Dr Donald Stevens QC

REPORT FOR MINISTER OF JUSTICE ON CLAIM BY TYSON GREGORY REDMAN FOR *EX GRATIA* COMPENSATION FOR WRONGFUL CONVICTION AND IMPRISONMENT

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EXECUTIVE SUMMARY

1. An incident took place at a 21st birthday party held at Mt Roskill in 2005.

2. As a result, a group of teenage males went from another address in Mt Roskill ("the second address") to the address at which the party was taking place.

3. The claimant, Tyson Redman – who was aged 17 at the time – was amongst their number.

4. No violence occurred at this incident (referred to in this report as "the first incident"), but an unlawful assembly took place.

5. The claimant was subsequently convicted of unlawful assembly, in respect of this incident, and sentenced to imprisonment for one month. This conviction was not challenged.

6. Some hours after the first incident a second group (comprising mostly the same persons as made up the first group) went from the second address to the address at which the 21st birthday party was taking place, whereupon a violent incident occurred.

7. The claimant was, amongst others, convicted in 2007, following a trial by jury, of offences in relation to this incident (referred to in this report as "the second incident").

8. He was convicted of one count of wounding with intent to cause grievous bodily harm, one count of injuring with intent to cause grievous bodily harm and six counts of injuring with reckless disregard for the safety of others. He was sentenced to imprisonment for two and a half years, which he served in full.

9. Whilst he admitted attending the first incident, the claimant's answer to the charges arising from the second incident was that he was not at that incident, as he had gone home before the group left the second address to return to the address at which the birthday party was taking place.

10. The claimant's mother gave evidence for the defence at the trial, to the effect her son had arrived home before the time the second incident took place, and had remained at home. This countered evidence from two Crown witnesses, who were at the birthday party, and who purported to identify the claimant as one of those at the second incident.

11. After an unsuccessful appeal, and after the claimant had served the sentence of imprisonment, the Governor-General issued an Order in Council, in 2012, referring to the Court of Appeal the convictions arising from the second incident. The Order was made because evidence was then available that was not given at the trial, or raised on appeal, that could lead the court to conclude a miscarriage of justice may have occurred. That evidence took the form of affidavits from eight persons, to the effect the claimant was not at the second incident.

12. Because the new evidence might have altered the verdicts the convictions were quashed. A retrial was not ordered, as the claimant had served the sentence. Instead the proceedings were stayed.

13. Mr Redman has applied for compensation for wrongful conviction and imprisonment.

14. The application has to be determined in accordance with Cabinet guidelines, which are headed: *Compensation and Ex gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases*.

15. Mr Redman meets the eligibility requirements of the Cabinet guidelines, to be able to apply for compensation.

16. To qualify for compensation, he must establish his innocence on the balance of probabilities, on each charge.

17. In seeking to do so the claimant relied upon his own evidence, the evidence of his mother (effectively providing an alibi) and the evidence of the eight persons who provided the affidavits, as well as one additional person.

18. I found the evidence of six of the affiants to be unreliable – variously because of intoxication at the time of the incident, poor memory – when giving evidence in the Court of Appeal – and inconsistencies in the accounts of events they gave.

19. I found the claimant's mother, conversely, to be reliable, both in her account of her son arriving home and her description of the basis upon which she determined the time he did so, and her evidence that he was still at home when she retired to bed and when she got up the next morning. I also found the account of the events by one of the two remaining affiants to be reliable, including his assertion the claimant was not at the second incident. The second remaining affiant lent some support to the alibi, by his recollection of

Mr Redman being given a lift home before the second incident; and, as well, he provided some support for Mr Redman's claim he was not at the second incident. I interviewed a further person who had been at the second incident, and who had not previously given evidence, and determined that, in at least one respect, his account assisted the claimant's case. I found the claimant, when I interviewed him, to be genuine and authentic, but reminded myself of the need to be skeptical of protestations of innocence. I therefore looked for supporting evidence from other sources. The sources I have just described (in this paragraph) provided that support.

20. The only evidence pointing towards guilt was the evidence of identification from Crown witnesses who were at the birthday party (two of whom purported to make an identification, whilst a third, when giving evidence, could not be sure and accepted the claimant may not have been at the second incident), and the claim by a co-defendant at the trial, in his police statement, that the claimant had been at the second incident.

21. I have concluded that the identification evidence – which the law recognizes "carries an inherent risk of unreliability"[1] – was in fact, in the circumstances of this case, unreliable.

22. The co-defendant who told the police, when interviewed by them, that Mr Redman was at the second incident, resiled from this when I interviewed him. Instead, he asserted the claimant was not at the second incident. I concluded that he lacked credibility, and that neither of his versions could feature in the balancing of the probabilities.

23. Ultimately, I concluded that the evidence that the claimant was not at the second incident combined to markedly outweigh the (unreliable) evidence to the contrary. It is thus more likely than not that the claimant was not at the second incident.

24. The result is that Mr Redman has established his innocence on the balance of probabilities, on each of the charges relating to the second incident.

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[1] Mahoney et al, *The Evidence Act 2006: Act and Analysis* (3 ed), 503.

THE MANDATE

Introduction

25. By letter dated 2 July 2015 the Minister of Justice, the Honourable Amy Adams MP, sought my advice on the application by Mr Tyson Redman for *ex gratia* compensation for wrongful conviction and imprisonment.

26. The application followed the quashing by the Court of Appeal of Mr Redman's convictions entered in the District Court at Auckland in 2007 on one count of wounding with intent to cause grievous bodily harm (contra section 188(1) Crimes Act 1961), one count of injuring with intent to cause grievous bodily harm (contra section 189(1)) and six counts of injuring with reckless disregard for the safety of others (contra section 189(2)).

27. Mr Redman was sentenced to imprisonment for two and a half years in respect of the conviction on the charge of wounding with intent to cause grievous bodily harm, imprisonment for two years on the charge of injuring with intent to cause grievous bodily harm, and imprisonment for six months on each of the charges of injuring with reckless disregard for the safety of others. The sentences were to be served concurrently.

28. Mr Redman served in full the effective sentence of imprisonment for two and a half years. He was not granted parole.

29. At the time these convictions were entered Mr Redman was also convicted of unlawful assembly (contra section 86(1)). The sentence imposed on that conviction was imprisonment for one month. That conviction was not the subject of appeal.

30. When the Court of Appeal quashed Mr Redman's convictions it did not order a new trial. Instead, it made an order staying the proceedings. A new trial was not ordered because Mr Redman had served the full sentence imposed on the convictions.

Terms of Reference

31. Mr Redman's application for compensation for wrongful conviction and imprisonment is to be determined in accordance with guidelines set by the Cabinet. The background to the Cabinet guidelines – which are headed: *Compensation and Ex gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases* – was described in 2006 by Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice, in a paper – *Compensation for Wrongful*

Conviction and Imprisonment – he delivered to a criminal law symposium. He said:

> There is no legal right to compensation for wrongful conviction and imprisonment in New Zealand. Compensation payments have always been treated as *ex gratia* or discretionary. However, in the interests of fairness and consistency, and in light of the duty to compensate normatively imposed by the International Covenant on Civil and Political Rights, the Government decided that it should nevertheless adopt a standard process for applications and decisions. Accordingly, in the last decade, Cabinet adopted guidelines for determining eligibility for, and quantum of, payments for wrongful conviction and imprisonment. Because payments are *ex gratia* and involve the expenditure of, often, substantial amounts of public money for which they are accountable, decisions appropriately rest with Ministers.

32. The Cabinet guidelines require that an applicant for compensation must have served all or part of a sentence of imprisonment and, of relevance to the present application, had his convictions quashed on appeal without a retrial being ordered. The guidelines specify that the applicant must be alive at the time of the application.

33. Mr Redman meets these eligibility requirements. In this situation, the guidelines require the Minister to refer the matter to a Queen's Counsel, where the Minister considers the application merits further assessment.

34. The Queen's Counsel to whom the matter is referred must report to the Minister certifying whether he or she is satisfied that the claimant is innocent on the balance of probabilities. My mandate is accordingly, to provide the Minister, as a first step in the process, with my assessment of whether Mr Redman is innocent on the balance of probabilities.

The parties to the claim and their representation

35. Mr Redman, as claimant, was represented by Mr Jeremy Sutton and Mr Brintyn Smith, both of whom are Auckland barristers. The interests of the Crown were represented by Mr Simon Barr, Crown counsel, of Crown Law, Wellington.

CHAPTER I: THE REQUIRED LEGAL APPROACH TO THE INQUIRY AND METHODOLOGY ADOPTED

Onus and standard of proof

36. The onus of proof is on the claimant. He must prove he is innocent on the balance of probabilities. In this respect the position is quite different from that which applied in the trial process.

37. At the trial the onus of proof was on the Crown. The claimant did not have to prove anything – he did not have to prove that he was innocent. Further, the Crown was required to prove guilt beyond reasonable doubt. That meant that if the jury had been left with a reasonable doubt about guilt, that is to say one that left them unsure, Mr Redman would have been entitled to an acquittal. For the purposes of a criminal trial it would not have been enough for the Crown to satisfy the jury that Mr Redman was probably guilty, or guilty on the balance of probabilities. Nothing short of proof beyond reasonable doubt would suffice.

38. The position on this claim is, as I have just noted, very different. Here the claimant does carry the burden of proof, unlike the position in the trial. He does not have to reach the same high standard of proof required of the Crown in a criminal trial – that is proof beyond reasonable doubt – and it will suffice if he reaches a lower standard of proof: he must establish his innocence on the balance of probabilities. That means he must show it is more likely than not he is innocent. In short, in the present case it is for the claimant to satisfy me it is more probable than not he is innocent of the charges referred to in paragraph 26 of this report.

39. In seeking to meet this standard Mr Redman cannot rely on the Court of Appeal's finding that, faced with the new evidence presented to that court, a jury might have been left with a reasonable doubt. Counsel for Mr Redman, in their written submissions in support of the claim, appear to suggest that the court's view on this issue is a factor that can be taken into account in determining whether the claimant has established innocence on the balance of probabilities.[2] With respect, it is not. The court's observation was made in the context of the burden of proof being upon the prosecution, and the standard of proof being beyond reasonable doubt. As I have noted, the burden of proof in this claim is squarely upon the claimant, to establish his innocence on the balance of probabilities. He is not assisted in meeting his burden by pointing

[2] Submissions of Counsel for Tyson Redman, dated 18 November 2015, para 25.

to reasonable doubt in the context of proceedings where the burden was on the prosecution.

40. The test to be applied was recently described by the Honourable Ian Callinan AC in the *Report on David Cullen Bain – claim for compensation for wrongful conviction and imprisonment* (24 December 2015):

> Albeit that the standard of proof in a civil proceeding is lower than the standard of proof that must be reached by the prosecution in a criminal trial, the civil onus is a real and substantial one. A person bearing it must make his case. He must bring forward or point to evidence to sway the mind of the person who is to decide whether his cause should prevail.... This necessarily means that the Applicant, rather than the Crown must explain to my satisfaction why I should prefer his version of the events to any contrary one. In order to do that he must point to evidence that supports his version: he must convince me that some or most of the matters that he raised as sufficient possibilities to secure his acquittal in his criminal trial, supplemented by probative further evidence, were, and are in fact, probabilities. The Applicant cannot now make a case simply by advancing possibilities and challenging the Crown to negative them beyond reasonable doubt. The Applicant has to produce or point to the relevant evidence and advance case theories to weigh the balance in his favour.

Legal admissibility

41. Courts of general jurisdiction must confine themselves to legally admissible sources of information. The law of evidence does not, however, apply to inquiries conducted under the Cabinet guidelines. In such an inquiry, any source of information can be taken into account, so long as it logically bears upon the question whether the claimant has demonstrated he was innocent of the charges he faced. Nonetheless, appropriate caution must be exercised in considering the weight to be given to hearsay evidence and the risk of unfair prejudice must always be borne in mind.

Material considered

42. For the purposes of the inquiry I received and considered the material described in the schedule to this report.

Interviews

43. I undertook interviews over the course of five days (in July and September 2016), with the following:

- The claimant, Mr Tyson Redman.
- The claimant's mother, Mrs Carol Redman.
- The claimant's father, Mr Gregory Redman.
- "I" (a co-defendant at trial).
- "L" .

44. Counsel for both the claimant and the Crown attended and participated in the interviews.

45. The claimant and his parents, as well as "L" , were interviewed at Auckland; "I" was interviewed at ss 9(2)(a) and 9(2)(ba)(i)

46. I interviewed these persons because I considered the determination of the issue of whether the claimant had proved his innocence would be assisted by findings of credibility, on some issues. Moreover, I interviewed "I" as he had, when interviewed by the police, made statements that would, if true, implicate the claimant in the offending. Those statements were not legally admissible against Mr Redman at trial; but they could be taken into account for the purposes of assessing whether Mr Redman had proved innocence, in the context of the present claim. I wished to discover whether "I" still adhered to the statements he had made, which implicated Mr Redman.

47. I had originally sought to interview an additional three people: "N" , "A" and "C" . s 9(2)(a) they now reside in Australia. Efforts were made to locate them. The police sought the assistance of Interpol; but that organization decided it could not help, as the current process, it said, was not a criminal one.

48. Once the first four interviews had been completed, at Auckland and s 9(2)(a) , I reviewed whether there remained sufficient utility in interviewing the additional three persons, given the cost and delay that would be involved in seeking to locate them and given, also, that I had no power to compel them to attend an interview. I arrived at the view that there would not be sufficient utility in interviewing "N" and "C" , to offset the cost and delay involved in seeking to locate them. I took the view that there would be benefit in interviewing "A" , if that were to be possible, and that the level of that benefit justified an attempt to locate her.

49. Crown Law asked the Ministry of Foreign Affairs and Trade to assist with locating "A" in Australia. The Ministry reported that the

Australian authorities were unable to assist. Rather, it was suggested that a desk-based Internet search be undertaken, or a private agent appointed to seek to locate her in Australia. I arranged for an Internet search to be conducted. This revealed "A's" Facebook page. A message seeking to make contact with "A" – and explaining why contact was sought – was left on her Facebook page. The message was accepted, from which it can be assumed that "A" was aware of the attempt to contact her and the reason for it. However, there was no response from her. As a result, a second message was, some time later, left on the Facebook page. Again, the indications were that the message was accepted; again, there was no response.

50. I decided not to engage an inquiry agent in Australia to locate "A" . I doubted that the expense and delay would be justified, given that it was reasonable to assume that "A's" failure to respond to the Facebook inquiries rendered it unlikely that she would respond favourably to any other approach. I advised counsel of this decision. Because the claimant's counsel had earlier indicated a wish to question "A" I had informed counsel that, in the event of my deciding to take no further steps to locate "A" , I would consider a request from the claimant for further time, to enable the claimant to seek to locate "A" , should that be his wish. No such request was received.

51. In the case of "A" and "N" I had regard, in arriving at the view I did in each case, that they had each given evidence at the depositions hearing and at the trial, and been cross-examined on each occasion. I had the benefit of the record of their evidence and also the written statements each made to the police. Similarly, in the case of "C" , I had the advantage of his affidavit sworn for the royal prerogative application, as well as the record of his cross-examination and re-examination in the Court of Appeal, and his statement to the police.

52. In arriving at the view I reached, I adopted the observation of the Honourable Robert Fisher QC when he said, in his Interim Report (dated 13 December 2012) for the Minister of Justice on Compensation Claim by David Bain:

> 119. The modern approach to the assessment of witnesses is a humbling one. It has increasingly been recognized that, contrary to their own expectations, judges and juries actually have little or no ability to assess credibility through observing a witness's demeanour.[3] They cannot tell when a

[3] See for example Heaton-Armstrong, Shepherd, Gudjonsson and Wolchover, Witness Testimony (OUP, Oxford, 2006) at 26; Olin Guy Wellborn III "Demeanour" (1991) 76 Cornell L Rev 1075 at 1080.

> witness is lying.[4] Without disregarding demeanour altogether, courts and other decision-makers now tend to place greater weight on other considerations such as the inherent likelihood of the witness's story, consistency with his or her contemporaneous and subsequent behaviour, and independent sources of evidence.[5]

53. Accordingly, I do not see myself as disadvantaged by not having interviewed these three persons.

Submissions

54. I received submissions from the parties with respect to the merits of the claim itself in late 2015. I agreed to allow supplementary submissions to be made by the parties in relation to the interviews, following the completion of the interviews. Those submissions were received on 28 November 2016.

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[4] (Stone, "Instant Lie Detection? Demeanour and Credibility in criminal Trials" [1991] Crim LR 821, p 829; Littlepage and Pineault "Detection of deceptive factual statements from the body and the face" 5 Personality and Soc. Psychology Bull 463 (1979); McClellan, "Who is Telling the Truth: Psychology, Common Sense and the Law" (2006) 80 ALJ 655, pp 660 and 662; Maier and Thurber "Accuracy of Judgments of Deception when an Interview is Watched, Heard and Read" 21 Personnel Psychology 23 (1968); Paul Ekman "Telling Lies" 162-189 (1985); Bond and Fahey "False Suspicion and the Misperception of Deceit" 26 Brit J Soc Psychology 41 (1987); Miller and Fontes "The Effects of Video Taped Court Materials on Juror Response" 11-42 (1978); Zuckerman dePaulo & Rosenthal "Verbal and Non-Verbal Communication of Deception" 14 Advances Experimental Soc Psychology 1, 39-40 (1981).

[5] *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87; *Fox v Percy* [2003] HCA 22, (2003) 214 CLR 118 at [30]-[31].

CHAPTER II: THE BACKGROUND TO THE CRIMINAL CHARGES

55. The Court of Appeal, in its judgment delivered on 19 December 2013 (the second appeal),[6] described the incident that gave rise to the prosecution of Mr Redman, and others, as follows:[7]

> [3] The events surrounding the offending took place over 17 and 18 September 2005. Tyson Redman was then aged 17. He was part of a group of young men who had met up through school who called themselves JDKs (the Junior Dominion/Dom Kings).
>
> [4] A party was held on 17 September to celebrate the 21st birthday of "A" . "A" was living at home in Mount Roskill. The party took place in the garage at that property. There were in fact two garages, one that belonged to the "AN" and next door to it, a garage and carport that belonged to their neighbours, the "GH" family. "A's" family and friends attended the party and they included a couple of young men who had been involved with the JDKs and so knew Tyson Redman. The "GH" family, but for "H" , were invited to the party. was a friend of Tyson's.
>
> [5] The charges were the result of two key incidents involving the JDK group that took place on 17 and 18 September. We describe each in turn after we explain a preliminary event that triggered the group's involvement.
>
> [6] Prior to the two incidents involving the JDK group, the episode was set in train by an altercation between "H" , then aged 17, and one of the adult males who was ultimately a victim of the offending, "O" . The Crown witnesses gave evidence of "H" arriving at the birthday party some time during the day with another friend. It appears the friend was "P" another member of the group. "H" was intoxicated and provoked a fight with "O" . This resulted in "H" being knocked to the ground by "O" . It appears that "H" then went home and whilst there cut himself during a collision with a window. Exactly what happened next is a little unclear but, essentially, "H" and / or his friend told others in the JDK group that "O" had "sliced" or "bottled" him. The group were at that stage drinking at the home of two brothers, "E" and "Q" .
>
> [7] News of "H's" attack led to the first key incident. This involved a group of the young men leaving the "EQ" household [at s 9(2)(a) Road, Mt Roskill] having armed themselves with various weapons like a baseball bat and bits of wood and heading out to the "AN" house [at s 9(2)(a) Avenue, Mt Roskill]. When they got there, after some yelling and swearing, "G" , "H's" mother, told them to leave and they did so. Tyson Redman was part of this group and his involvement in this incident led to the charge of unlawful assembly which is not now in issue.

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[6] *Redman v The Queen* [2013] NZCA 672.

[7] A number of the group used to play in a band at church together.

> [8] The group continued to be unhappy about what they understood had occurred to . Eventually, again armed, they returned [from the "EQ" household at s 9(2)(a) Road] to the scene of the party. They attacked a number of the partygoers including "O" . Bottles were thrown and various objects swung around. The group left the scene when the light in the garage was knocked out. The police were called. Six of the partygoers, including "O" were injured. This gave rise to the wounding and injuring charges. Tyson Redman was charged as a party to this offending under s 66(2) of the Crimes Act, that is, having a common intention with others in the group to pursue an unlawful purpose.

56. In this report the incident described by the Court of Appeal, in paragraph 7 of the judgment, as the "first key incident" will be referred to as "the first incident"; while the incident involving the violence, described by the Court in paragraph 8, will be referred to as "the second incident."

CHAPTER III: THE LEGAL PROCESS

The Trial

57. The trial took place in the Auckland District Court. It commenced on 24 July 2007 and verdicts were delivered on 17 August 2007. Tyson Redman was jointly tried with "R" , "I" , "E" , "Q" and "M" . "M" pled guilt during the trial. Others had entered a similar plea prior to trial.

58. The evidence adduced at the trial was described by the Court of Appeal, in the following terms:[8]

> [11] The Crown evidence came from a number of the partygoers, including "O" , "A" and other family members and friends of these two who were at the party, and from the police officers who had interviewed the defendants. There was an agreed statement of facts relating to the injuries received by the victims. The video interviews of a number of the defendants were played to the jury and the jury also had a written statement made to the police from Tyson Redman.
>
> [12] There was little clarity in the evidence at trial about the timing of the various events. At best, the end of the violent incident could be pinpointed by the timing of the police involvement. The first police officer on the scene received information at 2.20 am that led him to travel to the "AN" house. There was also a lack of clarity about the numbers involved in either the group's first visit to the "AN" house or their visit on the second occasion. For example, in relation to the second visit, one witness described "16 plus". Another witness said there were about 10, another 15 or 20 while another estimated that between 30 and 50 people were present on that occasion. Many of the partygoers who gave evidence had been drinking and some had been smoking cannabis, all of which added to the general confusion about events. "A" for example, in her evidence accepted that she had been given an ounce bag of "skunk" (strong cannabis) as a birthday present and had smoked some of that. There was also a fair amount of confusion as to what had happened at the time of the fight because of lighting difficulties and as a result of the general melee.
>
> [13] The Crown evidence essentially confirmed that the events could be broken down into the event which set in train the whole episode, that is, "H's" provocation of resulting in "H's" being knocked out and then the two key incidents, namely, the JDK group making their first retaliatory visit but leaving before violence occurred and the group's return with violence ensuing.
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> [14] Two Crown witnesses placed the appellant at the scene at the time of the party; they were "A" and "B" . "A" said she noticed the appellant with a baseball bat. He was a friend of her

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[8] *Redman v The Queen* [2013] NZCA 672.

brother's. She had been to school with his sisters. By the time of the fight she had smoked cannabis and drunk alcohol. "B" said that she recognized the appellant as one who had thrown bottles.[9] She was aged 15 at the time and accepted she had been drinking and smoking cannabis and that by the time the violence took place people at the party were "truly wasted". She explained she had met Tyson before as she had gone drinking on one occasion at Tyson's house. "B" said she thought Tyson was on the other side of the garage, not close to her. Defence counsel cross-examined these two witnesses on the basis they might have been mistaken.

[15] "N" , ss 9(2)(a) and 18(c)(i) identified Tyson Redman as present during the group's first visit to the "AN" house. He said he saw "the same people" come back about two or three hours later. However, he qualified that by saying he was "not very sure" about Tyson or about "E" ; he said he could not really remember. He knew Tyson Redman through primary school and used to play league on a regular basis with Tyson and with "E" "N" at depositions accepted it was possible that Tyson might not have been present on the second occasion.

[16] Tyson Redman had provided a written statement to the police and this was before the jury. In that statement he accepted he was present on the first visit to the "AN" house but not on the second. He said he had gone back to the "EQ" house after that first visit and had then been dropped off home. It was put to him that "N" said he had seen Tyson Redman during the assault. Tyson responded: "Yeah he's just saying that cos he knows me. I saw him too."

[17] The Crown placed some reliance on the exchange which followed:

> Q. "B" has also put you at the main assault and throwing bottles.
>
> A. Yeah I saw her and was talking to her. Ask my mates.
>
> Q. "I" put you at the main assault as well.[10]
>
> A. Yeah don't believe what he says, believe . I don't know why he's saying that.

[18] Tyson Redman did not give evidence but his mother, Carol Redman, was called to provide an alibi. She said she was watching television in their home at about 10.30 pm. She heard a car and then Tyson came into the house. He was very drunk and soon fell asleep on the bed where he remained. She was cross-examined about inconsistencies as to her recollection of the timing of Tyson's return home apparent on a comparison between her statement to the police and her evidence.

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[9] This reflected her evidence at depositions in which she said that she recognized Tyson Redman in the group of those throwing bottles.

[10] We understand that in "I's" video interview with the police, he described Tyson as "fired up" and said all the group including Tyson went back to the "AN" house on the second occasion. "Q" in his interview with the police did not identify Tyson as present at the party on the second occasion.

The First Appeal

59. An appeal against conviction was taken to the Court of Appeal. The appeal[11] – which was unsuccessful (even though the judgment revealed some prescience by observing: "These kinds of cases can lead to miscarriages of justice."[12]) and which was heard in April 2008 – raised several issues, three of which have more than passing interest for the present claim. I briefly describe those three issues.

60. Mr Redman's counsel contended[13] that only two witnesses – "A" and "B" – placed Mr Redman at the scene of the attack and their evidence was inherently unreliable, due to their intoxication and motive for giving reckless evidence. He argued that the jury should have been so directed.

61. The judgment recorded[14] that "B" – who at the time of the incident was 15 years old – had consumed ten bottles of beer, as well as having smoked a "distinct quantity" of cannabis (in fact, a powerful strain of cannabis, known as 'skunk'). "A" had also consumed alcohol and had smoked cannabis (though apparently less than "B"), which had been given to her as a birthday present.

62. The court considered the trial judge's directions to the jury, in summing-up, dealt adequately with the issue of intoxication. The judgment quoted the trial judge as saying, "when speaking to the defence submission that the witnesses were not reliable":

> Look at some of the Crown witnesses, they are not that reliable. They are, at the very least, extremely drunk under the influence of alcohol and drugs. And some of them have convictions for dishonesty so they are somewhat of a motley crew members of the jury.[15]

63. The judgment of the Court of Appeal said nothing further was required in the summing-up on the issue of intoxication. It said the jury was "rightly reminded that they should have regard to the character and characteristics of the people concerned on the night in question, and the judicial comment was, if anything adverse to the Crown witnesses."[16] Unfortunately, the passage

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[11] *R v* "Q" *and Tyson Redman* [2008] NZCA 117.
[12] At [14].
[13] At [38].
[14] At [39]
[15] At [40].
[16] At [41].

cited by the court as coming from the summing-up was, in fact, not part of the summing-up. Rather, it was an extract (set out precisely in the judgment) taken directly from the closing address of counsel for co-accused "Q" , Mr Wilkinson-Smith.[17]

64. The issue had, in fact, been dealt with in the summing-up somewhat differently. The trial judge had referred to the Crown's submission that "A" was "a credible and reliable witness", who, it was accepted by the Crown, had been drinking and consuming cannabis; but that fact did not, the Crown said, "stop her from recalling the details of what occurred."[18] She was able to make a speech at the party.[19] The judge then summarized defence counsels' submissions on the issue, by saying they had asserted that "A's" account was not reliable:[20] she had convictions for offences of dishonesty, reflecting on her credibility;[21] she had been smoking skunk – "a powerful form of cannabis" – and was also "drinking and intoxicated."[22] The judge summarized defence counsel as describing "B" as "under the influence", having consumed 10 bottles of beer, and "one of those who were well and truly wasted."[23] He said defence counsel described the Crown witnesses as "somewhat of a motley crew."[24]

65. There was thus no judicial comment "adverse to the Crown witnesses." Rather, the comment was limited to the judge summarizing counsel's submissions. It cannot be known whether this error would have made any difference to the conclusion of the Court of Appeal, on the adequacy of the directions concerning reliability of key prosecution witnesses; but, the court's error in attributing to the trial judge the observation made by defence counsel at the trial could perhaps be seen as an indication the comment would not, in any event, be entirely inapposite.

66. The Court of Appeal rejected Mr Redman's argument that the jury directions did not deal adequately with a motive attributed by the defence to "A" to give reckless evidence. It held that no "special direction" was required in relation to a defence concern that "A" had – because it was her birthday that had been disrupted by the attack – "every reason to be angry about what occurred"; which could well have translated into a strong basis "to hate the wider group of young men, regardless of any involvement, and to

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[17] Closing Submissions of Defence Counsel for "Q" Before Judge C J Field, at [24].
[18] Summing-up of Field DCJ, at pp 17, 18.
[19] At p 18.
[20] At p 19.
[21] Ibid. See also, for evidence on the issue, Trial notes of evidence, pp 26, 29-30.
[22] Ibid.
[23] At p 24.
[24] At p 26.

push for a conviction of those charged."[25] This concern, the court said, was "just one of the many factors for the jury to weigh up in making up their mind whether they accepted "A's" credibility."[26]

67. The second issue of present interest concerned the trial judge's directions to the jury concerning identification evidence. This was important because the prosecution case against Mr Redman was based on the evidence of "A" and "B", both of whom claimed to identify him as one of those present at the attack. The judge said that the law required him to warn the jury of the special need for care before relying on identification evidence as the basis for the conviction. He gave the usual reasons for this direction, including that it is "quite possible for a perfectly honest witness to be mistaken about identification.[27] When referring specifically to the case against Mr Redman the judge said:

> Again you must remind yourselves of the special need for caution when considering issues of identification evidence. I have already touched upon some of those – distance, time, circumstances, darkness, what was going on around them at the time, how well they knew him, whether he was holding as "A" says, a baseball bat or "B" (sic) says a bottle, varies. The evidence may be explicable on the basis that yes they did see him there the first time and are confusing that first occasion with the second and that is in fact what they are recalling. But in any event, both had been consuming alcohol and cannabis and the intoxication could increase the likelihood of confusion or mistaken what they observed.28

68. Mr Redman's counsel at the Court of Appeal challenged the adequacy of the direction, saying the judge did not explicitly warn the jury that mistaken identify "can cause a serious miscarriage of justice". This point failed, as the court considered the judge had "adequately conveyed the seriousness of the exercise being undertaken by the jury and the need for real caution."[29] This issue is mentioned at this point of the report so as to highlight the significance of the evidence implicating Mr Redman being of a type that required special care, before it could be relied upon as the basis for a conviction.

69. The third issue of present interest concerned the record of a video interview, conducted by the police with a co-accused, "I". In that interview "I" asserted that Mr Redman was present at the second incident, and went back to the scene of the party at the "EQ" address, after the attack. Mr Redman's counsel argued at the Court of Appeal that the

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[25] At [42].
[26] At [44].
[27] Summing-up of Field DCJ, at p 6.
[28] Idem, at p 23.
[29] At [49].

use to which "I's" comments, in his interview, could be put was "loosely handled."[30] The trial judge had told the jury that it was "vitally important to remember that what one accused may say about the actions of another for good or bad, is not evidence against that other person."[31] The judge had given that direction more than once.[32] The Court of Appeal considered the terms of the direction to be "perfectly adequate."[33] These issues are considered further, later in this report.

The Application for an Exercise of the Royal Prerogative of Mercy

70. Prior to an application being made to His Excellency the Governor-General for an exercise of the royal prerogative of mercy, in the form of a referral under section 406 of the Crimes Act 1961, a private investigator, instructed by the Public Defence Service, obtained affidavits from some eight persons, who deposed that Mr Redman was not present at the attack. One affiant said he had taken Mr Redman home prior to the attack, and the other seven, who were at the attack, said they had not seen the claimant there. The availability of this evidence had not featured in the appeal (or at the trial). Seven of the eight affiants had been charged with offences arising out of the incident; four pleaded guilt prior to committal for trial, two pleaded guilt before the commencement of the trial and one went to trial with Mr Redman. This 'fresh' evidence[34] provided the basis for the application to his Excellency.

71. The Ministry of Justice advised the Minister that the affidavit evidence, if believed, provided a "potential source of credible evidence that counters the evidence of the Crown eyewitnesses and strengthens the alibi defence given by Mrs Redman."[35] The Ministry considered the evidence submitted by the applicant to be "credible and sufficiently cogent" to provide the applicant with "a reasonable prospect of success in the Court of Appeal," as the affidavits, taken together, were "capable of raising a real doubt about the safety of Mr

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[30] At [50].
[31] At [53].
[32] At [53].
[33] At [54].
[34] The evidence was not strictly 'fresh' as it was potentially available at the time of trial, had counsel made further inquiries. The Ministry of Justice noted that there were reasons why the evidence was not briefed and called at the trial, and advised the Minister that the Court of Appeal may entertain an appeal based on evidence that is not strictly fresh, if the evidence is strong and demonstrates a real risk of a miscarriage of justice (see Advice to Minister of Justice, dated 28 February 2012, on Application [by Tyson Redman] for Exercise of the Royal Prerogative of Mercy, at 9).
[35] Advice to Minister of Justice, dated 28 February 2012, on Application [by Tyson Redman] for Exercise of the Royal Prerogative of Mercy, at 10.

Redman's convictions."[36] The Minister was advised there were sufficient grounds for the exercise of the royal prerogative of mercy, and the Minister was recommended to advise His Excellency to refer the convictions to the Court of Appeal, pursuant to section 406(1)(a) of the Crimes Act.[37]

72. The Minister advised His Excellency accordingly, with the result that an Order in Council was made on 29 October 2012, referring Mr Redman's disputed convictions to the Court of Appeal. The reasons for the referral, as set out in the Order in Council, were that evidence was then available that was not given at the trial, or raised on appeal, that could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred.[38]

The Second Appeal

73. The Court of Appeal said[39] the evidence of the eight affiants – which did not meet the test for 'fresh' evidence[40] - could be divided into two broad groups. The effect of the evidence of those in the first group ("C" , "D" and "K") was that the claimant was dropped home by car, prior to other young men going to the second incident at s 9(2)(a) Avenue. The evidence of those in the second group – the remainder of the affiants – was simply that the claimant was not present at that incident.[41]

74. The Order in Council had placed the affiants into four categories[42]:

a) "K" , "D" , and "EQ" who went to the attack, deposed that they saw the applicant at the "EQ" household immediately after the unlawful assembly (the first incident), but did not see him later in the night or at the attack.

b) "C" , who did not go to the attack, deposed that he drove the applicant home from the "EQ" household before the attack.

c) "H" and "M" , who arrived at the "EQ" household a period after the unlawful assembly and who went to the attack, deposed that they did not see the applicant at the "EQ" household or at the attack.

d) "G" and "F" , who were at the 21st birthday party and saw the attack, deposed that they did not see the applicant at the attack.

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[36] At 11.
[37] At 12.
[38] Clause 6 of Schedule to Order in Council.
[39] *Tyson Gregory Redman v The Queen* [2013] NZCA 672.
[40] At [26].
[41] At [28].
[42] Clause 4(2) to (5) of Schedule to Order in Council.

75. All eight affiants were cross-examined extensively before the Court of Appeal.[43] The court described the evidence as displaying a number of 'difficulties':[44] seven of the eight witnesses were 'co-offenders', all of whom had by then served their sentences; there were "inconsistencies in the accounts of the new witnesses in some important respects, such as with both the evidence of Mrs Redman and with Tyson's own statement regarding Tyson's time of return to the Redman house"; there were "some inconsistencies between some of the witnesses' current evidence, what they say in their affidavits, and with their police interviews"; a number of the group were "plainly affected by alcohol"; and, "the accounts of those who said they could not see Tyson at the house on the second occasion must be questionable given problems with lighting and the general confusion of activity."

76. Some of the witnesses, the court said, "individually were simply so unsatisfactory as witnesses" that their evidence "could be dismissed as not credible."[45] Having said that, however, the court was not satisfied "when the matter [was] considered in the round" that the evidence might not reasonably have altered the verdict.[46] It was noted, in this respect, that the prosecution case against Mr Redman was "not particularly strong." The two witnesses who placed him at the scene – "A" and "B" – were "obviously both affected by alcohol and drugs." "B" had only met Mr Redman once before. The ability of both witnesses "to see must have been just as affected as that of the new witnesses."[47]

77. The Crown did not suggest the witnesses had concocted their accounts.[48] Indeed, the judgment noted,[49] the absence of Mr Redman from the second incident was "a consistent theme in the witnesses' police statements." They had been made "closer to the time in a context where there [had] been a considerable lapse of time since the offending." The judgment summarized the essence of several of the statements:

> …when asked specifically about Tyson, "E" told the police he was not there. "K" said that Tyson was home that night. "F" said she did not think Tyson was there. "C" (his statement is of course later in the piece as the police cannot find his first statement) says he took Tyson home although he is not sure of the timing. "D", "H" and "M" all provide names of persons present but do not include

[43] At [28].
[44] At [52].
[45] At [53].
[46] At [54].
[47] Ibid.
[48] At [56].
[49] Ibid.

> Tyson's name in these lists. "G" says she does not really know who was there.[50]

78. Because the new evidence might have altered the verdicts, the appeal was allowed. The court was not, however, satisfied that judgment of acquittal should be entered: that was because although, if there were to be a retrial, the jury might well have had a reasonable doubt about whether Mr Redman was at the attack, it would still, on the evidence, have been "open to a jury to find Tyson Redman guilty."[51] As a consequence, there would have been in the "ordinary course" an order for a new trial; but as Mr Redman had served his full sentence, such an order was not made: instead, the proceedings were stayed.[52]

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[50] At [57].
[51] At [58].
[52] Ibid.

CHAPTER IV: ASSESSMENT OF MATERIAL RELIED UPON BY CLAIMANT TO ESTABLISH INNOCENCE ON THE BALANCE OF PROBABILITIES AND OF ANTITHETICAL MATERIAL

79. This chapter assesses the material the claimant relies upon to establish his innocence on the balance of probabilities, and also the antithetical material.

80. In seeking to discharge his burden, the claimant relies upon the following:

a) His statement to the police and his interview with me.

b) The alibi evidence: viz., the statement to the police by the claimant's mother, Carol Redman, together with her evidence at the trial, her brief of evidence, and her interview with me; as well as the statements to the police and evidence of "C" , "K" and "D" .

c) The statements, affidavits and evidence of people who were present at the attack and who say that the claimant was not present.

d) The interview I conducted with "I" .

e) The interview I conducted with "L" .

81. Conversely, evidence tending to negate the claimant's innocence is the following:

a) The statement to the police, evidence at the depositions and evidence at trial of "A" .

b) The statements to the police, evidence at the depositions and evidence at trial of "B"

c) The statements to the police by "N" .

d) The police video interview of "I" .

e) Evidence suggesting the claimant could have left his home in the early hours of the morning, had he returned home earlier.

82. An assessment of the material pointing in both directions is made in this chapter.

Uncontested facts

83. First, I set out the uncontested facts, as follows:

a) On 17 September 2005 the claimant was 17 years of age and unemployed.

b) He was, at that time, residing with his family at s 9(2)(a) Mt Roskill.

c) At the time, he had no criminal convictions.

d) He was a member of a group of youths, who called themselves the JDKs (Junior Dominion Kings).

e) On Saturday 17 September 2005 the applicant visited the home of "E" and "Q" at s 9(2)(a) Road, Mt Roskill.

f) He and others – associates or members of the JDKs – consumed alcohol at this address.

g) A 21st birthday party was held for "A" on 17 September and the early morning of 18 September 2005, in the garage and an adjoining marquee at the home of her mother, at s 9(2)(a) Avenue, Mt Roskill.

h) "H" – who lived next door to the address where the party was being held – attended the party, with his friend "P" in disregard of a request that he not attend.

i) "H" attempted to engage a guest at the party, "O" , in a confrontation. "H" fell to the ground, after being punched by "O" . In the same incident "P" was struck, whilst supporting "H" .

j) Thereafter, "H" returned to his home, where, in an incident involving a window, he sustained cuts to his arm and shoulder.

k) "H" then went to the "EQ" home at s 9(2)(a) Road and (falsely) told those present at the address that he had been 'sliced up' by a person at the party at s 9(2)(a) Avenue.

l) "P" also went to the "EQ" home and told those present that he and "H" had been involved in a fight at the s 9(2)(a) n Avenue party.

m) Soon thereafter, a number of young men went from the s 9(2)(a) Road address to the party at s 9(2)(a) Avenue, to confront those at the party about what they believed had happened at the party to "H" .

n) The claimant was one of those who went to s 9(2)(a) Avenue, with this group of young men.

o) The claimant was carrying a piece of wood, as a weapon. Others did the same.

p) On arrival at s 9(2)(a) Avenue, the group of young men stood at the entrance to the driveway leading to the garage, and called out to those socializing in the garage and the adjoining marquee.

q) Older guests at the party – including "H's" mother – approached the group and told them they should leave, as the guests did not want any trouble.

r) The group then left the address and returned to s 9(2)(a) Road, where they continued to drink alcohol.

s) In the early hours of the morning a group of up to 20 young men decided to go again from the s 9(2)(a) Road address to the party at s 9(2)(a) Avenue.

t) They armed themselves with various weapons, including pieces of wood, baseball bats, golf clubs, beer bottles, a table leg, a pole, and a hammer.

u) Members of the group attacked those at the party – as a result of which several people were injured, one seriously.

v) "A" telephoned the police emergency number during the incident – the call is recorded as being made at 2.29 am.

w) Following the incident, most of the group of young men returned to s 9(2)(a) Road, before dispersing.

84. The principal issue in dispute is whether Mr Redman (who concedes he was present at the first incident at s 9(2)(a) Avenue) attended the second incident, where the violence occurred.

85. I now assess the evidence relating to that issue.

A. Evidence relied upon by claimant to establish innocence

86. In this part of the report I evaluate the claimant's assertion that he was not at the second incident and also the evidence in support of his alibi. I assess the evidence from people who were present at the second incident and who say the claimant was not there. I discuss the intereviews I conducted with two persons who were at the second incident and who say the claimant was not at the incident. I make findings concerning the reliability of witnesses and findings of fact on essential issues.

Statement to police by the claimant and his interview for the inquiry

87. Tyson Redman made a statement to the police in November 2005 and I interviewed him for the purposes of his compensation claim. He did not give evidence at his trial; he did not provide an affidavit in support of his royal prerogative application, or for the appeal to the Court of Appeal; and he did not provide an affidavit in support of his application for compensation. Consequently, the only occasions he was questioned about the events of 17 and 18 September 2005 were in the interview by the police and my interview with him.

88. Using those two interviews as the source, I set out a summary of Mr Redman's version of events.

89. He said that on Friday 16 September 2005 his mother had a surprise party to celebrate her 50th birthday. He started drinking at that event. He then met up with his friends, with whom he "went to town," and was drinking with them through until the morning.[53] He had no sleep that night.[54] The last time he had anything to eat was on the Friday night, before he started drinking.[55] Sometime on the Saturday morning he went to "H's" house,

[53] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 45-52.
[54] Idem, p 50.
[55] Idem, p 53.

where he had more to drink, before going – following a brief diversion to his home – to the home of the "EQ" brothers at s 9(2)(a) Road. The drinking continued at that address.[56] He was drinking beer and spirits and wine: "anything, whatever was there."[57]

90. Whilst he was at s 9(2)(a) Road, the claimant said, "P" arrived and informed those present that "H" had been stabbed at the party at s 9(2)(a) Avenue.[58] Thereafter, Mr Redman was part of a group that went from s 9(2)(a) Road to s 9(2)(a) Avenue, for the visit that is referred to in this report as the first incident. The claimant described, somewhat inaccurately, in his statement to the police, the purpose of that visit as being "to make sure "H" was alright."[59] He took with him to s 9(2)(a) Avenue a piece of wood, said to be approximately 70 cm in length.[60] The purpose of having that with him was "to use it as a weapon."[61] On arrival at s 9(2)(a) Avenue the group "stood around yelling and swearing." Nothing was thrown; no weapons were used; no one was assaulted.[62] The group left, and returned to s 9(2)(a) Road, after adults at the party counseled them to leave.[63] It was, of course, the events at this incident that gave rise to the claimant's unchallenged conviction for unlawful assembly.

91. The claimant has described the extent to which he was affected by alcohol, at the time of this incident. He told me he was "pretty buggered" and "on [his] last legs."[64]

92. After the first incident he returned with the others to s 9(2)(a) Road. There they continued to drink.[65] After a time, he said, because he was intoxicated, he asked "C" to give him a ride home. "C" obliged. Mr Redman said that he travelled home in the front seat of the car, with "C" driving and another person in the back seat.[66] On arrival home he was met by his mother, and went directly to his bedroom, where he "fell on [his] bed" and went "straight to sleep" without getting into bed.[67] Next morning, he said, he was awoken by a telephone call from "H's" mother,

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[56] Idem, p 51.
[57] Ibid.
[58] Idem, p 18.
[59] Statement to police of Tyson Gregory Redman, dated 11 November 2005, p3.
[60] Idem, p 6.
[61] Ibid.
[62] Idem, p 8.
[63] Idem, p 5.
[64] Interview of Tyson Gregory Redman, 5 and 6 July 2016, p 52.
[65] Statement to police of Tyson Gregory Redman, dated 11 November 2005, p3.
[66] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 34.
[67] Idem, p 52.

inquiring about her son's whereabouts.[68] After speaking with her he looked out his bedroom window and noticed his garage door was ajar. He went to the garage, to discover that "D" and "L" were there, having apparently slept there.[69] They told him what had happened at the second incident.[70]

93. Mr Redman was adamant that he was not at the second incident,[71] and that he knew nothing of it, before being acquainted with what had happened by "D" and "L" .[72]

94. My interview with the claimant was designed to test his assertions in this regard.

Memory

95. It was put to Mr Redman that his level of intoxication had been such that it may have affected his memory (something he did not accept): in other words, that he was suffering alcohol induced amnesia, which prevented him from recalling that he had been involved in the second incident.[73] I consider this to be unlikely for three reasons. First, other people support Mr Redman's contention that he was not at the second incident – a feature I consider later in the report. Secondly, Mr Redman's mother provides evidence of alibi – which is also considered later in the report – which supports Mr Redman's claim that he was not at the second incident. Thirdly, the evidence does not suggest there were memory issues. Mr Redman was able to remember events up to the point he was taken home and arrived home. He recalled the first incident, and he remembered that whilst at s 9(2)(a) Road, after that incident, he was falling asleep on the couch and asked "C" if he would drive him home.[74] He remembered getting into the front passenger seat of the vehicle, and he remembered someone else getting into the back of the vehicle.[75] He remembered being taken home, going into his house and talking with his mother.[76] He remembered going to his room and lying down on his bed.[77] This suggests that the claimant had a recall of events, notwithstanding the level of his intoxication. There is nothing to suggest otherwise.

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[68] Ibid.
[69] Idem, pp 55, 62.
[70] Idem, pp 52, 66.
[71] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 73, 75, 205, 209, 216, 220.
[72] Idem, pp 65-6; Statement of Tyson Gregory Redman, dated 11 November 2005, p 14.
[73] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 161, 196, 199, 219, 220.
[74] Idem, p 209.
[75] Idem, pp 209-10.
[76] Idem, pp 223-4.
[77] Idem, pp 52-3.

96. It was further put to the claimant that he may well have arrived home in the way he described; but that he later went out again and went to the second incident, before returning home and that he had no recollection of any of this, because of his intoxication (a proposition that Mr Redman did not accept).[78] I have discounted this as a possibility, for two reasons. First, as I have said, there is no evidence of significant memory deficits. Secondly, I discount, later in this report, the suggestion that the claimant left his home to go to the second incident.

97. Whilst I have found there is no evidence of significant memory deficiency I refer, for the sake of completeness, to one memory issue - but not one I consider of any moment.

98. The claimant told the police that a person called "S" accompanied him and "C" when Mr Redman was driven home.[79] He told me that someone got into the back of the vehicle and he thought it was "S" .[80] "C" , however, said there was no one else in the car, other than the claimant and himself.[81] I explore this issue later in the report,[82] where I conclude it is more likely that "C" is mistaken. For present purposes the issue is that the claimant told the police that "S" was in the vehicle at the time, but later qualified this by saying he "wasn't quite sure," but thought it was "S" i.[83] He explained this by saying he was sitting in the front of the car, he looked over and thought it was "S" in the back.[84] He said that when he spoke to the police he was quite sure "S" was the person in the back, but now, after 11 years, he was not quite so sure.[85] I consider this to be no more than the fading of memory over the intervening time.

Who carried news of 'stabbing' to s 9(2)(a) *Road?*

99. Initially I was concerned about a difference between the account advanced on one issue by the claimant, and the contrary version of five other persons. Mr Redman told the police that "P" had arrived at s 9(2)(a) Road, before the first incident, and told those present that "H" had been stabbed.[86] This was, of course, the catalyst for the group

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[78] Idem, p 225.
[79] Statement to police of Tyson Gregory Redman, dated 11 November 2005, p12.
[80] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 34.
[81] Affidavit of "C" , sworn 21 January 2009, para 4(g).
[82] See paragraph 212 of the report.
[83] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 35.
[84] Idem, p 162.
[85] Idem, pp 36-7.
[86] Statement to police of Tyson Gregory Redman, dated 11 November 2005, pp 3-4.

going from s 9(2)(a) Road to s 9(2)(a) Avenue. Mr Redman was adamant that it was not "H" who had gone to s 9(2)(a) Road and announced that he had been stabbed.[87] Yet five other persons,[88] who had been present at s 9(2)(a) Road, asserted that it was "H" who had borne the news to s 9(2)(a) Road that he had been stabbed.[89]

100. When I confronted the claimant with this conflict between his position and that of the five others he remained adamant that it was "P" who reported that "H" had been stabbed.[90] In this respect he can derive support from "P", who told the police that he went to s 9(2)(a) Road after the incident in which "H" was allegedly stabbed.[91] Obviously he would have discussed the incident, with at least some of those there. An insight into the resolution of this conflict in the evidence is available, however, from the affidavit of "H" himself. He deposes that he went to s 9(2)(a) Road and "told [his] mates" what had happened to him. They then went to s 9(2)(a) Avenue with him "to see who was there."[92] He continued to say, in the affidavit, that upon arrival at s 9(2)(a) Avenue he saw his mother talking to Tyson Redman, and this was when she was telling Mr Redman and the others to leave.[93]

101. I am prepared to infer from this that both "P" and "H" carried the news (separately) to s 9(2)(a) Road of "H's" alleged stabbing and that Mr Redman learnt of it from "P", whilst the five affiants learnt of it from "H". I infer that "P" arrived first and told some of those present at s 9(2)(a) n Road, who then left for s 9(2)(a) Avenue, and soon after their departure (or at the same time) "H" arrived. "H" then left for s 9(2)(a) Avenue with others, to arrive to find "H's" mother telling Mr Redman and those with him to leave. This seems to me to be the only sensible construction of the two different accounts. The alternative is that the claimant is wrong in his account (given that five people differ from it); but I find that to be unlikely, in view of the insight provided by "H's" affidavit, and also the support from "P". I therefore do not view this conflict in the evidence as undermining the claimant's reliability.

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[87] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 20, 23.
[88] "H", "C", "K", "D" and "E".
[89] Affidavit of "H", sworn 6 January 2009, paras 7-10; Affidavit of "C", sworn 21 January 2009, para 4(b) and (c); Affidavit of "K", sworn 18 December 2008, paras 7-8; Affidavit of "D", sworn 18 December 2008, paras 9-10; Affidavit of "E", sworn 6 January 2009, paras 6-7.
[90] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 25.
[91] Statement to police by "P", dated 10 November 2005, p 5.
[92] Affidavit of "H", sworn 6 January 2009, para 8.
[93] Idem, para 9.

Incident with "B" in 2007

102. Nor, following analysis, do I find the claimant's reliability and credibility undermined by another evidential issue, notwithstanding initial concerns about the issue. "B" made a statement to the police in July 2007, in which she said she had attended a party (in early 2007), during the period the claimant was on bail, and whilst there she had spoken to the claimant. She said she was drinking alcohol at the party, as was the claimant. She said that the claimant said to her, "Are you sure you saw me at that party," to which she had replied in the affirmative. She said he was laughing when he asked this. [94] This was apparently all that was said on this matter.[95]

103. This produced two issues. First, the claimant was in breach of his bail conditions by drinking alcohol and by having contact with a prosecution witness.[96] Secondly, the claimant initially denied, when I interviewed him, that any such contact with "B" had occurred.

104. The breach of bail conditions demonstrated a lack of responsibility on the claimant's part. It was mitigated, insofar as the communication with "B" was concerned, by the claimant not having initiated the contact with "B" – he went to a party where she happened to be present[97] – but had he been acting responsibly he would have ensured there was no contact between them. He had no excuse for consuming alcohol.[98] While this was irresponsible, the claimant freely admitted consuming alcohol when it was raised with him, and did not seek to excuse his actions. While this could raise concerns about his reliability, I do not view it, on its own, as doing so in any significant way in so far as the issues in this case are concerned, and I do not consider that it undermines his honesty.

105. Perhaps of more concern was the denial on Mr Redman's part that there had been contact with "B" . But in that respect the particular circumstances of the denial are important. When first asked about the encounter Mr Redman said he could not recall it.[99] He said he did not know what "B" was talking about, as he did not know her.[100] He said he

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[94] Statement to police by "B" , dated 30 July 2007, p 3.
[95] Ibid.
[96] Conditions attached to Notice of Bail: Not to consume alcohol; Not to communicate with a crown witness.
[97] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 236.
[98] Idem, pp 238-9.
[99] Idem, pp 130, 135, 139.
[100] Idem, p 134.

did not have any conversation with "B" , whilst on bail.[101] He then qualified that position by saying he could not recall such a conversation and was "pretty sure" there was not one.[102]

106. Mr Redman had not previously seen or heard of "B's" statement, before I referred him to it.[103] In fact, he was unsure who "B" was, seeking confirmation from me that she was ss 9(2)(a) and 18(c)(i) at the time.[104] I therefore arranged for Mr Redman's counsel to have time (in private) to read the statement to Mr Redman and to familiarize him with its contents.[105] This process had the effect of refreshing Mr Redman's recollection of what had happened. As a result, he was able to say that he recalled attending the party and asking "B" if she was sure she had seen him at the s 9(2)(a) Avenue incident in 2005.[106] He said he was laughing when he asked "B" if she had seen him at the incident, because he was not there.[107] He challenged "B's" assertion that he later that evening had been involved in a fight at another address,[108] and said he had only been involved in an argument.[109]

107. Normally an inconsistent account such as this would raise issues about reliability. However, I have to have in mind that the claimant was unaware of the statement made to the police by "B" until I asked him about it, nine years after the events it described had occurred. I cannot regard it as exceptional that he had no recall of the incident nine years afterwards, until he had been afforded an opportunity to read the statement in its entirety and reflect on its contents. I therefore do not view this issue as undermining his reliability.

Comments during police interview

108. When he was interviewed by the police Mr Redman made comments that could be interpreted as undermining his claim he was not at the second incident. I set out now the passages from the record of the interview that contain these comments,[110] before assessing their significance. The

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[101] Idem, pp 138, 140, 176.
[102] Idem, p 140.
[103] Idem, pp 136, 227.
[104] Idem, p 131.
[105] Idem, pp 226-7.
[106] Idem, pp 228-232.
[107] Idem, pp 231-2.
[108] Statement to police by "B" , dated 30 July 2007, p 5.
[109] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 234-5.
[110] See also the reference to them in the judgment of the Court of Appeal at [17] (see paragraph 58 of the report).

interviewer read to the claimant extracts from the statement to the police by "N" , which then produced the following question and answer:

Q. "N" states quite clearly he saw you enter the garage with your friends during the main assault and throw bottles.

A. Yeah he's just saying that cos he knows me. I saw him too.

The interviewer then read to Mr Redman from "B's" statement to the police, and asked:

Q. "B" has also put you at the main assault and throwing bottles.

A. Yeah I saw her and was talking to her. Ask my mates.

Q. "I" put you at the main assault as well.

A. Yeah don't believe what he says, believe "K" . I don't know why he's saying that.

109. Given that "N" accepted at the deposition hearing that Mr Redman might not have been at the second incident, the parties agreed at the trial that the passage of the claimant's interview that dealt with what "N" had said in his statement would not be led in evidence.[111]

110. The trial judge over-ruled a defence objection to the admissibility of the passage of the interview recording the claimant's response to the statement made by "B" .[112] The defence had argued that Mr Redman's response might have been equivocal, in the sense that he was not necessarily referring to the second incident when he said he saw her and was talking to her; rather, he might have been meaning "that he saw her at the incident as a whole," or in other words the first incident.[113] His Honour ruled that this was a matter for submission to the jury, rather than an issue of admissibility.[114]

111. The judge would have been prepared to exclude from evidence the passage of the statement where what "I" had to say was put to Mr Redman, but the defence did not seek its exclusion.[115]

112. Mr Hart contended, on the first appeal, that the judge should have excluded from evidence the reference in the statement to what "B"

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[111] Ruling No. 7 of Judge C J Field at [2].
[112] Idem, [5].
[113] Idem, [4].
[114] Ibid.
[115] Idem, [6].

had said. It was argued the response of the claimant to the "B" statement was "clearly equivocal," and thus unreliable and unfairly prejudicial.[116] The Court of Appeal ruled that this was a jury issue.[117] The court's judgment said if anything "B's" statement assisted the claimant's case, because when giving evidence at the trial "B" asserted that the person she identified as Mr Redman was not nearby[118] – she could not therefore have been talking with him at the second incident.

113. This makes it more likely, in my view, that Mr Redman was referring to the first incident when he responded in the way he did to the "B" statement. He explained it to me in that way. He said that he meant he saw "B" at the first incident. He said that when he was at the first incident he was talking with her.[119] I consider that explanation to be plausible. Not only is it supported by "B's" evidence at the trial, it would seem to me, as well, to be unlikely that Mr Redman would have been admitting presence at the second incident when earlier in his statement he had denied being present.

114. For the same reason the trial judge excluded from evidence the comments made by Mr Redman in relation to the "N's" statement I propose to draw no adverse inference from what Mr Redman said in his statement in relation to it. I am reinforced in this approach by Mr Redman's assertion, when I interviewed him, that he was meaning, in relation to "N" , that he had seen him at the first incident[120] – again it would be unlikely that he meant he had seen "N" at the second incident when earlier in his statement he had denied being at that incident.

115. I draw no adverse conclusion from the response in the interview to what "I" had to say, for the simple reason that the response is not a statement against interest. Moreover, I later in the report[121] make adverse findings of credibility in relation to "I" .

116. From this analysis I have concluded that none of the issues that might have undermined Mr Redman's honesty or reliability has done so.

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[116] Submissions of the Appellant on Appeal against Conviction and Sentence, paras 32-4.
[117] *R v* "Q" *and Redman* [2008] NZCA 117 at [62].
[118] At [61].
[119] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 82.
[120] Idem, pp 78-81.
[121] See paragraph 387 of the report.

Consistency to claimant's position

117. There has been a consistency to the claimant's position that he was not at the second incident. When interviewed by the police he accepted he had attended the first incident,[122] but denied he was at the second.[123] When arrested and charged with offences relating to the second incident he responded, when asked if he had anything to say in answer to the charge, "Yeah, it wasn't me. I wasn't there."[124] That has been Mr Redman's unwavering position from the date of his arrest, when he was first taxed with the matter.[125] He has maintained that position, even when there might conceivably have been some benefit to him from doing otherwise. His prospects of release from prison on parole, whilst serving his two and a half year sentence of imprisonment – a sentence that he served in full – would have been enhanced by an admission of guilt and expression of remorse. Because he continued to deny guilt – being described in a parole assessment report prepared for the Parole Board by the Department of Corrections as "remain[ing] adamant in his stance of denial, 'I was not there'" – he was "preclude[d] from eligibility for a rehabilitation programme in prison."[126] A parole assessment report put it thus: "As Mr Redman does not admit the offences he would not be eligible for any Departmental rehabilitation programmes."[127] Mr Redman's insistence on his innocence was described as a "motivational barrier," which was "preventing him from attending a criminogenic programme."[128] Attendance at such a programme – together with an improvement in his behaviour in prison[129] - would have made a release on parole more likely.

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[122] Statement to police of Tyson Gregory Redman, dated 11 November 2005, pp 4-7.
[123] Idem, pp 12-3, 18-9.
[124] Job Sheet of Constable J R Hemingway, dated 12 November 2005.
[125] It needs to be noted, however, that the sentencing judge described Mr Redman as "readily express[ing] remorse for [his] actions to the probation officer," which his Honour took to be genuine (Notes of Judge C J Field on Sentencing at [55]). This was based on the probation officer recording in the pre-sentence report that Mr Redman "readily expressed remorse for his actions" and "was sorry for the role he played in the offence and was prepared to accept the consequences of his actions." (Pre-Sentence Report, p 2). This comment was made without specific reference to the actions it was referring to; the report said that the court was "privy to the details of the charges and they were therefore not discussed with Mr Redman except in a broad context." (Pre-Sentence Report, p3). I infer from this that the expression of remorse related to the claimant's actions in attending the first incident – the actions that produced the conviction for unlawful assembly – and did not amount to a concession he was at the second incident.
[126] Department of Corrections, Parole Assessment Report to the New Zealand Parole Board, April 2009.
[127] Ibid.
[128] Department of Corrections, Parole Assessment Report to the New Zealand Parole Board, August 2009.
[129] The claimant had accumulated a number of misconduct reports (Department of Corrections, Parole Assessment Report to the New Zealand Parole Board, January 2010) and had an identified drug user status, as a result of returning positive results on testing for cannabis use (see Decisions of Parole Board dated 28 October 2008, 22 April 2009, 23 September 2009, 21 January 2010). See also the discussion of this issue in my interview of Mr Redman at pp186-90.

118. Mr Redman told me that parole was unlikely without an expression of remorse.[130] As he put it, when elaborating this point:

> Yeah they wanted me to give remorse to the victims but I was remorseful to the victims for what happened to them but I can't say I'm remorseful to the victims if I didn't do it and I wasn't there. So all my sentence I told them that I wasn't there and all I got is everybody says they weren't there but you're here so you're guilty and that's why I done my full time.[131]

119. I consider Mr Redman's insistence on innocence, at a time when a concession of guilt would have been expected to work to his advantage, to be telling.

120. I was also impressed by the conviction apparent in his assertion of innocence, during my interview of him. A passage taken from the transcript of that interview records the following response to a question from Crown counsel, Mr Barr, in which that conviction was on display:

> Excuse me sir, I was not there at the second incident. I think I said it over 1000 times. Yeah there's, you know, there's a lot of witnesses saying that I wasn't there. I said I wasn't there, even my own mother said I wasn't there, my own mother said I wasn't there and yeah she's – yous guys have made out that we're liars. You know what it feels like to be called a liar for so long but you're not a liar? So no I didn't lie. My mum's not lying, my family ain't lying. I've served the time, two and a half years, you gave me two and a half years, I done two and a half years. Why would I be sitting here today if I did do it? s 9(2)(a)
>
> I did not attend the second incident. I put my hand up for accepting that first incident, unlawful assembly, I got sentenced one month, I done that one month. If I'm wrong, I'll accept I'm wrong sir but I can't accept something, I can't accept something if I'm right. So please understand and I don't know how. I've got no bad feelings towards you, I know you're doing your job and yeah I'm just trying to explain the truth, the fact that I wasn't there. I don't know what else I can say. It's been 11 years since the incident, I don't know, quite a long time, I've done two and a half years in jail for something I didn't do. s 9(2)(a)

[130] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 145.
[131] Idem, pp 142-3.

s 9(2)(a)

121. The claimant's description of the conditions he endured in prison reinforces the significance of his continuing, at that time, to insist on his innocence. He would have known that had he admitted guilt and expressed remorse, and thereby qualified for a rehabilitation programme, he would have enhanced his prospects of parole. Yet he did not.

122. My overall impression of Mr Redman was that he was genuine. I have reminded myself that one has to be skeptical of protestations of innocence, and to look for supporting evidence from other sources. That I have done in this report. I confine myself, at this point, to simply saying I thought Mr Redman was authentic.

Alibi evidence

123. The evidence of alibi comes principally from two people: Carol Redman and "C" . The evidence of "K" and "D" as well as "L" also has a bearing upon it.

Carol Redman

124. Carol Redman was the only person describing the events of this evening who was not affected by alcohol or drugs. She is a teetotaler.[133] Mrs Redman described her son, Tyson, arriving home during the evening and remaining home thereafter. Her account was set out in a statement she made to the police, as well as in a brief of evidence prepared by the claimant's counsel, and in evidence she gave during the claimant's trial. It was also covered in depth when I interviewed her.

Mrs Redman's account of events

125. Mrs Redman said she was able to remember the weekend of 17 – 18 September 2005 well, for two principal reasons. First, on the Friday evening her family had hosted a surprise party for her 50th birthday; secondly, she had an interest in the general election that took place on the Saturday, and closely followed on television, on Saturday evening, the outcome of the election. She was able to link events that took place on the Saturday evening to a feature of the TV3 coverage of the election results. She said that, as a result, the

[132] Idem, pp 219-20.
[133] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 257.

weekend was "fresh in [her] mind" when she made a statement to the police in July 2007.[134] She had earlier described the events when speaking with her son's counsel, Mr Geoffrey Wells – he had reduced Mrs Redman's account to him to writing, in the form of an unsigned brief of evidence. This brief was supplied to the Crown, under cover of a letter faxed to the Crown Solicitor on 7 August 2007; but it would seem that the events it recounted were described by Mrs Redman to Mr Wells in conferences some two to two and a half months after the events had taken place.[135]

126. Mrs Redman said that after the birthday party on the Friday evening Tyson, after helping to clean up the venue, left with a friend.[136] She did not think he had returned home that night.[137] The next time she saw him was on the Saturday when she returned home from shopping, in the middle of the day, and saw her son leaving in a car to go to s 9(2)(a) Road.[138]

127. Mrs Redman went to the local primary school at 6 pm to vote, and then returned home and settled in to watch the election coverage on television.[139] She was that day babysitting "T" [140] Her husband, Greg Redman, who had been out golfing during the day, came home, after Mrs Redman had returned from voting, and retired to bed, soon after having dinner.[141]

128. Whilst Mrs Redman was watching the television election coverage a car pulled up outside the house, and Tyson got out of it.[142] Mrs Redman went to the front door to unlock it.[143] She stood at the door and watched her son walking up the path.[144] It was apparent to her that he was intoxicated – in fact, she said he was "very drunk."[145] He was falling against the wall, as he walked up the steps.[146] He could not walk a straight line.[147] His mother had to "help

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[134] Statement of Carol Redman, dated 19 July 2007, p 1.
[135] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 3-4, 10-2.
[136] Idem, pp 44-5.
[137] Idem, p 45.
[138] Ibid.
[139] Brief of evidence of Carol Redman, pp 3-4.
[140] Idem p 3.
[141] Idem, p 4.
[142] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 51.
[143] Ibid.
[144] Idem, pp 51-2.
[145] Brief of evidence of Carol Redman, p 5.
[146] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 51-2.
[147] Idem, p 55.

him through the door."[148] His speech was slurred.[149] Mrs Redman had never seen him like that before, and she was "really angry."[150]

129. Mrs Redman said that her son did not want anything to eat,[151] and he went directly to his bedroom, where he "crashed on top of the covers" of his bed without getting undressed.[152]

130. Mrs Redman said she checked on him several times during the night.[153] The first was immediately after he went to his bedroom.[154] She said her "T" later woke up, and got up, whilst she was watching the election coverage. He wanted to play with the PlayStation, which was in Tyson's bedroom. Mrs Redman went to the bedroom to retrieve it, so it could be connected to the television in the lounge – but only after the television coverage of the prime minister's speech at Labour Party headquarters, and related discussion by commentators, had concluded.[155] She thought this would have been after midnight.[156] Mrs Redman said that when she went into the room Tyson was still on the bed, exactly as he had been earlier.[157] She thought she had probably gone to the toilet earlier, and seen him in the same state.[158] Mrs Redman said that "T" had played with the PlayStation for "a good two hours," before he then returned to bed.[159] During this time Mrs Redman had been sitting on a couch in the living room, from which position she was able to see into Tyson's bedroom, and while, because of the position of the bed in the room, she had not been able to see his head or his body, she had been able to observe his leg "hanging off the bed."[160]

131. After "T" had returned to bed Mrs Redman prepared to retire for the night herself. On her timings, she went to bed somewhere around 3 am.[161] When doing so she saw Tyson lying on the bed, still fully clothed and "still snoring."[162]

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[148] Idem, p 48.
[149] Idem, p 55.
[150] Idem, p 47.
[151] Idem, p 55.
[152] Idem, pp 46-7; Brief of evidence of Carol Redman, p 5.
[153] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 56.
[154] Idem, p 68.
[155] Brief of evidence of Carol Redman, pp 5-6.
[156] Trial notes of evidence, pp 209-10.
[157] Idem, p 210.
[158] Idem, p 209; Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 70.
[159] Trial notes of evidence, p 209; Brief of evidence of Carol Redman, p 6.
[160] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 66-7.
[161] See discussion below.
[162] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 65.

132. Next morning Mrs Redman got up, she thought, at about 6 am – "the time that "T" usually wakes up."[163] She said it was just getting light.[164] Tyson was, Mrs Redman said, still asleep on his bed.[165]

133. If Mrs Redman's account is accepted the claimant could not have been at the second incident. That incident occurred at 2.30 am. At that time, Mrs Redman said, her son was at home, asleep on his bed.

Mrs Redman's timing of events

134. It is important to review the manner in which Mrs Redman arrived at the timing of the events she described. This, of course, has a bearing upon the accuracy of Mrs Redman's assertion that her son was home at 2.30 am. This was a live issue when Mrs Redman gave evidence at the trial and when I interviewed her.

135. Mrs Redman has described the timings of events on several different occasions:

- In conferences with her son's counsel (over the period of 2005 – 2007, the first of which took place soon after her son' arrest), which are reflected in the unsigned brief of evidence sent to the Crown Solicitor on 7 August 2007.
- In a statement to the police, dated 19 July 2007.
- When giving evidence in 2007 at her son's trial.
- When interviewed by me in 2016.

136. Mrs Redman's position is that she did not know the exact time her son arrived home that evening, other than by referencing it to events that were occurring in the television coverage of the election.[166] She said that the car bringing Tyson home pulled up outside the house around the time the TV3 election coverage was showing the front door of the prime minister's home, in anticipation of her leaving to go to Labour Party headquarters.[167]

137. Mrs Redman told her son's counsel this. He arranged to obtain from TV3 a video of the television coverage of the election. Using this he was able

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[163] Brief of evidence of Carol Redman, p 6.
[164] Trial notes of evidence, p 211.
[165] Brief of evidence of Carol Redman, p 6. See also Trial notes of evidence, p 211.
[166] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 26, 28, 30.
[167] Idem, p 31.

to prepare a schedule[168] setting out the times, during the broadcast, that the camera had cut to the door of Ms Clark's home.[169] That occurred on five occasions:

- 10.35 pm for one minute.
- 11.46 pm for one minute.
- 11.52 pm for six minutes.
- 12.00 am for five minutes.
- 12.07 for one minute, during which time the prime minister left her home to travel to Labour Party headquarters.

138. The following times, set out on the schedule, are also significant for present purposes:

- At 12.13 am the prime minister spoke at Labour Party headquarters.
- At 12.22 am Ms Clark spoke with reporters.
- At 12.26 am TV coverage from the party headquarters terminated.
- At 12.42 am coverage of discussion by commentators concluded.

139. The schedule, prepared by Mr Redman's counsel, was produced at the trial as Exhibit B.[170] The whereabouts of the video recording obtained from TV3 is not now known.[171] It is not known precisely when trial counsel, Mr Wells, received the video recording, but Mrs Redman thought it was "late in the piece, very late."[172] All that can be said with any certainty is that it was received before Mrs Redman's brief of evidence was prepared, as she makes reference in that brief to having "recently seen" (at Mr Well's chambers) the recording of the TV3 coverage, which enabled her to determine that the time her son came home was "shortly before" the camera was on Ms Clark's front door, at around 10.30 pm.[173]

140. I asked Mrs Redman how she knew that it was the first time the camera was on Ms Clark's door, as opposed to the second or third. She told me that she recalled her son getting home at about the time she saw Ms Clark's door on television for the first time, and that she saw the door again several times thereafter.[174]

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[168] "'TV3 Election Special 2005' Televised Live on TV3 on Election Day 2005 Saturday 17th and Sunday 18th September 2005."
[169] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 31, 38.
[170] Trial notes of evidence, p 217.
[171] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 38.
[172] Idem, p 31.
[173] Brief of evidence of Carol Redman, p 4.
[174] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 40-2.

141. From this point Mrs Redman was able to estimate the timing of the subsequent events that evening. She said that about half an hour after first seeing Ms Clark's door, Mrs Redman's "X" and her partner arrived home. They went directly to their bedroom.[175] Roughly half an hour later "T" woke up. The timing of this event would therefore be somewhere between 11.30 pm and midnight.[176] He had something to eat and drink, until the conclusion of the election coverage, whereupon Mrs Redman went into Tyson's room to get the PlayStation.[177] That, Mrs Redman says, was after midnight – it was after Helen Clark had finished speaking and after the TV3 commentators had completed their discussion. We know from the election coverage schedule that this would have been around 12.42 am. If "T" had then spent "a good two hours" on the PlayStation, before returning to bed – as Mrs Redman had estimated in her evidence at the trial[178] – he would have returned to bed around 2.40 am. Mrs Redman said she would have spent 30 to 45 minutes after that in preparing for bed;[179] which would have seen her going to bed around 3 am.

142. While Mrs Redman claimed to be able – using the election coverage schedule – to identify the time her son arrived home she accepted that other timings were estimates. Hence, she accepted that the time that "X" arrived home was an estimate;[180] the time that "T" woke up was an estimate;[181] the "good two hours" "T" had spent on the PlayStation was an estimate;[182] and the time involved in her preparations to retire to bed was an estimate.[183] She accepted she could not be certain about these timings – but she was doing the best she could when recalling the events, some time after they occurred, whilst outlining them to her son's counsel.[184]

143. The accuracy of Mrs Redman's estimates of timings is something I will consider shortly, in my assessment of Mrs Redman's overall reliability.

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[175] Idem, p 58.
[176] Idem, p 59.
[177] Ibid.
[178] Trial notes of evidence, p 210.
[179] Ibid.
[180] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 61.
[181] Ibid.
[182] Idem, p 62.
[183] Idem, p 64.
[184] Idem, pp 61-2. Mrs Redman said she had several meetings – probably more than three – with Mr Wells, with the first – in which she said she gave him a pretty detailed account – being soon after her son's arrest. Mr Wells was, she said, "focused on… trying to put timelines together with [her]." She thought she gave an account of what had happened on the Friday and the Saturday, and would probably have done so some two to two-and-a-half months after the events (Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 3-4, 10-2.

144. In the meantime, it is necessary to record that when Mrs Redman was describing these events to Mr Wells, and providing her timing estimates, and when she was interviewed by the police, she did not know the time at which the second incident occurred.

145. The most she seems to have known was that the second incident occurred sometime after midnight,[185] or perhaps earlier around 11 pm.[186] She learnt that from Mr Wells, during one of her meetings with him.[187] It is evident, however, that Mr Wells was unaware of the exact time of the second incident, as late as the commencement of the trial. This is apparent from correspondence, and from a file note made by the prosecutor. Mr Wells gave notice of alibi to the Crown Solicitor by way of letter dated 12 June 2006.[188] He said he had been instructed the accused was at his home at the time the offences were alleged to have been committed. He asked – so as to be able to inform the prosecution of the names of alibi witnesses – for advice as to the time it was alleged the second incident had occurred. This request was repeated a year later on 3 July 2007.[189] The following day – as is apparent from a file note made by the Crown prosecutor[190] – Mr Wells was phoned by the prosecutor and informed the Crown was "unable to place a time on events."[191] According to Mrs Redman the time the second incident occurred only became apparent during the trial.[192] The significance of this, of course, is that Mrs Redman would have been handicapped, were she to have endeavoured to tailor the timings of events in order to provide an alibi for her son at the time of the second incident.

146. Mrs Redman's account, and in particular her timing of events, were subject to close scrutiny when I interviewed her, and to a lesser extent in her evidence at the trial. There was scope for a number of criticisms – some relating to substance and others mere detail. The following passages of the report assess Mrs Redman's account of events and her timing of events, as well as the reliability and integrity of her account.

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[185] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 9.
[186] Idem, p 74.
[187] Idem, pp 10-1.
[188] An earlier letter purporting to give notice of alibi, dated 7 June 2006, appears not to have been sent.
[189] Letter dated 3 July 2007 from Geoffrey W Wells to Meredith Connell & Co.
[190] Attachment "C" to affidavit of Katie Margaret Suzzanne Alison, sworn 2 December 2013.
[191] It is difficult to see why the prosecution could not at least have informed Mr Wells of the time of the second incident, as the police were in possession of data indicating the time of the 111-emergency call.
[192] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 9, 75-6.

Critique of Mrs Redman's account of events and timing of events

(a) Allegation account concocted

147. I have to say that some of the criticisms made of Mrs Redman at the trial were unfounded. The prosecutor put to Mrs Redman that she had made up the times of events she had described in evidence in an endeavour to "help [her son] out."[193] It was suggested to her that her son was not home that night and she had "no idea where he was."[194] Mrs Redman denied these suggestions. Prosecuting counsel at the trial illuminated this contention, in her closing address to the jury, when she said that as a loving mother Mrs Redman would "do anything to assist her son."[195] There was no basis for the contention that Mrs Redman had concocted her evidence, and committed perjury. In my view, the suggestion such an action would be the natural consequence of a mother's love for her son was both unrealistic and unfortunate.

(b) Failure to go to police immediately

148. Mrs Redman was subject to trenchant criticism at the trial for not having gone to the police immediately she became aware her son had an alibi. The evidence established that Mrs Redman had not spoken with the police about this until they interviewed her on 19 July 2007,[196] some twenty months after Mrs Redman became aware of the incident, and shortly before the trial commenced.

149. This issue was put to the jury, by the prosecutor, in the following terms:

> You need to ask, members of the jury, if that was you, if that was your son and you recalled that he'd been home from about 8.30, nine o'clock that night, what would you do as soon as you'd found out. Wouldn't you go straight to the police and tell them? ....
>
> It was not until five or six weeks later that Mrs Redman hears of what has happened. She doesn't go straight to the police. She doesn't go, "hey, he was home with me, I was watching the election, I remember that night so clearly." She doesn't speak to the police, you heard, until two weeks before this trial starts....[197]

150. This submission overlooked that while Mrs Redman accepted she had not contacted the police herself, she explained this by saying she understood

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[193] Trial notes of evidence, p 217.
[194] Ibid.
[195] Closing address of counsel for the Crown at [118].
[196] Trial notes of evidence, p 212.
[197] Closing address of counsel for the Crown at [118] and [119].

they were going to contact her and that she was expecting a call from them – but they did not call her.[198]

151. She expanded upon this when I interviewed her. She explained that she had made her son's counsel aware of the alibi and had been told by him the police would contact her when they wished to take a statement from her. She said she believed this would be the process.[199] She said she followed up with Mr Wells, "on several occasions asking him, "When are we going? When are we going?" only to be informed by Mr Wells that the police would contact her when they needed her.[200] Mrs Redman said she thought that was "the process."[201] Ultimately, both Mrs Redman and her husband went to the police station to be interviewed, once Mr Wells had phoned them to advise they were then to go to the station.[202]

152. It was perfectly understandable that Mrs Redman would have relied upon the advice her son's counsel gave her in this respect. She knew that counsel was to inform the prosecution of the alibi and indicate who would give evidence in support of it. She understood the police were to contact her, to interview her in relation to the alibi – and that that was 'the process.'

153. Prosecuting counsel at the trial could be expected to have known that was 'the process.' Even though Mrs Redman had not given at the trial the more detailed explanation she gave me – and that would seem to have been because she was not expressly asked to do so at the trial – she did say enough for it to be apparent she was expecting a call from the police and waiting for them to contact her. The effect of the way this matter was put to the jury could have been unfair, producing illegitimate prejudice. It could have made a distinct impression on the jury.

(c) Discussion between Redmans

154. There was an issue about whether Mrs Redman and her husband and / or son had discussed the events of 17 and 18 September, before the claimant was interviewed at the police station.

155. When it became known the police wished to interview the claimant his father arranged to take him to the police station, for this purpose. Mr Redman senior had just returned from Melbourne and his wife had remained in

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[198] Trial notes of evidence, p 212.
[199] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 158, 160.
[200] Idem, p 178.
[201] Idem, p 247.
[202] Idem, p 161.

Melbourne. Mr Greg Redman phoned his wife in Australia to tell her he was taking Tyson to the police station, but, he said, they did not discuss the matter, because they did not know, at that stage, what it was about.[203] It was not until Greg Redman was at the police station, with his son, that he first heard of the matter.[204] Mrs Redman took the same position: the first she knew of it, she said, was after the police interview of her son.[205] The Crown challenged this assertion. It pointed to a notebook entry made by a police constable[206] who had assisted Constable J R Hemingway, the constable who conducted the police interview of the claimant. The first constable sat in on the interview, as indeed did the claimant's father. The notebook entry records the claimant as having said that he got a ride home at "around 2030 [hours]." The notebook follows this with the entry, "Father confirms that Tyson came home at about 2030 [hours] – went to bed."[207] The Crown asks how it is that Mr Redman senior would be in a position to confirm that his son went home at 20.30 hours, and went to bed, if there had not been a discussion about the issue with either his son or his wife. He would not otherwise have known, the Crown says, because Mr Redman senior had gone to bed before his son got home.[208] To be blunt, the Crown was inferring a lack of honesty on this issue.[209]

156. The topic was canvassed at my interviews of Mr Redman senior and also Mrs Redman. Mrs Redman was adamant that when her husband accompanied their son to the police station neither she nor her husband "was aware of what they were going to assist the police with."[210] Mr Redman had no recollection of having confirmed during the interview that his son got home at 20.30 hours;[211] which was hardly surprising given that the interview at the police station had taken place nearly 11 years before my interview with Mr Redman.

157. I consider there are two explanations that are alternatives to that advanced by the Crown. First, the job sheet of Constable Hemingway records that she spoke with the claimant (with his father present) at 9.08 on the

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[203] Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, pp 3, 4, 36.
[204] Idem, p 3.
[205] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 2-3. See also trial notes of evidence, pp 211-2.
[206] Constable J Carlisle.
[207] Notebook entry of Constable J Carlisle, p18. It is of interest, however, that the handwritten record of the interview – recording the questions and answers – made by Constable Hemingway does not record Greg Redman as making the observation recorded in the other constable's notebook. I assume the explanation for this must be that Constable Hemingway was confining her record to the questions she asked and the claimant's answers.
[208] Closing submissions of the Crown, dated 28 November 2016, at 25.2.3.
[209] See, e.g., Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 84.
[210] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 187.
[211] Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 79.

morning of the interview. The job sheet further records[212] that she first outlined the purpose of the interview and that the claimant acknowledged he was aware of the incident to which she was referring. The taking of the statement did not, however, commence until 9.15 am (according to the notebook entry of Constable Carlisle the interview commenced at 9.20 am). Depending on how long it took for Constable Hemingway to outline the purpose of the interview and for the claimant to acknowledge he was aware of the incident, there was a time differential of up to seven minutes, between the claimant being made aware of the purpose of the interview and the commencement of the interview. I would not view it as surprising if the claimant had reacted to being made aware of what the interview was about by telling his father, in the interval before the interview commenced – either in the presence or hearing of the constable, or otherwise[213] – that he had arrived home on the night in issue at about 8.30 pm. That would have been a significant point to make. Nor would it be surprising if Mr Redman senior had repeated this information during the interview.

158. The second alternative follows from Greg Redman having confirmed his son's arrival home at about 2030 hours, soon after the son had himself told the interviewer that was the time he got home. It may well have been that the father emphasized this for some reason that escapes the record when an audio or visual recording of the interview is not made, and, instead, a constable only records the basic questions and answers in longhand.

159. I consider it to be telling that when these possibilities were suggested to Mr Greg Redman, when I interviewed him, he did not embrace them, as he could well have if he were to have been intent on being less than candid, but admitted he had no recollection.[214] When asked about the second alternative he said maybe that was what had happened, but then said he "wouldn't have a clue honestly."[215]

160. Given Greg Redman's responses to the questions put to him in my interview with him I formed the view that he was responsible and measured in his approach to the issues.

161. I have concluded that it is simply not possible to say how it came about that Mr Greg Redman was possessed of the information, during the interview,

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[212] Job sheet of Constable J R Heningway, dated 12.11.2005, p 2.
[213] Mr Greg Redman could not remember whether there was an opportunity between 9.08 am and 9.15 am to speak privately with his son (Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 77).
[214] Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, pp 74-80.
[215] Idem, p 80.

about the time his son arrived home. The two innocuous possibilities I have canvassed are at least as tenable as the one the Crown contends for. Accordingly, this is not an issue that can tell against the reliability of Greg Redman or his wife.

(d) Recall of detail

162. There are four issues upon which Mrs Redman could be criticized in respect of her recall of detail.

(i) Commonwealth Games

163. First, she said that her husband and son had returned to New Zealand (immediately before the claimant's police interview) having been in Melbourne at the time of the Commonwealth Games,[216] for the purpose of attending the Rugby Sevens.[217] The visit to Melbourne was in 2005; the Commonwealth Games took place in that city in 2006.[218] I have concluded that Mrs Redman was simply mistaken on this issue: her husband and son had indeed gone to Melbourne to attend the Sevens and Mrs Redman mistakenly assumed they were at the same time as the Commonwealth Games. The Redmans' daughter had lived in Melbourne since about 2000, and Mrs Redman visited her on a regular basis,[219] although the claimant and his father had only visited "on a couple of occasions."[220] Mrs Redman did not attend any of the Commonwealth Games events – she explained she stayed at home babysitting.[221] It seems evident that Mrs Redman has mistaken the visit of her son and husband with a visit she also made the following year. I see nothing exceptional about this, given that Mrs Redman was recalling the events more than ten years later.

(ii) Person in rear of vehicle

164. Mrs Redman, in her evidence at the trial, said there was "definitely" someone sitting in the back of the vehicle that brought her son home, whilst she was watching the television election coverage. She could not, however, recognize that person because it was raining and it was dark.[222] When I interviewed Mrs Redman I pointed out to her that "C" who claimed to have driven her son home, was emphatic that there was no one in the car apart

[216] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 2.
[217] Idem, p 179.
[218] Idem, p 180.
[219] Idem, p 258.
[220] Idem, p 259.
[221] Idem, p 180.
[222] Trial notes of evidence, p 208.

from the claimant and "C" .[223] Mrs Redman was viewing events from the front door of her home,[224] but because it was dark and it was raining Mrs Redman was prepared to concede she may have made a mistake about there being someone in the back of the car.[225] This mistake, if that were what it was, would seem to be the result of Mrs Redman thinking she saw the shadow of a person in the back of the vehicle. This is the type of mistake that can be readily made, and then conceded in the face of new information – the troubling aspect of it being, however, that Mrs Redman was prepared to assert at the trial that there was 'definitely' someone in the rear of the car. I view this, however, as no more than undue confidence in a position that is later conceded, on further analysis, to possibly be mistaken.

(iii) Removal of shoes

165. Somewhat more problematic were Mrs Redman's different assertions about her recollection of her removal of her son's shoes, after he had fallen asleep on his bed. In her brief of evidence Mrs Redman said, "I can't recall if he still had his shoes on but I am sure that if he had I would have taken them off."[226] In giving evidence at the trial Mrs Redman repeated her assumption that she would have taken the shoes off. She said her son was still wearing his shoes, "but I would have taken them off." She continued, "I would have just put them down the side by his cupboard."[227]

166. When interviewed by me, however, Mrs Redman purported to have a recollection of removing her son's shoes. She said, "I had to take his shoes off 'cos I'm a pretty tidy Kiwi,"[228] and elaborated, "when he got home I went in and took his shoes off and put them down on the ground, and then he was – didn't even flinch when I took his shoes off. Yeah, he was, like I said, snoring and out to the monkey like his dad."[229]

167. I challenged Mrs Redman about whether she had a specific recollection of removing the shoes, or was assuming she had done so. I reminded her that in evidence at the trial she had said that she would have taken the shoes off.[230] She responded that she "would've taken the shoes off 'cos I wouldn't have wanted them being on the bed."[231] She effectively

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223 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 133.
224 Idem, p 135.
225 Idem, pp 143-4.
226 Brief of evidence of Carol Redman, p 5.
227 Trial notes of evidence, p 208.
228 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 47.
229 Idem, p 68.
230 Idem, p 79.
231 Ibid.

accepted that she had no specific recollection of taking the shoes off. Her claim that she had removed the shoes was suppositious.

(iv) Statement to police about time claimant arrived home

168. There was another example of Mrs Redman's recall of detail being questionable. She told the police, when she was interviewed by them in July 2007, that her son had come home "around 9 pm"[232] and that it was whilst the television election coverage was "showing Helen Clark's house...."[233] When giving evidence at the trial Mrs Redman said she initially thought the time Tyson came home was "around about nine to ten," but that since viewing the recording of the television coverage "a couple of weeks" before the trial she was able to identify the actual time as "around 10.30."[234] She pointed out that she had not been looking at the clock, but was relying on the television coverage to provide the time.[235] This was perfectly understandable; however, when I interviewed Mrs Redman she denied having told the police officer that her son had arrived home "around 9 pm." She said she "never mentioned a time 'cos I didn't know a time."[236] I suggested to Mrs Redman that she might have mentioned 9 pm to the police officer, because at the time she thought it was around that time, but later realized – when the recording of the television coverage was received from TV3 – it could not have been around 9 pm, and must have been later. Mrs Redman would not accept this, saying that at the time of the interview with the police she did not know the time, and would not have told the police it was "around 9 pm."[237] Mrs Redman was adamant: "I know that I didn't make any reference to times because I didn't know them. I know that for a fact."[238]

169. Mrs Redman was later prepared, however, to retreat from this emphatic position. Given that she had said at the trial that she initially thought the claimant came home around 9 to 10, she accepted it was "possible" she might have told the police officer Tyson arrived home "around 9 pm" or "around nine or 10 pm" or "something like that."[239]

170. I have no doubt that what Mrs Redman accepts as a possibility is in fact what happened. In my view the words "around 9 pm" appear in the statement because that is what Mrs Redman said to the officer. I do not accept

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232 Statement of Carol Redman, dated 19 July 2007, p 2.
233 Idem, p 3.
234 Trial notes of evidence, p 207.
235 Ibid.
236 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 27.
237 Idem, pp 27-9.
238 Idem, p 32.
239 Idem, pp 33-4.

that the officer would have included those words in the statement, if that were not what was said. But it is important to also have in mind that the statement records, as I have pointed out, that the time of Tyson's arrival home could be referenced to the television coverage of the election.

171. I am prepared to accept, however, that the statement may not record everything that was said by Mrs Redman. The reference to Tyson arriving home around 9 pm may be the result of the officer paraphrasing what was said. Mrs Redman may have emphasized that she was unsure of the time, having said it was around 9 pm. As is well known, a shortcoming of the interview process that was adopted here (where the record is limited to question and answer format and is not a verbatim record) is that not every qualification or subtle nuance is recorded.

172. I consider this is the most likely explanation for Mrs Redman having initially taken the emphatic position in her interview with me that she had not mentioned a time to the police. The failure of the statement to record precisely what she said may have produced Mrs Redman's reaction to this part of the statement. This would not be an unusual response to this situation, especially when the passage of nine years between the police interview and my interview of Mrs Redman is also taken into account.

173. The issue does not, however, end there. Mrs Redman asserted that when the statement was read back to her by the detective, before she signed it – a process that was adopted because she didn't have her glasses with her[240] – she challenged the reference in the statement to the time her son arrived home. She claimed the officer told her that if she initialed the part referring to the time the officer would change it.[241] That part of the statement has indeed been initialed and a change made to it. The change, however, is not to the time that is recorded; but rather it involves the addition of the word "say" to the sentence, so that it reads: "On the night of the disorder I can *say* that Tyson arrived home around 9 pm and that he was very drunk."[242]

174. The statement does not, on its face, support Mrs Redman's contention on this issue. I consider the most likely explanation for this is that over the nine years between the two interviews Mrs Redman has mistaken the detail of this discussion.

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[240] Trial notes of evidence, p 213.
[241] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 88-9.
[242] Statement of Carol Redman, dated 19 July 2007, p 2.

(e) Reliability of assertion of 10.35 pm arrival home

175. The Crown has challenged the reliability of Mrs Redman's assertion that her son arrived home at around 10.35 pm and the means by which she arrived at that conclusion. This is a critical feature of Mrs Redman's position on the alibi. I will set out the basis upon which Mrs Redman substantiates her claim, but first make reference to what the Crown says are "varying accounts"[243] by Mrs Redman of the time the claimant arrived home.

176. It is said that Mrs Redman asserted in her police statement that Tyson arrived home at about 9 pm (the issue I have just discussed), and that this is inconsistent with her later claim it was 10.30 pm. In my earlier discussion of this issue I noted that the statement also said Tyson arrived home whilst the television election coverage was "showing Helen Clark's house..."[244] and I concluded it was understandable that Mrs Redman had revised the time, after viewing the recording of the television coverage, once her son's counsel had obtained the recording. I see nothing to the point the Crown makes on this issue.

177. Likewise, I see little in the Crown's additional point that Mrs Redman had suggested, in effect, that it would have been shortly after midnight that the claimant arrived home. This point is based on Mrs Redman having said in her police statement that Tyson got home as she was "watching the television when it was showing Helen Clark's house and her leaving to go do her speech."[245] The TV3 Election Special Schedule reveals that the prime minister left her home to go to Labour Party Headquarters at 12.07 am. Mrs Redman was cross-examined on this issue at the trial. She said that she had told the detective who interviewed her that Tyson had "come home before Helen Clark made her speech."[246]

178. I consider this to be explicable on the basis that the language used by Mrs Redman, when explaining this aspect to the police, was rather loose or imprecise, or, alternatively, the paraphrasing by the detective in the statement of what Mrs Redman said was imprecise. I consider it to be likely that what Mrs Redman said was that the camera was on Ms Clark's house while they were waiting for her to leave "to go do her speech." This is what Mrs Redman said in her draft brief: "...he came home shortly before a camera was pointed at the front door of Helen Clark's house and the reporters were waiting for her

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[243] Closing submissions of the Crown, dated 28 November 2016, at 52.5.
[244] Statement of Carol Redman, dated 19 July 2007, p 3.
[245] Ibid.
[246] Trial notes of evidence, p 213.

to come out to go and do her victory speech."[247] On this basis, what Mrs Redman said would not be inconsistent with her evidence that her son came home at 10.35 pm.

179. Mrs Redman described to her son's counsel, Mr Wells, what she was observing on the television at the time her son came home.[248] She told him the TV3 camera was on Ms Clark's door, whilst the television depicted a male commentator, standing outside the door. She said that two brown side panels on the door were lit up.[249] Once Mr Wells obtained the TV3 recording both he and Mrs Redman[250] viewed it, Mrs Redman said. One object in doing so was to determine the time the camera was focused on the door, with a male commentator in the picture and the panels on either side of the door lit up. Mrs Redman said that Mr Wells identified this combination of features being present on only one occasion, and that was the broadcast at 10.35 pm.[251] The other timings did not have this combination of features.[252]

180. The Crown was not able to effectively challenge this. It contended that Mrs Redman "was inconsistent with her reasoning," on this issue. I do not readily see the inconsistency, however. The point relates to the different ways that Mrs Redman was expressing herself, whilst essentially asserting complementary features, rather than inconsistent ones. She said during her interview with me that she was able to select the 10.35 pm time because that was the first time she had "seen them taking a shot of the door."[253] Crown counsel suggested to Mrs Redman this was inconsistent with her evidence at the trial, where she had said she identified the 10.35 pm occasion because of the presence of the commentator and the door panels being illuminated.[254] Mrs Redman effectively explained this by saying she was relying upon both features: the first time she saw Ms Clark's door was the occasion where the commentator was present and the panels illuminated, whereas on the "couple of times" she saw the door after that the panels were not lit up.[255] She emphasized that the combination of unique features was present on the first time she saw the door, whether that was the first time the door had featured, or not. It was the work of Mr Wells that established that part of the broadcast was at 10.35 pm. This is not an entirely simple concept for a lay witness to be expressing; hence Mrs Redman was emphasizing different features at

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247 Brief of evidence of Carol Redman, p 4.
248 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 28-9.
249 Trial notes of evidence, pp 207, 216.
250 Trial notes of evidence, p 207.
251 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 41-2, 207-10.
252 Idem, pp 207-8.
253 Idem, p 41.
254 Idem, p 206. See also Trial notes of evidence, p 216.
255 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 208.

different times. Crown counsel suggested Mrs Redman was no longer relying during the interview on the presence of the commentator.[256] This, however, was not an inconsistency; rather an example of different features being emphasized at different times.

181. The recording of the TV3 election coverage was in the possession of Mr Wells at the time of the trial. Its whereabouts is no longer known. I assume it was available, at the time of the trial, to the Crown, had they wished to view it, for the purposes of determining whether it supported Mrs Redman's evidence about the door panels and the commentator. The recording itself was not used at the time by the Crown to challenge Mrs Redman in this respect.

(f) "L's" timing of first incident

182. The Crown points to "L's" account, which was that he would not have gone to the first incident until approximately 11.30 pm. It says that even allowing for "some latitude for the approximate nature of his timings" this suggests Mrs Redman's claim that her son arrived home at 10.35 pm cannot be correct.[257]

183. "L's" account demonstrated the extent to which he had approximated timings. He said he had been drinking Kava at the Methodist Church until "about 10 pm that night"[258] and that he had then walked to s 9(2)(a) Road, which took him about half an hour.[259] He claimed to have left for the first incident "maybe an hour" after that.[260]

184. A feature of the case has been the widely varying estimates of the timing of the first incident. "A" estimated the first incident occurred at around 6 pm.[261] "B" thought the time was "about midnight."[262] "N's" evidence at the trial was that it was about 9.30 pm.[263] "C" thought he drove the claimant home between 9 and 9.30 pm,[264] which meant, on his account, the first incident must have been before then. The claimant thought he left s 9(2)(a) Road to go home at about 8.30

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256 Closing submissions of the Crown, dated 28 November 2016, at 52.5.4(d).
257 Idem, 53.
258 Transcript of video interview of "L" , conducted on 14 November 2005, p 2.
259 Idem, p 5.
260 Transcript of interview of "L" , conducted on 10 September 2016, p 19.
261 Trial notes of evidence, p 6.
262 Statement of "B" , dated 25 October 2005, p 3.
263 Trial notes of evidence, pp 110-2.
264 Affidavit of "C" , sworn 21 January 2009, para 4(f) and (g).

pm.[265] Moreover, "L" , himself, did not claim to be confident about his timing - he said he wasn't "too sure" about the times he gave and said one (upon which he based another) was "a rough estimate."[266] He described his memory of the night as variously "not that great"[267] and "shocking."[268]

185. I cannot, therefore, view "L's" estimate of the timing of the first incident as undermining Mrs Redman's account that the claimant arrived home at 10.35 pm.

(g) Friends staying in garage

186. Some of Tyson Redman's friends were wont to sleep in the garage at his home. The claimant said "D" stayed in the garage "quite frequently."[269] He had no family and nowhere to live and would sleep wherever he could.[270] "D" asserted that at the time of the events in issue he was living with Tyson Redman.[271] Mr Redman said his mother was aware of this.[272] Mrs Redman, however, told the police that she was not aware of any of Tyson's friends staying in the garage.[273] The Crown submits this indicates that "Mrs Redman's current memory of the extent to which she kept an eye on the applicant" is "distorted."[274]

187. In my view this issue is probably one of degree. Mrs Redman's draft brief of evidence records that "there was the odd occasion that some [of Tyson's friends] may have stayed overnight in the garage."[275] Mrs Redman told me she knew "on a couple of occasions" "D" stayed, because he would ask if he could do so.[276] Greg Redman accepted that Tyson's friends might have been staying in the garage more often than he or his wife were aware of.[277] This would accord with the claimant's assertion that "D" slept wherever he could, and if the pair were to be out together and "D" had nowhere to sleep the claimant would invite him to stay in his garage.[278] Mr Redman accepted he might not have told his mother of the

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[265] Statement of Tyson Gregory Redman, dated 11 November 2005, p 11.
[266] Transcript of interview of "L" , conducted on 10 September 2016, p 10.
[267] Idem, p 78.
[268] Idem, p 58.
[269] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 60.
[270] Idem, p 63.
[271] Affidavit of "D" , sworn 18 December 2008, para 7.
[272] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 64.
[273] Statement of Carol Redman, dated 19 July 2007, p 4.
[274] Closing submissions of the Crown, dated 28 November 2016, at 52.4.1.
[275] Brief of evidence of Carol Redman, p 2.
[276] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 127.
[277] Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 31.
[278] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 64.

extent to which "D" was sleeping in the garage.[279] It seems that on the occasions "D" was sleeping in the garage he was not using the facilities in the house.[280] It also seems the garage was seldom accessed by Mr and Mrs Redman, who mainly used it for storage purposes.[281] In these circumstances, I have little difficulty in concluding that "D" was sleeping in the garage more often than Mr and Mrs Redman were aware. Accordingly, I do not see this issue as in any way undermining Mrs Redman's reliability.

Findings concerning Mrs Redman's account of events and timing of events

188. I have described two aspects of Mrs Redman's account of events that have given me some concern: her account that she took her son's shoes off (together with accompanying detail), when this was based on assumption; and, her initial insistence she had not told the police her son arrived home "around 9 pm", together with her mistaken understanding of the conversation concerning the amendment of her statement to the police.

189. These are features of the evidence, however, that relate to detail. It would be a rare case in which mistakes on matters of detail did not occur. This must be all the more so where someone is describing events, as Mrs Redman was in her interview with me, that took place eleven years previously.

190. I must also have regard to published scholarly research that has revealed the malleability of memory.[282] Research has suggested a memory trace is "reconsolidated" each time it is recalled: the trace, research suggests, is rewritten afresh in memory each time it is recalled. Memory can be reconstructed, in the process, with the gaps unknowingly filled in.

191. This may well explain how it was that Mrs Redman could describe her son's demeanour when she removed his shoes – an event she assumed had taken place. It might also explain her mistaken position concerning the *9 pm issue*, in her police interview.

192. Notwithstanding these two errors in matters of detail, I am satisfied that Mrs Redman's account of her son arriving home and the time that he did so is accurate. I am also satisfied of the accuracy of her description of the

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[279] Idem, p 63.
[280] Ibid.
[281] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 172.
[282] See, e.g., Alan Scoboria et al, "A mega-analysis of memory reports from eight peer-reviewed false memory implantation studies" 2016 *Memory*. See also "Wipe away bad memories" *New Scientist* vol 182 issue 2443 – 17 April 2004, 18; "Not-so total recall" *New Scientist* vol 178 issue 2393 – 3 My 2003, 26.

other principal events of that evening (not including, for present purposes, estimated timings – which are discussed below), subsequent to the claimant arriving home. I am satisfied as to these matters for several reasons. First, they are substantive issues, and not detail. Mrs Redman has been consistent throughout in her account of the substantive events. Second, Mrs Redman was able to determine the time her son arrived home by reference to events that were verified, when the TV3 recording of the election coverage was obtained.[283] Third, my impression of Mrs Redman was that she was honest and genuine. I simply do not accept that she would concoct an alibi for her son. Nor do I consider her to be mistaken about the substantive events of that evening. I consider her account of the principal events she describes to be reliable.

193. I should note that I am reinforced in this conclusion by the support given to Mrs Redman's account of her son arriving home, at the time she gives, by "K" and "M" Later in the report[284] I conclude that "K's" assertion, in both his statement to the police and in his affidavit, that he recalled "C" giving the claimant a lift home from s 9(2)(a) Road, before the second incident, lends some support to the evidence of alibi given by Mrs Redman. I also conclude, later in the report,[285] that "M" is reliable in his account in his police interview of the events of the evening. In that interview he said that he was picked up from his home by "C" and driven to s 9(2)(a) n Road, where he started drinking at about 10 pm. He was drinking the whole time he was there. It follows from this that "C" was using the car to at least convey people to s 9(2)(a) Road, and that he took "M" there at about 10 pm. It can reasonably be inferred that if "C" was taking people to s 9(2)(a) Road at this time of the night he might also have taken someone fom s 9(2)(a) Road. This would provide support for "C's" claim in his statement,[286] and the claimant's assertion,[287] that "C" took Mr Redman from s 9(2)(a) Road to deliver him home. I view the combined evidence of "K" and "M" as providing meaningful support to the assertion the claimant was taken home and to Mrs Redman's account of her son arriving home.

194. My view of Mrs Redman's veracity is further confirmed by a number of letters of reference that were provided to the District Court, at the time of the sentencing of the claimant. Unusually (given that it was her son and not

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[283] See paragraphs 146-8 of report.
[284] See paragraph 227 of thee report.
[285] See paragraph 292 of the report.
[286] Statement to police of "C" , dated 23 July 2007, p 1.
[287] Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 33-4; Statement to police of Tyson Gregory Redman, dated 11 November 2005, pp 7, 11, 12

Mrs Redman who was before the court), several of the 24 letters referred to the character of Mrs Redman. In addition to mentioning her substantial voluntary work in the community, over many years, as a sports administrator, particularly in the area of schoolboy rugby league, a theme of the references was Mrs Redman's integrity and honesty, as well as her trustworthiness.[288] This material was not before the jury – which was unfortunate, as her veracity was in issue in the proceeding and arguably evidence of her honesty – known as 'oath helping' evidence[289] – would have been substantially helpful to the jury in assessing her veracity.[290]

195. For the reasons set out, I make the following findings of fact:

- The claimant arrived home at around 10.35 pm.[291]
- "T" woke in the night and spent time playing on the PlayStation.
- "T" started playing on the PlayStation from somewhere between 12.22 am. (the time the prime minister's speech at Labour Party headquarters concluded) and 12.42 am (the time the election broadcast ended).[292]

196. I also accept Mrs Redman's assertion that the claimant was asleep on his bed at the time she retired to bed. I am able to approximate the time that she did so.

197. Two timing estimates for events that followed "T" starting to play on the PlayStation assist in making this finding. They are Mrs Redman's estimate of the time "T" was using the PlayStation and the time involved in her preparations to retire to bed: a "good two hours" in the case of the former[293] and 30 to 45 minutes in the case of the latter.[294]

198. Mrs Redman, of course, as I have noted earlier,[295] accepted that these timings were estimates. She accepted she could not be certain about them. I propose to take a conservative approach to the estimates. I will accept that "T" was using the PlayStation for about one hour and that Mrs Redman spent approximately 20 minutes preparing for bed.

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288 See references attached to pre-sentence report.
289 See Mahoney et al, *The Evidence Act 2006 – Act and Analysis* (3rd ed 2014), at EV37.03(6).
290 Section 37 Evidence Act 2006.
291 See paragraphs 179 and 180 of report.
292 See paragraph 130 of report.
293 See paragraph 130 of report
294 See paragraph 141 of report.
295 See paragraph 142 of report.

199. On that basis, taking the median of 12.32 am as the time "T" commenced on the PlayStation, I conclude that Mrs Redman retired to bed sometime around 2 am.

200. I find as a fact that when she went to bed she saw her son asleep on his bed[296] and that she saw him there again, still asleep, when she got up at about 6 o'clock the next morning.[297]

201. I note, parenthetically, that the finding concerning the time that Mrs Redman retired to bed, and observed the claimant on his bed, would not be affected by the time the claimant arrived home. Even if it were to be one of the times – other than 10.35 pm – when the television broadcast was showing the prime minister's door, that would not impact the time at which "T" started playing on the PlayStation, and, as I have recorded, that is the critical starting point in determining the time Mrs Redman retired and where the claimant was at that time.

"C"

202. "C" supports Mrs Redman's evidence of alibi. He has said that he drove Tyson Redman home, from s 9(2)(a) Road, well before midnight on 17 September 2005.[298] What he says in this regard supports Mrs Redman's evidence that she saw a car drop her son off home. It also supports the claimant's assertion to his mother, when he got home, that "C" had driven him home.[299]

203. There are significant troubling features, however, about "C's" evidence, in over-all terms, which must impact on his credibility, and thus on the extent to which his evidence can provide support for the alibi.

204. The police interviewed "C" over the course of 45 minutes, on 14 November 2005. The interview was video recorded. Unfortunately, the record of the interview, and any synopsis prepared of it, has been lost.[300] All that remains is a notebook entry[301] and a police job sheet,[302] both of which record no more, for present purposes, than that the interview took place.

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[296] See paragraph 131 of report.
[297] See paragraph 132 of report.
[298] Appeal notes of evidence, p 34.
[299] Statement of Carol Redman, dated 19 July 2007, p 4.
[300] Affidavit of Glenn Edward Baldwin, sworn 2 December 2013, paras 2,3,7, 14.
[301] The notebook entry is said by Detective Senior Sergeant Baldwin to be "difficult to read." (Baldwin affidavit, para 13.
[302] Annexures "A" and "D" to Baldwin affidavit.

205. The police again interviewed "C" on 23 July 2007, the day before the trial commenced. A handwritten statement was taken. "C" claimed in this statement that he was not involved in "any of the incidents" that occurred on 17 and 18 September 2005. He said that he was using a Nissan Primera car, belonging to his "J" , and called at the s 9(2)(a) Road address – "out of the blue to see what they were up to" – where he remained for "around 10 minutes", before he left to "take Tyson home." He said Mr Redman was not drunk and after dropping him off, he drove back home. He said he could not recall the time of any of these events.

206. However, 17 months later – when "C" swore an affidavit in support of Mr Redman's royal prerogative application – he could remember the timings: he said that after returning to s 9(2)(a) Road, from the first incident at s 9(2)(a) Avenue, they continued partying and that at about 9 to 9.30 pm Mr Redman asked him for a lift home.[303] He then, he said, took Mr Redman home. When cross-examined in the Court of Appeal "C" was adamant that this was "way before midnight;"[304] he disputed that it could have been later than 9 to 9.30 pm,[305] but then conceded he might be wrong on this point, taking a fallback position that it was before midnight and "that's all I know."[306]

207. "C's" changing position on the timing of events undermines his reliability. There are other difficulties with his evidence.

208. First, his acceptance in his affidavit, and in the Court of Appeal, that he was at the first incident – he describes going to the incident and what occurred whilst he was there[307] – is in conflict with his denial in his statement of 23 July 2007 that he was present.[308] This denial – made in a formal written statement to the police – may have been prompted by a desire not to incriminate himself, by admitting presence at an incident that produced for others a charge of unlawful assembly; but, nonetheless it was a dishonest denial.

209. "C" asserted in his affidavit that he believed he told the police in his video interview on 14 November 2005 of his attendance at the first incident, and why he attended.[309] I find this assertion to be unlikely, for two reasons: first, it would conflict with the denial in his written statement of 23

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[303] Affidavit of "C" , sworn 21 January 2009, para 4(f).
[304] Appeal notes of evidence p 34.
[305] Idem, p 35.
[306] Ibid.
[307] Affidavit of "C" , sworn 21 January 2009, para 4; Notes of evidence pp 24-33.
[308] See paragraph 205 of the report.
[309] "C" affidavit, para 4.

July 2007 that he had attended the incident; and, secondly, it would seem probable that had he admitted, in the interview, attendance at the incident, he would have faced a charge of unlawful assembly, which he did not.

210. I find that these features of the evidence undermine "C's" credibility as a witness. Two additional features of his evidence in the Court of Appeal compound this. First, "C" , when cross-examined, gave conflicting accounts of the reasons for going from s 9(2)(a) n Road to s 9(2)(a) Avenue. He said initially that the reason for going to the address was to see if "everything was alright with ["H's"] family;" it was simply "to make some inquiries," not to have a fight or cause problems.[310] Later, however, in a quite extraordinary departure from this position, "C" responded, when asked how he thought he was going to be able to help the situation by going to s 9(2)(a) Avenue, "Go back and bash the cunt." The purpose was to, "Give it to him," in a reference to the person supposed to have caused "H's" injuries.[311]

211. The second compounding feature was the evidence about whether weapons were taken to the first incident. "C" sought to downplay the criminal intent implicit in the first visit to s 9(2)(a) Avenue by saying he was 'positive' no one had carried anything with him, whilst going to the address.[312] He said that if anyone carried a weapon, he would have seen it.[313] He said that if anyone had picked up an object that could be used as a weapon, en route to s 9(2)(a) Avenue, he would have noticed when the group arrived at the address: he was adamant he did not see any such object.[314] This is out of accord with the account of two others of the group, who walked to s 9(2)(a) Avenue. Tyson Redman told the police he had carried a piece of wood, which he had taken from s 9(2)(a) Road – he said he had taken it to use as a weapon.[315] He thought someone else had taken a hammer.[316] "E" , in a statement to the police, described members of the group arriving at s 9(2)(a) Avenue with pieces of wood and a metal pipe.[317] The statements by both Mr Redman and "E" , about the carriage of items that could be used as weapons, were against their interest. I consider it unlikely these claims would be made, unless they were true. This accords with the purpose of the visit, as ultimately conceded by "C" . The assertion by "C" that

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[310] Appeal notes of evidence pp 26, 31-2.
[311] Idem, p 33.
[312] Idem, p 26.
[313] Ibid.
[314] Idem, pp 28-9.
[315] Statement of Tyson Gregory Redman, dated 11 November 2005, p 6.
[316] Ibid.
[317] Statement to police by "E" , dated 9 November 2005; Video interview by police of "E" on 9 November 2005, p 10.

items to be used as weapons were not taken to s 9(2)(a) Avenue demonstrates his unreliability.

212. Finally, in relation to "C's" credibility, a further issue arises. "C" claimed in the Court of Appeal to be sure there was no one in the car, when he drove Mr Redman home, other than Mr Redman and himself.[318] In contrast, Mr Redman said a person by the name of "S" was also in the car[319] – although "C" said he knew no one by that name;[320] however, "K" said that he did, and that "S" had been at s 9(2)(a) Road that day.[321] Mrs Redman claimed to be able to 'definitely' see somebody else, who she could not recognize, sitting in the back of the car;[322] although she later accepted, when I interviewed her, that she might have been mistaken about this. It is difficult to know who is mistaken, although it is, perhaps, more likely – given other issues relating to "C's" reliability – to be "C" .

213. I cannot view "C" as a credible or reliable witness. He may have given Mr Redman a lift home, but it would not be possible to rely on his evidence alone to establish that.

"K"

214. "K" claimed in his affidavit, sworn in support of the royal prerogative application, that he recalled "C" giving the claimant a lift home, before the second incident.[323] He made a similar claim when interviewed by the police.[324]

215. There are a number of features that call into issue the reliability, in general terms, of "K's" evidence. First, he had on the day of the incidents been consuming alcohol, possibly for up to 14 to 16 hours.[325] As well as beer, he was drinking spirits.[326] By 6 am, when he was involved in an accident whilst driving a car, he was, as he put it, "drunk."[327] He agreed that by midnight (six hours previously) a lot of the group he was drinking with were

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[318] Appeal notes of evidence, p 36.
[319] Statement of Tyson Gregory Redman, dated 11 November 2005, p 9.
[320] Appeal notes of evidence, p 36.
[321] Idem, p 13.
[322] Trial notes of evidence, p 208.
[323] Affidavit of "K" , sworn 18 December 2008, paras 10 and 15.
[324] Synopsis of Video Interview on 11 November 2005.
[325] Appeal notes of evidence, p 21.
[326] Idem, p 11.
[327] Idem, pp 20-21.

"very drunk, very intoxicated."[328] It would not be surprising if this condition impacted on his recall of events.

216. A constable spoke to "K" in relation to this inquiry, on 11 November 2005. The constable had recognized him from an encounter, the previous day, at the Auckland District Court, when "K" had given the constable false particulars about his identity.[329] While this was, no doubt, to avoid assisting the police with inquiries, it revealed, nonetheless, an absence of candour, which must have at least some bearing on the present assessment.

217. "K's" cross-examination in the Court of Appeal revealed, as the judgment of the court put it, "various inconsistencies."[330] Foremost was an assertion that he was "positive" he did not attend the first incident at s 9(2)(a) Avenue, and that he instead stayed behind at s 9(2)(a) Road.[331] Cross-examination, that confronted "K" with the assertions of four people who said "K" was at the first incident, resulted in his conceding he was no longer sure – it was, he said, "eight years ago."[332] His concession was in accord with what he initially told the police, when he mentioned "the first time *we* went to s 9(2)(a) Avenue" (emphasis added) – it needs to be noted, however, that this is not a direct quote from the video interview (which is no longer available), but is rather taken from a synopsis of the interview (which remains available).[333]

218. The interview synopsis records "K" as having claimed "J" had dropped the claimant home in the car (in contrast to his claim in his affidavit that it was "C"). "K" claimed that "J" was present at s 9(2)(a) Road during the day.[334] Cross-examination challenged this – on the basis that "J" had given evidence at the trial that he had stayed home with his family all day – and this saw "K" retreat from his position that "J" had been present: in fact, he accepted that he was wrong in this respect.[335] In fairness to "K", however, it should be noted that his mistaken belief "J" was at s 9(2)(a) Road that day was probably based on the presence at the address of "J's" vehicle, which was being used by his friends.[336]

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[328] Idem, p 11.
[329] NZ Police Job Sheet, prepared by PC Pita Fuafiva.
[330] *Tyson Gregory Redman v The Queen* [2013] NZCA 672, at [38].
[331] Appeal notes of evidence, p 6.
[332] Idem, p 9.
[333] Synopsis of video Interview on 11 November 2005.
[334] Appeal notes of evidence, p 14.
[335] Ibid.
[336] Trial notes of evidence, p 149.

219. A further conflict arose concerning the timing of an event described by "K" . He said in his affidavit that later in the night he went with one of his friends in "J's" car to Mr Redman's home to (unsuccessfully, as it turned out) "try and get Tyson to come back to our party".[337] He said in the affidavit he could not recall what time of the night it was, but he did remember that it was before midnight.[338] In the Court of Appeal he said that he went to the claimant's house after the second incident.[339] The incident involving the violence occurred, of course, around 2.30 am. The Crown seeks, in its submissions in relation to the compensation claim, to develop this inconsistency by asserting that it undermines the alibi. The Crown makes two points. It says "K's" "point of reference" in his affidavit for timing the departure of the claimant from s 9(2)(a) Road (on his way home) was wrong.[340] It further says that if "K" went to the claimant's home after the second incident then – because he claimed to have seen, during that visit, Mrs Redman sitting in the lounge – Mrs Redman was wrong in her evidence about the times of various events and in her assertion that she had gone to bed around 2 am.[341]

220. The Crown, in making the first point, conflates two distinct events: first, the claimant being taken home by "C" , and second, "K" later going to Mr Redman's home. The inconsistency relates to the timing of the latter, not the former. If "K" gave inconsistent accounts of the timing of his visit to Mr Redman's house, that is quite a different issue from the timing of the claimant's departure from s 9(2)(a) Road, on his way home. Moreover, any confusion about the timing of the visit by "K" to Mr Redman's home does not, in itself, in my view, undermine "K's" consistent stance that Mr Redman went home before the second incident.[342]

221. The Crown's submission on the second point is, in effect, that because "K" went to the Redman's home after the second incident, and saw Mrs Redman sitting in the lounge (meaning she had still not gone to bed), it was conceivable that Mrs Redman had got the timings wrong, and her description of the claimant arriving home drunk was an account of his arrival home, after the second incident. This contention relies on an assumption that "K" was correct when he said in the Court of Appeal that he went to the claimant's home after that incident, and incorrect when he said, in his affidavit, it was

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[337] "K" affidavit, paras 11-3.
[338] "K" affidavit, para 11.
[339] Appeal notes of evidence, pp 19-20.
[340] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, dated 23 December 2015, at 26.
[341] Idem, 26.3.
[342] See appeal notes of evidence, p 20; Synopsis of video Interview of "K" on 11 November 2005

before midnight. There is no sound basis, however, for making this assumption. The affidavit was sworn in December 2008, three years after the events in issue, whereas the evidence in the Court of Appeal was given eight years afterwards. It was apparent that "K" was struggling with his recollection of the detail of events when cross-examined: he asked counsel to "bear with [him], this was eight years ago."[343] What he said in his affidavit was a recollection closer by five years to the events. It was also consistent with his statement made only two months after the incident, where he said the claimant had gone home before the second incident.[344] In my view, the reason given by "K" , in his affidavit, for going to the claimant's home also tells against the assumption the Crown contends for: he said he went there "to try and get Tyson to come back to our party."[345] I find it less likely that this would have been the intention had the second incident already taken place.

222. I am inclined to the view that "K" , when giving evidence in the Court of Appeal, some eight years after the incident, was in error when he asserted that he went to the claimant's house after the second incident. I consider that it is more likely his affidavit is correct on this point, and that he did so before midnight.

223. I conclude, as a result, that the inconsistency in "K's" account of when he went to the claimant's address does not undermine the alibi, in the way the Crown suggests.

224. I am of the view that overall the several inconsistencies in "K's" account –with the exception of the issue of whether he was present at the first incident – all relate to matters of detail, with the explanation for inconsistent recall of detail being, essentially, the consumption of alcohol over a long period on the day of the incident, and the eight years that elapsed between the day of the violence and the evidence in the Court of Appeal. Likewise, I consider this is probably the explanation for the poor recall on whether "K" had been at the first incident. But, what seems to stand out for me, from "K's" accounts of events, is the consistent position he has taken from the beginning that Mr Redman went home before the second incident.

225. He was emphatic in the Court of Appeal that Mr Redman had been given a lift home, "before we went back the second time,"[346] and that the claimant was not at the second incident; indeed, he said that he had been clear

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[343] Appeal notes of evidence, p 9.
[344] Synopsis of video Interview on 11 November 2005.
[345] "K" affidavit, para 11.
[346] Appeal notes of evidence, p 11.

about that from "day one."[347] And so he had: the synopsis prepared by the police of what "K" said, when he was interviewed by the police in November 2005, records "K" as saying:

- Tyson Redman was home that night.
- Tyson was there for the first time we went to s 9(2)(a) Avenue.
- Second time "J" dropped him off in the car.[348]

226. His affidavit confirmed this: in it he said he recalled Tyson Redman being given a lift home.[349] He has not, at any point, resiled from that position. To me, it is telling that he said this at the outset, and has consistently adhered to it ever since. I consider this consistency enables the vigor of "K's" account, on this issue, to survive, notwithstanding the inconsistences apparent in other parts of his evidence. My conclusion on this issue is reinforced by the candour apparent in the synopsis of the interview, when "K" readily admitted his own offending – which involved striking a person in the face with a golf club, thereby causing the most serious injuries to have resulted from the incident. "K" made this admission at a time when – as is apparent from evidence given by Detective Sergeant Baldwin (as he then was), at the hearing of a *voir dire*[350] – the police did not know the identity of the person who had wielded the golf club. It is thus unlikely that "K's" admission was the result of the police confronting him with information they held. I infer this was a frank and candid interview.

227. I have therefore concluded that "K's" account – on the issue of the claimant being given a lift home – lends some support to the evidence of alibi given by Mrs Redman. His account also – aside from the support it gives to the alibi – lends some support to Mr Redman's claim he was not at the second incident.

"D"

228. "D" purported to recall in his affidavit, filed in support of the royal prerogative application, that sometime after the group of young men returned to s 9(2)(a) Road, from the first incident, the claimant left the address: "I think he got a lift home."[351]

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[347] Idem, p 20.
[348] Synopsis of video Interview on 11 November 2005.
[349] "K" affidavit, para 10.
[350] Appeal notes of evidence taken on *voir dire* hearing, 2 August 2007, p 12.
[351] Affidavit of "D" , sworn 18 December 2008, para 12.

229. "D" was challenged on this claim, when he gave evidence in the Court of Appeal. He had made no such assertion in his statement to the police, in November 2005,[352] although that may be because he was not asked about it.[353] "D" conceded that he did not see Mr Redman leave s 9(2)(a) Road, and that he was relying on memory "flashbacks" as the basis for his view that Mr Redman had left the address.[354] He claimed to know that the claimant had been dropped off home, because Mr Redman was in the garage at his home when "D" arrived there, sometime after the attack[355] – "D" was at this time apparently staying, from time to time, in the garage at the Redman's address.

230. "D" claimed to be "quite sure" Mr Redman was in the garage[356] and "quite sure" he woke a sleeping Mr Redman when he arrived at the garage[357] - and told him what had happened.[358] Yet, this assertion is contradicted by three people: the claimant said in his police statement that he went to the garage in the morning to be told by two of his 'mates', who had slept in the garage, what had happened;[359] Mrs Redman was adamant her son had slept in the house and was still in the house[360] when she got up the next morning;[361] "L" – who said that he slept in the garage that night (and that was the only night he slept in the garage) with "D" – said he and "D" were woken by Mr Redman the next morning: he said he remembered going to the garage with "D" before dawn and did not remember seeing Mr Redman there at that time – he said he would have remembered had he been there,[362] but later conceded the possibility of error.[363] Notwithstanding this concession, the combined effect of what the claimant together with Mrs Redman and "L" have to say on this issue undermines the reliability of "D's" account, and directly calls into question his claim that Mr Redman had gone home before the second incident - the claim being based, as it was, on Mr Redman being asleep in the garage when "D" arrived there.

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[352] Statement of "D" , dated 9 November 2005.
[353] In his affidavit "D" said the police did not ask him anything about Tyson Redman when they interviewed him: para 19.
[354] Appeal notes of evidence, p 140.
[355] Ibid.
[356] Idem, p 138.
[357] Idem, pp 136-7, 107.
[358] Idem, p 104.
[359] Statement of Tyson Gregory Redman, dated 11 November 2005, p 14.
[360] Trial notes of evidence, p 208.
[361] Idem, p 211.
[362] Transcript of interview of "L" , conducted on 10 September 2016, pp 51-2, 54.
[363] Idem, pp 58-60.

231. There are other indicators of "D's" ' unreliability. He was not prepared to accept that he might have got it wrong when he disputed that "L" had stayed with him in the garage that night.[364] Yet, two people – the claimant and "L" – assert that he was wrong. He incorrectly stated, when interviewed by the police, that on 17 September 2005 he had been staying with the Redmans at s 9(2)(a) Street[365] – they were in fact living at the time at s 9(2) Avenue and did not move to s 9(2)(a) Street until sometime later.[366] He gave conflicting accounts of what he did after the second incident, and after he had given "some girls" a lift home in "J's" car: in his statement he said he went back to s 9(2)(a) Road and continued drinking;[367] but, in the Court of Appeal he said he went home.[368]

232. Significantly, "D" had no recollection of "K" driving the vehicle at this time; of it being involved in an accident; and his walking to the claimant's address, with "L" , after the accident.[369] That there was such an accident is beyond doubt. The police attended at s 9(2)(a) Avenue, Mt Roskill at 6.11 am on 18 September 2005. "K" was the driver of the vehicle, when he had lost control of it, whilst rounding a corner, and crashed into the front fence at that address. He was driving, he told the police who responded to the accident, notwithstanding substantial alcohol consumption, because there was "no one else who could drive him and his mates."[370] He agreed in the Court of Appeal that he had "crashed" "J's" car.[371]

233. "L" described to me leaving s 9(2)(a) Road with "D" and "K" , with the latter driving.[372] He described the vehicle being in an accident, not far from the "EQ" home. He said the car was "crashed fairly bad."[373] He said that he and "D" then walked to Mr Redman's address, intending to sleep in the garage.[374] Yet "D" has no recollection of any of this.

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[364] Appeal notes of evidence, p 106.
[365] He seemed to be unclear about where he was living at the time of the incident, when he gave evidence in the Court of Appeal – it was only in response to a leading question, after being told where Mrs Redman said she was living at the time, that "D" agreed it was s 9(2) Avenue (Appeal notes of evidence, pp 135-6).
[366] Trial notes of evidence, p 203.
[367] Statement of "D" , dated 9 November 2005, p 18.
[368] Appeal notes of evidence, pp 130-1.
[369] Idem, pp 129-30.
[370] Statement of Detective Senior Sergeant Glenn Edward Baldwin, dated 1.11.2016, p 4.
[371] Appeal notes of evidence, p 20.
[372] Transcript of interview of "L" , conducted on 10 September 2016, p 45.
[373] Idem, p 46.
[374] Idem, pp 47-8.

234. "D" was affected by alcohol. He had been consuming alcohol during the afternoon and into the evening and the early hours of the next morning.[375] He had been drinking over a period of 12 hours.[376] In addition to beer, he was consuming spirits – including gin, which he was drinking straight.[377] This would explain the inconsistencies within his own evidence and the conflicts between his account of events and those of others, as well as what appear to have been substantial memory blanks. His description of memory 'flashbacks' suggests to me an impaired memory, the result of excessive consumption of alcohol. I could not rely on "D's" ' account of events. His evidence does not assist the alibi; but nor does it undermine it: where his account conflicts with the evidence of Mrs Redman, I prefer the evidence of Mrs Redman; where his account conflicts with "L's" account, I prefer that of "L" .

Persons present at the attack who say claimant was not there

235. Aside from "K" and "D" , another five people, who were present at the second incident, assert that the claimant was not. Two were people attending the party, and three were young men who had been drinking at s 9(2)(a) Road, before going to the second incident. Of these five people – all of whom claimed in their affidavits, filed in support of the royal prerogative application, that the claimant was not at the second incident – two ("E" and "F") told the police, when interviewed, that the claimant was not present; while the other three did not name the claimant as being amongst those who were present, when they were interviewed. I now assess the evidence of these five affiants.

"E"

236. "E" said in his affidavit that the claimant was "definitely not with us," at the second incident.[378] This accords with what he told the police when interviewed. When directly asked if Tyson was present at the incident, he said he was not.[379] He said the claimant was probably there the first time.[380] In the Court of Appeal, "E" asserted initially that he "knew Tyson wasn't there," but then accepted that, because eight years had elapsed between the incident and his evidence in that court, he didn't know.[381]

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[375] Appeal notes of evidence, p 129
[376] Ibid.
[377] Idem, p 117.
[378] Affidavit of "E" , sworn 6 January 2009, para 11.
[379] Transcript of video interview of "E" , conducted on 9 November 2005, p 20.
[380] Idem, p 21.
[381] Appeal notes of evidence, pp 62-3.

237. Poor recall was a feature of "E" evidence overall in the Court of Appeal. Perhaps it is understandable that he blames this on his memory not having survived the passage of eight years.[382] Perhaps the consumption of alcohol was also a factor – "E" accepted this was probably so, but then said he wasn't sure.[383] "E" had been drinking all day;[384] he hadn't, he claimed, been drinking heavily – which, he said, would be binge drinking – rather, he'd been steadily drinking.[385] Whatever the reason, "E" was not an impressive witness in the Court of Appeal. This must impact on the reliability of his affidavit, the contents of which were somewhat spartan anyway. The issue really becomes one of how much reliance can be placed upon what "E" said to the police in his interview with them – two months after the incident.

238. There are indications some things said in the interview may not be entirely reliable. "E" claimed that "I" was not at the second incident – that he was probably at home, on his curfew, he thought.[386] Yet, "I" accepts he was at the incident.[387] "E" named in the interview six people (including himself) as being present at the first incident,[388] but did not name the claimant, who, of course, admits he was at that incident. "E" told the police that "J" was drinking with the group at s 9(2)(a) Road, but that he did not go with them to s 9(2)(a) Avenue – because he was asleep at s 9(2)(a) Road.[389] "J's" car was used to transport the group. But "J's" evidence at the trial (as a prosecution witness) was that he had been at his home all day with his family – and had gone to bed at about 8 pm.[390] He said his friends had been using his car. When cross-examined in the Court of Appeal "E" was unable to remember "J" being present at s 9(2)(a) Road[391] – at one point he said he was sure he wasn't there,[392] but then said he didn't know[393] – but he could remember the car being there.[394] He couldn't explain why he had told the

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[382] Idem, p 63.
[383] Idem, p 44.
[384] Idem, p 42.
[385] Ibid.
[386] Transcript of video interview of "E" , conducted on 9 November 2005, p 36.
[387] Transcript of video interview of "I" , conducted on 9 November 2005, p 36.
[388] Idem, p 10.
[389] Idem, p 14.
[390] Trial notes of evidence, pp 148-9.
[391] Appeal notes of evidence, p 44.
[392] Idem, p 54.
[393] Idem pp 54-5.
[394] Idem, p 44.

police "J" was at s 9(2)(a) Road, when "J" gave evidence that he was not.[395]

239. I have concluded that there are too many indicators of unreliability in "E's" interview with the police for me to be able to place reliance on "E's" assertion that the claimant was not at the attack.

"F"

240. "F" was a guest at the 21st party. She had known the claimant for some time, as he was a friend of her brother's.[396] The police interviewed "F" in November 2005. In that interview she was asked if she had seen people she knew, who were members of the JDK, at the second incident. She responded by saying, "Yeah, the people that I knew were there, except for Tyson, I don't think Tyson was there."[397] When swearing her affidavit in 2009, for the royal prerogative application, "F" said she could "categorically state" that the claimant was not at the second incident. She said she had seen him earlier in the day, but he did not return later to s 9(2)(a) Avenue.[398] Likewise, when cross-examined in the Court of Appeal, "F" remained adamant that Tyson Redman was not present at the second incident. She said she knew "for a fact" he wasn't there and was "100% sure" of this.[399]

241. However, cross-examination in the Court of Appeal – together with passages of her interview with the police – called into question "F's" reliability. She was significantly affected by alcohol. She had been drinking beer and wine, from sometime in the afternoon, to the point where she was, at the time of the incident, "intoxicated, completely"[400] - "chronic" and "wasted", as she put it in her police interview.[401]

242. "F" was, during the second incident, standing in the driveway area, close to the action.[402] Yet, she was not watching "the whole thing."[403] It

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[395] Idem, p 45.
[396] Appeal notes of evidence, p 144. When swearing her affidavit, in 2009, she said she had known him for about 10 years (Affidavit of "F", sworn 23 February 2009, para 5).
[397] Transcript of video interview of "F", conducted on 16 November 2005.
[398] Affidavit of "F", sworn 23 February 2009, para 9.
[399] Appeal notes of evidence, pp 162-3.
[400] Transcript of video interview of "F", conducted on 16 November 2005, pp 27. See also Appeal notes of evidence, at p 160, where the witness accepted cross-examining counsel's terms "quite drunk" and "quite wasted".
[401] Transcript of video interview of "F", conducted on 16 November 2005, pp 12, 22.
[402] Appeal notes of evidence, pp 160-1.
[403] Idem, p 161; Transcript of video interview of "F", conducted on 16 November 2005, p 22.

seems she was trying to stop her boyfriend from entering the fray. All she could remember was "people fighting and stuff."[404] Her recollection was of "bits and pieces."[405] It appears to have been confined to "bottles flying." She didn't see any weapons, such as sticks or bats, or the like[406] - when clearly they were evident.

243. The "shortcomings of her observations / recollections" are said, by the Crown, to be illustrated by her having told the police she did not know if "E" was present at the second incident,[407] when he was. It was put to her in cross-examination, in the Court of Appeal, that she didn't have a good recollection of who was present at the incident, to which she replied: "I know for a fact that wasn't there."[408] She said she knew him better than she knew "E" .[409]

244. "F" was challenged in the Court of Appeal on the basis that her confident assertion she was "100% sure" the claimant was not at the incident did not sit easily with the more diffident approach she took to the issue in her police interview. She told the police that, "the people I knew were there, except for Tyson, I don't think Tyson was there."[410] She would not accept, when later cross-examined, that the words 'I don't think' qualified her confidence.[411] It may be that those words were used in a lose sense, without an intention to qualify her belief Tyson Redman was not present. Such an interpretation would accord with the earlier part of the sentence, where "F" said the people that she knew were there, *except for Tyson*. The words, 'I don't think Tyson was there,' followed this more pronounced assertion. Such an interpretation would accord with "F's" explanation that the use of the words 'I don't think' was a mistake.[412]

245. However, "F" had earlier disputed, in the cross-examination, that she had even used the words 'I don't think' in the police interview. She had to retreat from this position, when reminded that the interview had been video recorded, although not before saying that she had been in error in earlier agreeing the record of the interview was correct.[413] These are two more troubling features, which, when combined with the others, render

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[404] Interview, p 14.
[405] Idem, p 19.
[406] Idem, pp 16-7.
[407] Idem, p 21. Appeal notes of evidence, pp 163-5.
[408] Appeal notes of evidence, p 165.
[409] Idem, p 163.
[410] Transcript of video interview of "F" , conducted on 16 November 2005, p 21.
[411] Appeal notes of evidence, pp 162-3.
[412] Idem, p 163.
[413] Idem, p 162.

"F" largely unreliable. I note, as well, that "F" asserted in her affidavit that she recalled "A" saying at the depositions hearing that the claimant was not present at the second incident, "yet when it came round to the trial she changed her mind and said Tyson was there."[414] This, of course, was incorrect – "A" was consistent at the trial and at the depositions hearing in asserting Mr Redman was at the second incident.

246. Given "F's" unreliability, it would have to be a distinct possibility that if the claimant were to have been present at the second incident, she simply did not see him.

"G"

247. "G" had known Tyson Redman since he was of primary school age. He was a friend of her son, "H" .[415] She recalled talking to Mr Redman, at the first incident.[416] When the group returned for the second incident she did not, according to her affidavit, "see Tyson Redman amongst them." He was not "to the best of [her] knowledge" with them.[417] She said that if he had been there she would have recognized him.[418] There are, however, real issues about the reliability and accuracy of her recall.

248. "G" told the Court of Appeal, when asked, during cross-examination, if she had watched the 'whole fight' or left before it ended, that she couldn't remember, that it was "all a bit of a blur and a haze".[419] She said that she saw bottle throwing, but no fighting.[420] This suggests either poor recall, or limited observation of events, as the incident involved much more than bottle throwing. She suggested the first incident occurred during the hours of daylight.[421] In fact, it occurred at night. "G" was asked, when interviewed by the police, whether her son "H" was amongst the group of young men. She responded, "To tell you the truth I never saw "H" he wasn't in front."[422] This ran directly contrary to her evidence in the Court of Appeal. In evidence, she said she recognized "H" and "K" amongst the group, as they were both right in front of her.[423]

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[414] Affidavit of "F" , sworn 23 February 2009, para 10.
[415] Affidavit of "G" , sworn 19 January 2009, para 9.
[416] Idem, para 13.
[417] Idem, para 16.
[418] Idem, para 17.
[419] Appeal notes of evidence, p 177.
[420] Idem, p 183.
[421] Appeal notes of evidence, p 176.
[422] Transcript of video interview of "G" conducted on 9 November 2005, p 34.
[423] Appeal notes of evidence, p 178.

249. There were indicators of limited observation of events. She said there was limited lighting.[424] She said she had been at her house when the fighting started,[425] and she had then rushed from her house back to the party "to try and stop what was starting to eventuate."[426] She said she had fallen to the ground, had managed to get up, and then left.[427]

250. "G" could not recall if there were members of the group beyond the "entrance of the garage."[428] Her assertion that the claimant was not present at the incident would have to be undermined by this. Likewise, her inability to recall whether the "EQ" brothers were present calls into question her ability to exclude the claimant as being present. "G" knew both "E" and "Q" .[429] The brothers were present at both incidents; yet, "G" was unable to say, when interviewed by the police, whether they were present at the first incident,[430] and unable to say, in the Court of Appeal, whether they were present at the second.[431] As "G" had spoken to the group when they were told to leave during the first incident, it might be reasonable to expect that, were she to have a good recollection of events, she would have recalled the presence of the "EQ" brothers. Similarly, "G's" inability to recall, in evidence, whether the brothers were at the second incident suggests limited observation or recall, which calls into issue her ability to accurately assert that the claimant was not present.

251. In large measure, "G's" assertion that the claimant was not present at the second incident is based on an unsound assumption. It was put to "G" , in cross-examination, that Mr Redman might have been part of the group that was standing beyond the entrance to the garage, and, as a result, she might not have seen him.[432] She responded to this suggestion by saying, "If Tyson was there he would have been standing right next door to "H" ."[433] No basis was provided for this assertion, although presumably it reflected a close friendship between the two – they had gone to school together and played sports together from an early age.[434] But this does not, as a

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[424] Ibid.
[425] Idem, pp 177, 179.
[426] Idem, p 179.
[427] Transcript of video interview of "G" , conducted on 9 November 2005, p 35.
[428] Appeal notes of evidence, p 180.
[429] Transcript of video interview of "G" , conducted on 9 November 2005, p 52.
[430] Ibid.
[431] Appeal notes of evidence, pp 179-80. "G" was asked about 'the "EQ" boys' – this was a reference to the "EQ" brothers: see p 2 of tape 2 of Transcript of video interview of "E" , conducted on 9 November 2005.
[432] Appeal notes of evidence, p 180.
[433] Ibid.
[434] Idem, p 182.

matter of logic, justify an assumption that they would have been standing next to each other during the incident.

252. "G's" affidavit provides a further indicator of unreliability. She deposed that at the depositions hearing "A" was unable to be sure whether the claimant was present at the second incident.[435] That was simply incorrect - "A" asserted, without equivocation, that Mr Redman was at the attack.[436]

253. I have concluded that "G" was not a reliable witness. I have done so without taking into account her consumption of alcohol, or her plea of guilt to a charge when she denied the actions that constituted the offence. For the sake of completeness, I make brief mention of these two factors.

254. "G" had been drinking from the afternoon until the early hours of the morning.[437] She had consumed, she thought, "maybe half a dozen glasses" from a cask of wine she had taken to the party.[438] She was, she said, 'merry', but nothing more.[439] Indeed, she said she could "drink all night", so her consumption was "nothing."[440]

255. "G" pleaded guilt, prior to trial, to a charge involving an incitement to disorder. Yet she denied the facts involved in the conviction.[441] She said she entered into a plea deal, which involved a plea to a lesser charge, with the object of avoiding imprisonment. It would be pointless to dispute that such deals are from time to time entered into, out of a concern to avoid going to trial, which is seen as a risky option, although a trial could well result in an acquittal. I would, therefore, not place any reliance upon any dissonance between the denial of guilt and the plea.

"H"

256. "H" asserted that Tyson Redman was not at s 9(2)(a) Road, prior to the group leaving that address to go to s 9(2)(a) Avenue for the second visit, and nor was he present at the second incident. This he swore in an affidavit in support of the royal prerogative application.

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[435] Affidavit of "G" , sworn 19 January 2009, para 20.
[436] Evidence of "A" , given in Auckland District Court on 23 May 2006, pp 30-1, 35
[437] Appeal notes of evidence, p 169.
[438] Transcript of video interview of "G" , conducted on 9 November 2005, pp 48- 9.
[439] Idem, p 49.
[440] Ibid.
[441] Idem, pp 42-6; Appeal notes of evidence pp 180-1.

257. "H" , however, was shown to be unreliable.

258. He was affected by alcohol. He started drinking during the morning of 17 September, possibly as early as 9 or 10 am.[442] He continued drinking until somewhere in the vicinity of 4 o'clock the next morning - when he "fell down."[443] This amounted to something approaching 17 or 18 hours drinking, by a 17 year-old.[444]

259. It was put to "H" , in cross-examination in the Court of Appeal, that the combination of drinking over that period of time, combined with his having had nothing to eat, and having been knocked out at the party by "O" ,[445] might have adversely impacted his memory of events.[446] He conceded this might be so with regard to some of the events, and said he remembered "bits and pieces."[447] He claimed to remember the attack, however, "very clearly."[448]

260. "H" had misled his friends about the earlier events, when "O" had knocked him out.[449] He had, when reporting to his friends at s 9(2)(a) Road, blamed "O" for injuries he had sustained when he ran into a glass door at his home,[450] some time after he had been knocked out.

261. "H" recounted, when interviewed by the police, that he had told his friends at s 9(2)(a) Road, soon after the incident with "O" , that "O" had injured him, by slashing his shoulder and forearm with a broken bottle. He said his friends had reacted to being told of his having been "sliced up" by going, at his request, to s 9(2)(a) Avenue.[451]

262. "H" conceded in the Court of Appeal that "O" had not attacked him with a bottle.[452] He had therefore lied to his friends. However, under cross-examination, "H" denied telling his friends he had been

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[442] Appeal notes of evidence, p 69.
[443] Idem, p 72.
[444] Ibid.
[445] Affidavit of "H" , sworn 6 January 2009, para 7.
[446] Appeal notes of evidence, p 73.
[447] Ibid.
[448] Idem, pp 85-6.
[449] "H" accepted he had been knocked out: Appeal notes of evidence, pp 75, 78, 79. See also Transcript of video interview of "H" , conducted on 9 November 2005, Tape 1, pp 4, where "H" says he was punched in the head.
[450] Appeal notes of evidence, pp 77-9.
[451] Transcript of video interview of "H" , conducted on 9 November 2005, Tape 2, pp 22-4 and Tape 3, pp 5-6.
[452] Appeal notes of evidence, p 75.

"sliced up."[453] Rather, he said, he had only told them he had been knocked out.[454] This assertion was entirely inconsistent with the account "H" gave the police, where he said he responded to his friends' inquiries about the cause of his bleeding injuries by telling them he had been slashed with a bottle (that had been broken for the purpose) and "sliced up."[455] I find "H's" denial in the Court of Appeal to be implausible, given his detailed account to the police of having told his friends he was "sliced up," and given the reaction of those friends to what they were told.

263. Moreover, "H" sought to deny, in cross-examination, that he had said, when interviewed by the police, that he had told his friends he had been cut with a bottle. He suggested he could not remember telling the police that, although he could apparently remember being "harassed" by the police.[456] When confronted with the transcript of the police interview, he accepted he must have said it.[457] But, he said he would have been referring, when talking about being "sliced up," to his accident with the door.[458] That was entirely disingenuous. "H" , had in his police interview, described telling his friends that "O" had cut him with a broken bottle.

264. There were other indicators of "H's" unreliability. He denied, when interviewed by the police, that the purpose of going to s 9(2)(a) Avenue "with the boys" was to "sort things out,"[459] or to give "O" "a bit of a hiding."[460] He said the purpose was merely to "see what was happening at the party."[461] Yet, later in the interview, he said they went there to "get some justice"[462] and, when giving evidence in the Court of Appeal, he said he told his friends he "wanted to get ["O"]"[463]

265. "H" gave conflicting evidence about the number of times the group went to s 9(2)(a) Avenue. Initially he told the police the group went

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[453] Idem, pp 67, 75, 78, 79.
[454] Ibid.
[455] Transcript of video interview of "H" , conducted on 9 November 2005, Tape 2, pp 22-4 and Tape 3, pp 5-6.
[456] Appeal notes of evidence, p 77.
[457] Idem, p 75.
[458] Idem, p 78.
[459] Transcript of video interview of "H" , conducted on 9 November 2005, Tape 1, p 19.
[460] Idem, pp 41-2.
[461] Idem, p 20.
[462] Idem, Tape 3, p 7.
[463] Appeal notes of evidence, p 80.

there "just the once" – he disputed the suggestion they had gone twice.[464] Later, in the police interview, he accepted there were two visits; but suggested the first was during the hours of daylight[465] - which it clearly was not. "H" , in his affidavit, sworn in 2009, refers to two visits[466] to s 9(2)(a) Avenue; yet when giving evidence in the Court of Appeal he reverted to his original position that the group left s 9(2)(a) Road to go to s 9(2)(a) Avenue only the once.[467] He also gave conflicting accounts of the number of times he had seen the claimant on the day of the incidents. In evidence at the Court of Appeal "H" said he had only seen Mr Redman once on the day of the incidents, and that was when Mr Redman visited him at his home early in the morning.[468] He said he did not see him again that day.[469] Yet, in his affidavit he described seeing his mother talking with the claimant at s 9(2)(a) Avenue, during the first incident. On these accounts, he would have seen Mr Redman twice that day.

266. The catalogue of inconsistencies continued. "H" initially told the police that no one who went to the attack carried any weapons "or anything".[470] He repeated that in the Court of Appeal.[471] Yet, in another part of the police interview he said was carrying a table leg – which he saw, when he was "looking around"[472] – and had a golf club.[473] Finally, "H" denied that he was the instigator of the fight with "O" [474] – when the evidence to the contrary was compelling.[475]

267. I cannot conclude otherwise than that "H" was a thoroughly unreliable witness.

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[464] Transcript of video interview of "H" , conducted on 9 November 2005, Tape 1, pp 20-2, 44.
[465] Idem, p 22.
[466] Affidavit of "H" , sworn 6 January 2009, paras 8-13.
[467] Appeal notes of evidence, pp 80-1.
[468] Idem, p 81.
[469] Ibid.
[470] Transcript of video interview of "H" , conducted on 9 November 2005, Tape 1, pp 3-4.
[471] Appeal notes of evidence, p 84.
[472] Transcript of video interview of "H" , conducted on 9 November 2005, Tape 2, pp 1-2.
[473] Idem, pp 27-8.
[474] Transcript of video interview of "H" , conducted on 9 November 2005, Tape 1, p 23; Tape 2, pp 46-7.
[475] See, for example, Statement to the police by "O" dated 25 October 2005, p2; Trial notes of evidence, pp 44-5; and Statement to police of "H's" friend, who was with him at the party, "P" , dated 10 November 2005, p3.

"M"

268. "M" swore an affidavit in December 2008, in which he said he had gone to s 9(2)(a) Road and had been drinking there, before a group of young men left that address to go to s 9(2)(a) Avenue, where the second incident occurred. He deposed that he did not recall seeing the claimant at s 9(2)(a) Road.[476] Further, he said, he knew Mr Redman was not at s 9(2)(a) Avenue "when the fight took place."[477] He said he knew Mr Redman well and would have "recognized him had he been there."[478]

269. "M" was cross-examined on his affidavit in the Court of Appeal, in 2013. It is apparent from the transcript of the cross-examination that "M" at that time had a poor recall of events, aside from being confident he had not seen Mr Redman on the evening of the incident[479] and that he would have seen him if he was present at the fight.[480] His poor recall generally, when giving evidence, is understandable, given that he was being asked about events that had taken place eight years previously. "M" told the court that his best recollection of what took place would be contained in the record of his interview with the police, which took place on 10 November 2005.[481]

270. My assessment of "M's" reliability is therefore largely based on his interview with the police – although, I will also make some reference to the issues explored in the cross-examination in the Court of Appeal. The police interview was a detailed and thorough one, the transcript of which runs to 129 pages. It is the case that the interview makes no mention of Tyson Redman – indeed, "M" was not asked about Mr Redman. It is significant, however, that "M" names with a degree of accuracy the persons from s 9(2)(a) n Road who he says were present at the second incident. This is a feature I will return to shortly. Before doing so, I will make an analysis of the interview, and of the issues explored in the Court of Appeal, largely - but not entirely – in the context of the features of each that the Crown say impugn "M's" reliability.

271. "M" , on the day of the interview with the police, was a 17-year-old schoolboy. When the police arrived at his home that morning he was about to get ready for school. He went with them to the police station, where the interview took place over two and three quarter hours. In my view, the

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[476] Affidavit of "M" , sworn 9 December 2008, para 8.
[477] Idem, para 12.
[478] Ibid.
[479] Appeal notes of evidence, p 93.
[480] Idem, p 94.
[481] Idem, pp 87, 90.

interviewer conducted the interview in a skillful manner. My overall impression is that "M" was, during the interview, largely co-operative and forthcoming. He had no previous dealings with the police, not having been in trouble before,[482] and the officer conducting the interview described his having been told that "M" did not normally "get into any trouble," and that the matter being investigated was "quite out of character" for him.[483]

272. He described his consumption of alcohol on the day of the incident. He said he drank alcohol once a week, and, on this occasion, had three or four lager beers.[484] He also had three or four shots of gin.[485] He said he'd been drinking from about 10 pm[486] – a much later starting time than the others at s 9(2)(a) n Road. He described himself as not being drunk[487] and "feeling alright,"[488] although he said he was "pretty tipsy"[489] – but, nonetheless, able to walk straight, speak without slurring his words and "remember what was happening."[490] "M" thought the effect of the alcohol was to have made him "more angry" than he would otherwise have been at what had supposedly happened earlier to his friend "H" .[491] I conclude that "M" was significantly less affected by alcohol than the other affiants. He said he was not using any drugs.[492]

273. "M" was able to accurately give the time that the group went to s 9(2)(a) Avenue. He said it was "probably about two in the morning."[493] This accords with the time the police received the first 111 emergency call, reporting the attack. That call was made at 2.29 am.[494]

274. He also accurately named, in the police interview, the people who had gone from s 9(2)(a) Road to s 9(2)(a) Avenue. He said eight or nine people attended.[495] They were: "L" [496] "E" [497]

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[482] Transcript of video interview of "M" , conducted on 10 November 2005, p 72.
[483] Idem, p 54.
[484] Idem, pp 12, 14, 30.
[485] Idem, pp 30-1.
[486] Idem, p 5.
[487] Idem, p 15.
[488] Idem, p 14.
[489] Idem, p 31.
[490] Idem, p 32.
[491] Idem, p 55.
[492] Idem, p 31.
[493] Idem, p 29.
[494] Police Event Chronology N005944686, p 1. The chronology records the timing of the call and the description of a "major fight going on" at s 9(2)(a) Avenue, involving "baseball bats, golf clubs, bottles." The call was made by "A" .
[495] Transcript of video interview of "M" , conducted on 10 November 2005, p 27.
[496] Idem, p 28.
[497] Idem, p 47.

"D" [498] "K" ;[499] "Q" [500] "H" [501] "I" [502] as well as "M" , himself.[503] This accords with the outcome of the police inquiry, except, of course, that the police inquiry also concluded that the claimant was present.

275. It is notable that "M" did not name Mr Redman as being present at the second incident.

276. "M" told the Court of Appeal the claimant was not at s 9(2)(a) Road when he arrived there, and he did not see him at all that evening.[504] The Crown submits this evidence was undermined by "M's" "concession that the applicant could have been outside at the "EQ" house when "M" arrived."[505] This submission is based upon a premise that has an unsound foundation, which I will now describe.

277. Counsel for the Crown asked "M" , in cross-examination, in the Court of Appeal, the following question:

> So do you accept he might have been there [at s 9(2)(a) n Road] and you just don't remember him?

To which, "M" replied:

> He could have been at the "EQ's" , outside the house, I was inside, so that's probably why I didn't see him there.[506]

This theme was developed:

> Q. There's a difference between saying you didn't see him and saying he wasn't there?
>
> A. OK.
>
> Q. You accept that?
>
> A. Yes.

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[498] Idem, pp 50, 84.
[499] Idem, pp 68, 114.
[500] Idem, p 79.
[501] Idem, pp 27, 109.
[502] Idem, p 114.
[503] Idem, pp 27 et seq.
[504] Appeal notes of evidence, p 93.
[505] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, para 38.
[506] Appeal notes of evidence, p 94.

Q. I am suggesting to you you might not have seen him, that doesn't necessarily mean he wasn't there, what do you say to that?

A. Yes, there is a difference.[507]

278. This was predicated upon "M" having said he recalled "H" arriving at s 9(2)(a) Road and saying "he was beaten up by a bunch of guys,"[508] and the claimant having said in his statement to the police, according to counsel for the Crown at the Court of Appeal, that "H's" friend had arrived at s 9(2)(a) Road and given a similar account.[509] On this basis, cross-examining counsel put it to "M" that "for Tyson to know what had happened to "H" (sic) presumably he would have had to have been at the party at the "EQ's" as well round the same time you were?"[510] "M" accepted this proposition.[511]

279. The proposition is unsound, however, for several reasons. First, there is no evidence of when it was that " "H's" friend" arrived at s 9(2)(a) Road. It's a fair inference that it was before the first incident, because that is what prompted the claimant and others to go to s 9(2)(a) Avenue. Secondly, "H" went to s 9(2)(a) n Road more than once, and may well have discussed his injuries on each occasion (with any one who was not there on the earlier occasion). He says, in his affidavit, that after the first incident, when the group had gone from s 9(2)(a) Road to s 9(2)(a) Avenue, he "went back next door to [his] house"[512] and "sometime later that evening" he returned to s 9(2)(a) Road.[513] He re-affirmed this in cross-examination in the Court of Appeal, when he said he did not see the others again "until the fight occurred," and he saw them at s 9(2)(a) Road when he "went over there."[514] Although I have concluded that "H" is an unreliable witness,[515] I consider other evidence supports his evidence on this issue, making it safe to rely on what he says in this regard. "K" deposes that it was "during the late afternoon" that "H" went to s 9(2)(a) Road and said he had been "beaten up" at s 9(2)(a) Avenue.[516] In the Court of Appeal he said "H" arrived at s 9(2)(a) Road "during the

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[507] Idem, p 97.
[508] Idem, p 92.
[509] Idem, p 93.
[510] Idem, p 94.
[511] Ibid.
[512] Affidavit of "H" , sworn 6 January 2009, para 10.
[513] Idem, para 11.
[514] Appeal notes of evidence, pp 74-5.
[515] See paragraph 267 of report.
[516] Affidavit of "K" , sworn 18 December 2008, para 7.

daylight," about sunset.[517] "M" was not there at that time of the day. He said that while he was unsure about the time he arrived at s 9(2)(a) Road,[518] he got a ride there, in response to a text that was sent at "night time."[519] He said he had been drinking at s 9(2)(a) n Road from about 10 pm[520] – I infer that he would have started drinking soon after arriving there; indeed, "M" told the police he was drinking the whole time he was there.[521] He said he was at s 9(2)(a) Road for "a couple of hours,"[522] and I assume that is a reference to the time that elapsed between his arrival at the address and the group leaving for s 9(2)(a) Avenue, on the occasion that "M" accompanied them. "M" was adamant that he had only gone to s 9(2)(a) Avenue the once, and that was for the second incident. I find it to be unlikely that had "M" been at s 9(2)(a) n Road before the group left the address to go to s 9(2)(a) Avenue for the first incident that he would not have accompanied them. Further, I find it to be unlikely that if the claimant was at s 9(2)(a) Road before the group left for the second incident, that "M" would not have seen him, even if the claimant were to have been outside – the probability is that he would have at least seen him as the group was leaving s 9(2)(a) Road to go to s 9(2)(a) Avenue.

280. Questions put to "M" in the Court of Appeal by French J provide some clarity to this issue. I set the questions and answers out, in full:

> Q. We have heard evidence that the group went twice to the party, the first time they just stood there and were persuaded to go back, and then they went back the second time and the second time was when the fight happened?
>
> A. Yes, that's correct.
>
> Q. Now but you're saying you only went the once?
>
> A. Once.
>
> Q. And that was for the fight?
>
> A. Yes.
>
> Q. When you arrived at "EQ's" had the group already been up to the party once?

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[517] Appeal notes of evidence, p 3.
[518] Transcript of video interview of "M" , conducted on 10 November 2005, p 10.
[519] Idem, p 8.
[520] Idem, p5.
[521] Idem, pp 11-2.
[522] Ibid.

A. Most likely, because when I got there they were all there and we only went the once.

Q. But did anyone tell you that they had already been up to this party and had come away again?

A. I can't recall.

Q. Because you did say before in answer to the questions from the lawyer that there was no talk of what had happened at the party until arrived, so if they had already been up there once before would you not think they would have been talking about it?

A. Yeah they would have. They probably would, I just can't remember what has been said.

Q. When arrived with his cuts, was that the first time he had spoken to anybody?

A. Um, I'm not sure but that's the first time I saw him.

Q. Were you aware at all that the others had already been up before you arrived?

A. Was I aware ... yes. I can't remember. I can't remember exactly if I recall.

Q. Ok, so when you were at "EQ's" , did a group go away and come back and you were still there and you stayed where you were?

A. Yes, yeah. I didn't – I only went just that once.

Q. So while you were there a group of other people went from "EQ's" to the party but you at that time you stayed back at "EQ's" ?

A. Yes, I don't know if they went, I was inside the whole time and just went the once.

Q. Do you know whether anyone else had been twice?

A. I can't recall.[523]

281. From the totality of this evidence, I find:

- "H" went to s 9(2)(a) n Road and reported to those present that he had been injured at s 9(2)(a) Avenue.
- He did this before "M" arrived at s 9(2)(a) Road.
- A group from s 9(2)(a) n Road went to s 9(2)(a) Avenue, where the first incident occurred.

[523] Appeal notes of evidence, pp 99-100.

- This occurred before "M" arrived at s 9(2)(a) Road.
- Following that incident, "H" went to his home.
- Later that night "M" arrived at s 9(2)(a) Road.
- After "M's" arrival at s 9(2)(a) Road, "H" returned to the address.
- He acquainted "M" with what had happened to him earlier in the day.
- A group then left s 9(2)(a) Road for s 9(2)(a) Avenue, where the second incident occurred.

282. It follows from these findings that the premise upon which "M" made the "concession that the applicant could have been outside at the "EQ's" house when "M" arrived," was unsound. I, therefore, do not consider that this concession undermines "M's" reliability.

283. "M" did, however, concede in cross-examination that during his interview with the police there were "a number of occasions" where he had "difficulty remembering what went on."[524] The Crown says this undermines his reliability.[525] It says his certainty that Mr Redman was not at the attack does "not match with his low level recall of the other events of that night."[526] The Crown further points to "M's" comment, in cross- examination, that aside from his confidence that the claimant was not at the attack, he "can't remember exactly what happened to anyone else."[527] This last comment concerned his recall eight years later, when giving evidence in the Court of Appeal. As I have already noted,[528] I don't place much emphasis on a memory deficit eight years after the events – I am accordingly focusing on lack of recall at the time of the police interview, two months after the events.

284. I have carefully read the transcript of "M's" interview with the police. I do not accept that "M" had a "low level recall" of events. There were things that "M" could not remember, but most of all they were matters of detail, about which a lack of recall would not be surprising. He could not remember who he walked with, the short distance from where the car was parked when the group arrived at s 9(2)(a) Avenue, to the party.[529] He could not remember if anyone in his group had picked up bits of wood from

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[524] Idem, p 96.
[525] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, para 39.
[526] Ibid.
[527] Appeal notes of evidence, p 97.
[528] See paragraph 235 of report.
[529] Transcript of video interview of "M" , conducted on 10 November 2005, pp 48-50.

election hoardings[530] – I do not view it as surprising that "M" could not recall every detail of what other people were doing. He could not remember what it was he said when he was yelling at the people in the garage.[531] He could not remember what other people may have said: in particular, whether "D" said he hit anyone,[532] and he could not remember a conversation he was invited to tell the interviewer about with "I" [533] – assuming such a conversation had even taken place. He could not remember what "K" was wearing on the night,[534] or whether anyone else had the same hairstyle as he had at the time of the interview (his hairstyle had changed between the date of the incident and the date of the interview).[535] I attach very little significance to an inability to recall, two months later, matters of detail, such as these.

285. Perhaps of more significance was "M's" inability to recall if any of the bottles that had been thrown by the group had hit anyone.[536] But, this may simply have meant that he did not notice, in a fast-moving situation that took place in poor lighting, whether any had done so. He had taken a golf club to s 9(2)(a) Avenue (when he travelled there in the boot of the car), and could not remember initially where he got it from,[537] but then volunteered that he thought he picked it up "from the rubbish" at s 9(2)(a) Road.[538] This demonstrates a process whereby concentration was focusing his memory; a process described by the interviewer when he said, "...the way memory works it does take some time to think, not everyone has things right at the front of their mind...."[539] This may also explain why "M" initially couldn't remember whether he had hit anyone,[540] but within seconds said he thought he punched someone to the head with a closed fist, whilst trying to make him "back off."[541] He thought the punch connected, but couldn't be sure.[542] Again, this was detail emerging, in the description of a fast-moving situation. Likewise, I see little significance to "M's" inability to recall where precisely he disposed of the golf club. He said he dropped it on the grass as

[530] Idem, p 49.
[531] Idem, p 35.
[532] Idem, pp 96-7.
[533] Idem, p 103.
[534] Idem, pp 114-5.
[535] Idem, p 67.
[536] Idem, p 93.
[537] Idem, 51.
[538] Idem, p 53.
[539] Idem, p 93.
[540] Idem, p 58.
[541] Idem, p 59.
[542] Idem, pp 74-5.

the group approached the house in s 9(2)(a) Avenue.[543] He could not reasonably be expected to remember precisely where.

286. I see nothing untoward about "M's" inability to recall some detail. I would be surprised if this weren't the case. Overall, my impression was that "M" was co-operative and honest – for example, he frankly admitted that the group had gone to s 9(2)(a) Avenue for revenge.[544] Indeed, my impression seems to have been shared by the interviewer: he said, when telling "M" that it had "taken a bit of a slow time to get there," that "you certainly haven't been dishonest you just have not told me things and as we have gone along you have told me more and more um and that's all that I want...."[545] "M" was able to remember the significant events (such as who went to the address, and the major developments whilst there). Some of the detail only emerged with concentration, whist other of the detail he could not recall. I see nothing unusual or untoward about that.

287. The Crown contends that little reliance can be placed on "M" not having named the claimant as being present at the attack, as, the Crown submits, "M" demonstrated a "marked reluctance to implicate his friends and associates."[546] I do not discern such reluctance in the interview. To the contrary, as I have noted,[547] "M" named his friends and associates who were at the attack. The Crown seeks to illustrate its point by referring to the passage of the interview where "M" said he did not know of anyone taking anything from s 9(2)(a) Road,[548] and contrasting that with a later response that he saw "Q" at s 9(2)(a) Avenue with a bat[549] and "H" with a pole.[550] It does not follow that either young man took the item he was holding at s 9(2)(a) Avenue from s 9(2)(a) Road. There were suggestions that items may have been picked up on the journey to s 9(2)(a) Avenue.[551] Moreover, even if items, such as the bat or the pole, had been taken from s 9(2)(a) Road, it doesn't follow that "M" would

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[543] Idem, pp 52, 104-6.
[544] Idem, p 90.
[545] Idem, p 117.
[546] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, para 40.
[547] See paragraph 274 of report.
[548] Transcript of video interview of "M", conducted on 10 November 2005, pp 50-2.
[549] Idem, pp 79-80
[550] Idem, pp 109-10.
[551] The interviewer asked "M" about people picking up "bits of wood" from election hoardings on the way to s 9(2)(a) Avenue (p 49 of Transcript of "M" i interview). "E" told the police that he and "K" picked up pieces of wood on the way to the first incident and had the same items at the second incident (Transcript of video interview of "E", conducted on 9 November 2005, pp 8, 15). "L" said that he saw people with weapons at the fight, but not at s 9(2)(a) Road (Transcript of video interview of "L", conducted 14 November, 2005, p. 31).

necessarily have seen such items being taken, as people seem to have gone in different groups to s 9(2)(a) Avenue – "M" , for example, travelled in the boot of a car.[552] The Crown suggests that "M's" statement in the interview that he "couldn't really see" who was using weapons[553] provided a further example of a reluctance to implicate others, given the later response that he had seen "E" and "H" holding the bat and the pole. This submission overlooks the not insignificant distinction between holding an item and using it.

288. The Crown developed its theme by pointing out that it was undisputed that "E" and "D" were present at s 9(2)(a) Avenue, but that "M" said he couldn't remember their presence.[554] But, in the case of "E" , "M" said, when asked whether "E" had picked up any bits of wood from election hoardings, that he didn't know because "E" was behind him.[555] He said that he couldn't remember walking with "D" , as he was "probably behind us."[556] With respect, what the Crown has overlooked is that "E" and "D" travelled from s 9(2)(a) Road by car,[557] while "M" travelled in the boot of the car. It would not be surprising if "M" did not know precisely who was in the body of the car.[558] The car stopped a short distance away from the house in s 9(2)(a) Avenue that the group was going to (as the occupants were anxious to avoid the vehicle being damaged in what was to follow),[559] and the occupants of the car – having been joined by others who had travelled on foot to s 9(2)(a) Avenue – walked to the house, which was a short walk. I do not see that that there would be anything surprising, in these circumstances, if "M" couldn't remember walking with "D" , and assumed that he was behind him. Nor do I think there would be anything remarkable in "M" not knowing if "E" had picked up a piece of wood on the way, given that "E" was behind "M" .

289. The Crown also submits, in support of its contention that "M" demonstrated a reluctance to implicate people, that it was "only late in the interview that ["M"] acknowledged "K" and (sic)

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[552] Idem, p 74.
[553] Idem, p 78.
[554] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, para 40.2.
[555] Transcript of video interview of "M" , conducted on 10 November 2005, pp 49-50.
[556] Idem, p 50.
[557] Statement to police of "D" , dated 9 November 2005, p 9; Transcript of video interview of "E" , conducted on 9 November 2005, p 13.
[558] Transcript of video interview of "M" , conducted on 10 November 2005, p 74.
[559] Idem, p 23.

leaving the garage area at the end of the incident."[560] This submission overlooks that "M" provided this information in response to a question that asked him, "What happened when the lights went off".[561] "M" responded by saying he saw those two people run out of the garage. I do not read that as an indication of a reluctance to implicate people. To the contrary, he did implicate them. The interviewer was developing the narrative, by going through events in a sequential manner. "M" was providing detail in response to questions designed to develop the narrative. If "M" were to have been reluctant to implicate "K" and "I" he would simply not have named them. There was nothing in the questioning that compelled the response it produced.

290. I do not accept the Crown's submission that "M" was not being "completely forthcoming or did not observe much of the incident."[562] As I have noted, "M" accurately named his friends and associates who were at the second incident. At an early stage of the interview he said that his group started throwing bottles.[563] He was also frank in describing the weapons people had.[564] He said that, at one stage at least, he had a golf club.[565]

291. I consider it to be significant that "M" did not name Tyson Redman as one of those present. He had ample opportunity to have seen him, had the claimant been present. This would have arisen in the following situations: during the period of some hours when "M" was at s 9(2)(a) Road before the group left for s 9(2)(a) Avenue; when the group was preparing to leave s 9(2)(a) Road to travel to s 9(2)(a) Avenue; when the group was assembling at s 9(2)(a) Avenue – having either walked there or alighted from the car, in the case of those who travelled there in this manner – prior to then walking the remaining distance to the address where the incident occurred; at the incident itself; during the retreat and return to s 9(2)(a) Road; at s 9(2)(a) Road, during what would have been effectively a 'debrief.' Had the claimant been present, I would have expected "M" to see him, on at least one of those occasions.

292. I consider "M" to be reliable in his account in his police interview of the events of the evening. I conclude that I can thus rely on his subsequent assertion that the claimant was not present at the second incident.

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[560] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, para 40.2.
[561] Transcript of video interview of "M", conducted on 10 November 2005, pp 113-4.
[562] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, para 40.
[563] Transcript of video interview of "M", conducted on 10 November 2005, p 7.
[564] Idem, p 25.
[565] Idem, pp 51-2.

293. In arriving at this conclusion I am not unmindful that the trial judge described "M" as an unconvincing witness, in a decision given on a *voir dire* during the trial. His Honour could not say whether "M" was, in respect of the issues on the *voir dire*, being "deliberately evasive or genuinely could not remember."[566] Having read the evidence and the judge's decision, I am inclined to the view it was the latter. I say that because of the nature of the issues "M" claimed not to recall. They related to the issue on the *voir dire,* of whether "M" knew, at the time the police interviewed him, the substance of the matter the police were investigating. When this issue was canvassed in cross-examination "M" had difficulty distinguishing between what he knew, by way of detail, before the interview and the detail he learnt during the interview.[567] He could not remember some aspects of what he had told the officer in the interview or what the interviewer had asked him. Given that he was giving evidence about an interview conducted some 18 months previously, I do not find it remarkable that he had a memory deficit about these issues. Nor do I find it surprising that he could not remember being taken into the lounge at his address on the morning the police arrived at his home to take him to the police station, or sitting on a couch in the lounge "for a couple of minutes." I would expect a 17-year-old schoolboy to be somewhat overwhelmed by the early morning visit of the police, to the extent that an inability to remember 18 months later whether he was taken into a certain room or sat on a couch for a couple of minutes would be of no consequence. I do not consider that "M's" inability to remember these types of issues would undermine his reliability in respect of his account of significant issues that occurred on the night of the incident.

Interview with "I"

294. When I interviewed "I" he told me that Tyson Redman was not at the second incident. When the police interviewed "I" he claimed the opposite. I have found, for the reasons set out in paragraphs 367 to 387 of this report, that "I" lacks credibility and that his account either way, on this issue, cannot be relied upon. He does not therefore assist the claimant.

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[566] Oral Ruling No. 10 of Judge C J Field, *R v* "M" *et al*, Auckland District Court, at [18].
[567] Notes of evidence taken on *voir dire* before Judge C J Field, on 2 August 2007, pp 47-51.

Interview with "L"

295. "L" asserted, when I interviewed him, he was "100% sure" the claimant was not at the second incident.[568]He claimed to have a good view of what was happening at the incident.[569]

296. It became apparent, however, that "L's" level of confidence may not have been justified. "L" did not claim to have a good memory of all the events of the evening.[570] He said he could remember the "main parts of the night,"[571] but had difficulty recalling the "little details", which was hardly surprising, given the interval of 11 years between the events and the interview. Significantly, "L" accepted, when questioned at the interview by Crown counsel, Mr Barr, that his recollection of the people who were at the second incident was "focused around the people" who he thought were "in the thick of it", "those who were heavily involved" and that he did not "necessarily remember people who were more on the fringes or on the outside."[572] "L" acknowledged that there were gaps in his recollection of who was at and who was not at the second incident.[573]

297. Notwithstanding these concessions "L" remained adamant that the claimant was not at the second incident.[574] He said: "I know that Tyson wasn't there."[575] He said he "definitely" knew this.[576] He said he had been sure of that from the outset.[577] "L" said that everyone knew the claimant wasn't at the second incident.[578] He said that he had discussed this with Mrs Redman at the time and told her that he did not know why the claimant was charged, because he was not at the incident.[579] "L" told me that he had mentioned to his parents that the claimant was "doing time for something he didn't do."[580] He said when he was explaining to them the purpose of his visit to Auckland s 9(2)(a) , for my interview with him, he did so by

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[568] Transcript of interview of "L" , conducted on 10 September 2016, pp 32, 37. See also pp 31-3
[569] Idem, pp 27-8, 31.
[570] See Interview of "L" p 58 (his memory of the night was said to be "shocking") and p 78 (where it was said to be "not that great").
[571] Idem, p 14.
[572] Idem, p 107.
[573] Idem, p 113. This appeared also to be what he told the police when they interviewed him in 2005: Videotaped Interview of "L" , dated 14 November 2005, p 32.
[574] Transcript of interview of "L" , conducted on 10 September 2016, p 112.
[575] Idem, p 113.
[576] Idem, p 112.
[577] Idem, p 32.
[578] Ibid.
[579] Idem, p 75.
[580] Idem, p 32.

reminding them of his earlier having told them of his friend who had "done time for something he didn't do."[581]

298. But I am having difficulty reconciling "L's" level of conviction in respect of this issue with the concessions he made. It may be that "L's" high level of confidence that the claimant was not at the second incident is a reflection of the widely held view amongst those who were at the incident that the claimant was not there, rather than an independent view capable of strict rational substantiation.

299. I would not be inclined, however, to view "L's" position on this issue as undermined by his inability to recall whether the claimant was at the first incident[582] (on the assumption that he himself had an accurate recollection of being at the first incident[583]), or whether Mr Redman was present at s 9(2)(a) Road before the first incident,[584] or between the two incidents.[585] Mr Redman, of course, admits attending the first incident, and accepts he was at s 9(2)(a) Road before the first incident and, for at least a short time, after the first incident. But, "L" has never claimed to be in a position to say whether the claimant was at the first incident – as he put it when I interviewed him: "I can't tell you whether he was there or not at the first... incident, but I do know Tyson wasn't there taking part in what was happening in the second incident."[586] As these were quite separate incidents it would be understandable, especially with the passage of time, if "L" had a recollection in respect of one, but not the other.

300. There was, however, at least one instance of "L" not remembering, at least initially, the presence at the second incident of someone who accepts he was there. "M" admitted he was at the second incident; but "L" did not name "M" as one of those present, when the police interviewed him.[587] "L" did, however, tell me that he recalled "M" attempting to pull a tarpaulin down at the second incident.[588] When explaining why he had not told the police about "M's" presence "L" appeared to suggest that the memory of "M" attempting to pull down the tarpaulin was triggered by the later specific mention of "M" [589] I would

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581 Idem, p 75.
582 Idem, pp 32, 112.
583 He said he didn't remember much from the first incident (Interview, p 38. See also pp 72-4, 76).
584 Idem, p 23.
585 Idem, pp 24, 43-4.
586 Idem, p 112.
587 Idem, pp 35-6.
588 Idem, p 35.
589 Idem, pp 110-1.

view this as being consistent with "L's" concession that there were gaps in his recollection of who was and who was not at the second incident.

301. "L" impressed me, during my interview of him, as an honest person, doing his best to recall the events and to assist. In forming this view I have not overlooked that, in respect of one issue, "L" was not honest with the police, when they interviewed him. After the second incident "L" returned to s 9(2)(a) Road, yet he told the police he walked home, instead.[590] "L" said he told this lie in an attempt to avoid getting into trouble.[591] "L", at the time of the police interview, was a teenager. A decade later, when I interviewed him, he was a mature man. I would not hold against him a lie told to the police when a teenager.

302. I cannot help but be impressed by the conviction with which "L" asserts that the claimant was not at the second incident. But the concessions he has made in respect of this issue – which are perhaps the result of his honesty – mean that I would have to be cautious about placing reliance upon his assertion the claimant was not at the second incident. For these reasons I view what he says on this issue as insufficient on its own to be persuasive; but it is available to be considered along with the other material that has a bearing on the matter.

303. "L" is able to assist with another issue. "D" – as I have noted earlier[592] – asserted the claimant was asleep in the garage at his address, when "D" went there after the second incident. If this were to be so it would either undermine Mrs Redman's position that the claimant was asleep inside the house when she retired for the evening, or it would provide the foundation for a claim – such as the one advanced by the Crown – that Mr Redman left the house and went out after his mother had retired. I asked "L", when I interviewed him, whether the claimant was in the garage.

304. I have noted earlier in the report "L's" description of walking with "D" to the claimant's address, after the vehicle they were travelling in with "K" was involved in an accident. "L" said that "D" and he were intending to get some sleep there.[593] He says they both slept there, in the garage.[594] "D", as I have recorded earlier, disputes that r

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590 Idem, pp 38-39.
591 Idem, pp 41-2.
592 See paragraph 230 of the report.
593 Idem, p 48.
594 Idem, pp 50-1.

"L" was in the garage. I have earlier resolved this issue in favour of "L's" account.

305. "L" said he had a clear recollection of sleeping in the garage.[595] He remembered "D" being in the garage, but no one else. He said he did not remember the claimant being in the garage when he and "D" arrived.[596] He said he would have remembered had the claimant been there.[597] Later, however, he conceded that, because his memory of the night was poor, he could not rule out the possibility the claimant might have been there.[598]

306. I have earlier concluded that I could not rely on "D's" ' account of events.[599] There is thus no basis to conclude that the claimant had slept in the garage, at any point in the night. Moreover, notwithstanding "L" conceding he could not rule out the possibility the claimant was in the garage, I consider other material suggests "L's" view the claimant was not in the garage is correct. In particular, "L" has a memory of the events leading up to his going to the garage with "D" He remembered travelling with two other people in "J's" car.[600] He remembered who they were.[601] He remembered the accident[602] (which is verified by the police). He remembered that "K" was driving[603] (which is verified by the police). He remembered where the accident occurred[604] (also verified by the police). "L's" recollection of these events suggests to me that he would also have recalled the presence of the claimant in the confined space of the single garage, had Mr Redman in fact been there, when "L" arrived, a short time after the accident.

307. "L" remembered the claimant waking him and "D" in the garage in the morning.[605] This could suggest that Mr Redman slept in the garage, but my view, to the contrary, is that it affords support for the claimant's account that, having slept in the house and after having been woken on the Sunday morning by a phone call from "H's" mother, inquiring about her son's whereabouts, he went to the garage to find "D" and "L" there. Although "L" cannot recall the

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595 Idem, p 50.
596 Idem, pp 50-1.
597 Idem, p 51.
598 Idem, pp 58-60.
599 See paragraph 234 of the report.
600 Idem, p 44.
601 Ibid.
602 Idem, p 45.
603 Idem, pp 44-5, 92.
604 Idem, pp 45-7, 68.
605 Idem, pp 51, 52

ensuing conversation,[606] the claimant says it was then that he learnt about what happened at the second incident. To my mind the support that "L" provides Mr Redman by his recollection of Mr Redman waking him is substantial.

B. Evidence tending to negate the claimant's innocence

308. I assess in this part of the report the evidence of three Crown witnesses who were at the birthday party – two of whom purported to make an identification of the claimant as being present at the second incident, while a third, when giving evidence at the trial, said he could not be sure, and when giving evidence earlier, at the depositions, accepted the claimant may not have been at the second incident. I make an assessment of the reliability of the identification evidence. I also determine the credibility of a co-defendant at the claimant's trial, who gave conflicting accounts concerning the issue of whether the claimant was at the second incident. I explore the issue of whether the claimant could have left his home in the early hours of the morning to go to the second incident, had he returned home earlier.

"A"

309. "A" identified the claimant as being present at both the first and the second incidents. She made a statement one month after the incidents, in which she said the claimant was at the second incident.[607] She did not name, in the statement, those at the first incident. In evidence at the depositions hearing[608] and at the trial[609] she said Mr Redman was at both the first and the second incidents. She said the claimant was a friend of her brother, and she had gone to school with his sisters. She had known him "from a young age."[610] "A" was one of two witnesses at the trial to place the claimant at the second incident.

310. The issue is the accuracy of "A's" claim that Mr Redman was at the second incident. How reliable was "A's" identification of Mr Redman? This issue is assessed having regard to the evidence concerning "A's" sobriety (or otherwise) at the time; as well as the consistency of "A's" accounts of events; and the opportunity she had to make an accurate identification.

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[606] Idem, p 53.
[607] Statement to police of "A", dated 17 October 2005, p 2.
[608] Notes of evidence taken at depositions hearing, pp 30, 35.
[609] Trial notes of evidence, pp 7, 8.
[610] Idem, p 9.

Sobriety

311. Issues about the reliability and veracity of "A" first emerge in the evidence concerning her consumption of alcohol and cannabis at the party. She claimed to have been sober.[611] She said she was "not really" drinking that night – "just one or two beers."[612] She explained that because she was entertaining guests "she didn't really get to have a drink at all until later on in the evening," just before the second incident.[613]

312. Other evidence does not support this contention. "A's" mother – "U" – said she was drinking with her daughter and another woman in the afternoon, and that she saw them drinking during the day, until she went to bed at about 10 pm.[614] If this was so, "A" was drinking well before the second incident, which occured after 2 am. "A", herself, claimed, at the depositions hearing, that at the time of the fight between "H" and "O" (early in the evening), she was "having a drink around the corner."[615] In evidence at the trial she sought to resile from that, and suggested she was instead "having a joint around the corner."[616] Either "A" was not being truthful, or accurate, in her evidence on this issue at the depositions, or she was endeavouring at the trial to understate the amount of alcohol she consumed and the effect of it on her. It is not without significance that a high level of intoxication afflicted those attending the party. "A" agreed that later in the evening everyone at the party was "very intoxicated."[617] Significantly, when giving that answer, she did not seek to qualify the answer by saying that it did not apply to her. Another witness, "B", agreed, in cross-examination, that by the time of the second incident "people were well and truly wasted."[618] A police officer who attended the address, following the incident, reported that "there wasn't much else we could do" due to the level of intoxication of the partygoers.[619] While I accept it is possible that "A" was the only person at the party, at the time of the incident, not to be intoxicated, I consider this to be unlikely, given the evidence about the level of drunkenness generally, and given the evidence that she started drinking much earlier in the

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[611] Notes of evidence taken at depositions hearing, p 34
[612] Ibid.
[613] Trial notes of evidence, p 18. In evidence at a voir dire hearing "A" said she didn't start drinking until about midnight or 1 am (Notes of evidence taken on *voir dire* before Judge C J Field, on 24 July 2007, p 6.)
[614] Trial notes of evidence, p 40.
[615] Notes of evidence taken at depositions hearing, p 34.
[616] Trial notes of evidence, p 17.
[617] Idem, p 25.
[618] Idem, p 145.
[619] Idem, p 152.

day than she claimed at the trial. I am not persuaded by her claim that she was sober.

313. The evidence of her drug use that day reinforces this view. "A" was given an ounce of skunk – which she agreed was "very powerful heads of the cannabis plant"[620] – as a birthday present.[621] She was smoking this cannabis with her friends and family during the party.[622] Three or four joints were smoked.[623] She denied, however, that she was 'stoned.'[624] I find this denial – given the number of joints that were smoked and given the powerful nature of the cannabis – to be bordering on the implausible.

314. It is well known that when drugs are combined with alcohol the effects of one may potentiate the effects of the other. I cannot accept that "A" was not affected by the consumption of cannabis and alcohol. I consider it to be likely that drug and alcohol consumption affected the reliability of her account of what she observed at the incidents.

315. "A's" evidence of her alcohol consumption calls into question her veracity. I note that "A" has two convictions for crimes of dishonesty.[625] In 2002, she was convicted of theft – the circumstances of this conviction are not known. In 2003 "A" was convicted of obtaining by false pretences. That appears to have involved the production of someone else's driving licence to a shopkeeper, so as to obtain an advantage. These convictions – entered within two to three years before the incident giving rise to the prosecution of the claimant – mean that "A's" honesty cannot necessarily be relied upon.

Consistency of account of events

316. There are some inconsistencies apparent in "A's" three accounts of events (aside from the one mentioned above,[626] concerning the conflict between her smoking a joint or having a drink 'around the corner'). In her statement to the police "A" said she saw the claimant throwing bottles at the second incident.[627] At trial, she was asked if she could identify anyone other than "R" throwing bottles, and said she could not.[628]

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[620] Idem, p 24.
[621] Ibid.
[622] Idem pp 18, 24.
[623] Idem, p 19.
[624] Idem, p 25. See also Notes of evidence taken at deposition, p 34.
[625] Trial notes of evidence, pp 26, 29-30.
[626] See paragraph 312 of report.
[627] Statement to police of "A" , dated 17 October 2005, p 2.
[628] Trial notes of evidence, p 10.

"A" told the police the claimant was holding a baseball bat.[629] When giving evidence at the depositions she was unable to recall who was holding the bat, or to give a description of the person.[630] Yet at the trial she claimed to have seen Mr Redman holding a bat.[631]

317. There was a conflict in the accounts about where "A" was when she purported to recognize the claimant at the second incident. This produces uncertainty on this issue. At the depositions she said that when she went outside to speak to the group – who had arrived for the second incident – she recognized the claimant.[632] At the trial her account was somewhat different. She described noticing "H" "straight away," when the group turned up for the second incident (when she was in the garage) and said she told his mother to go out and talk to him.[633] She described "H's" mother returning to the garage, whereupon it was apparent the group wanted "O" to go out to them.[634] "A" was trying, she said, to keep "O" in the garage.[635] At the trial she appeared to suggest that it was at this time she noticed Mr Redman.[636] I cannot, however, discount the possibility that this apparent inconsistency was the result of the way the evidence-in-chief was led, at both the depositions and the trial.

318. The difficulties are compounded by an evident conflict between "A's" s claim at the depositions that she went out of the garage to talk to the group[637] and her evidence at trial that whilst in the garage, and whilst preventing "O" from going outside, she "tried to go out to talk to them,"[638] at which point the "aggressive" bottle attack – with bottles "coming from all over the place"[639] – was launched on the occupants of the garage; an attack that saw "A's" brother hit on the head with a bottle, causing him to fall to the ground, whereupon the group rushed into the garage and attacked the occupants, in a situation described by "A" as "horrendous."[640] "A" had, at that point, sought refuge under a table.[641] On this account it would appear that "A" did not leave the garage to

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[629] Statement to police of "A" , dated 17 October 2005, p 2.
[630] Notes of evidence taken at depositions, p 32.
[631] Trial notes of evidence, pp 8, 10,13.
[632] Notes of evidence taken at deposition, p 30.
[633] Trial notes of evidence, p 8.
[634] Ibid.
[635] Notes of evidence taken at deposition, p 31.
[636] Trial notes of evidence, p 8.
[637] Notes of evidence taken at deposition, p 30.
[638] Trial notes of evidence, pp 7-8.
[639] Idem, p 9.
[640] Idem, p 11.
[641] Notes of evidence taken at deposition, p 32.

speak with the group outside, and that she got no further than 'trying' or intending to do so.

Opportunity for accurate identification

319. The opportunity for "A" to make an accurate visual identification of the claimant, as one of those present at the second incident, was less than ideal, especially if she were to have been making the identification from within the garage. Not only was there a fast moving series of events, in a highly stressful situation[642], there was also, it would seem, poor lighting. There was a single light bulb in the garage[643] (the strength of which is unknown), which illuminated the garage and the area under the tarpaulin that was erected over the garage entrance. It could be expected to have provided limited lighting beyond the inside of the garage itself. There was no outside light.[644] During the attack, the light in the garage was broken.[645] Although this occurred after "A's" purported identification of the claimant as being one of those present, the significance of it breaking is that thereafter the lighting in the garage appears to be non-existent – "A" described it as being "real dark."[646] From this it can be inferred that little, if any, lighting was coming from outside the garage. There was street lighting, and the extent of it can be determined. There was one streetlight, on a lamppost situated on the corner of s 9(2)(a) Avenue and s 9(2)(a) Avenue, approximately 30 metres from the garage entrance.[647] That light illuminated the road, but notably it pointed away from s 9(2)(a) Avenue and the garage. At best it would have provided only limited lighting, if any, of the area outside of the garage. Added to the limited lighting outside the garage, "A's" ability to make an accurate visual identification was likely additionally compromised by her looking out from the garage (if in fact she was in the garage at the time of the purported identification), the interior of which was illuminated at the time, to the darker area outside. It would not

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[642] Richard A Wise, Clifford S Fishman and Martin A Safer note in "How to Analyze the Accuracy of Eyewitness testimony in a Criminal Case" *Connecticut Law Review*, December 2009, volume 42, 435 at 456 that a high level of stress may hamper an eyewitness's ability to accurately encode important details of the crime. They say that high levels of stress are likely to cause "a major deterioration in memory." (at 505).

[643] Trial notes of evidence, p 19.

[644] Ibid.

[645] Idem, p 22.

[646] Idem, p 24.

[647] See photo 1 of Police Photo Booklet (produced at trial) and scale plan drawn by DC Rawbone on 24.10.05. The scale plan shows a lamppost (without a light on it) 10.4 metres directly in front of the garage (it can be seen in photo 1). Whilst there is no measurement of the distance from the garage to the lamppost with the light (which is the middle lamppost shown in photo 1), it can be approximated, using the distance of 10.4 metres from the garage to the lamppost without the light as a basis for the approximation. This approximation (30 metres) is made on the basis that the plan is to scale.

have helped that it was, according to a police officer who attended the incident, a windy and rainy night.[648]

320. The scope for an inaccurate visual identification was compounded by the presence – among the group of young Polynesian men, of the same age as the claimant – of five young men who seem to have had rather similar hair styles to that the claimant had at the time of the incident.[649] "N" – who had known Tyson Redman, since primary school – described the claimant's hair as long, shoulder length, curly and black.[650] "E", "R" "P", "K" and "M" all had dark, long and curly (or thick) hair.[651] In the case of "E" and it was shoulder length, while the hair length of the other three was short of the shoulders.

321. The use of drugs and alcohol, the fast moving events, the stressful environment, the less than ideal lighting, the limited opportunity to make an identification and the presence of young men of a similar age and hairstyle combine to render the accuracy of the visual identification questionable. These are the sorts of circumstances that produce a risk of mistaken identification, even in cases where one person purports to have 'recognized' another person.

The need for caution

322. The law acknowledges that, "identification evidence carries an inherent risk of unreliability."[652] Hence, section 126 of the Evidence Act 2006 requires the judge in a jury trial to warn the jury "of the special need for caution" before convicting a defendant in reliance wholly or substantially on the correctness of evidence of identification. This is the case also where the identification witness knew the defendant and has 'recognized' him. Although in such circumstances the mandatory warning "may seem inappropriate where the evidence is recognition evidence of exceptionally good quality," a full warning in terms of section 126 is still required.[653] In so concluding the Court of Appeal in *R v Turaki*[654] cited the English Court of Appeal decision in *R v*

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[648] Trial notes of evidence, p 152.
[649] The claimant's hair appears to have been cut by the time he was photographed by police, on arrest.
[650] Statement to police of "N", dated 1 November 2005, p 6.
[651] See police photos, pp 89-90. In the case of "K", "N" described his hair as being "Long hair above shoulders, curly, black." (Statement to police of "N", dated 1 November 2005, p 6.)
[652] Mahoney et al, *The Evidence Act 2006: Act and Analysis* (3 ed), 503.
[653] *R v Turaki* [2009] NZCA 310 at [80].
[654] *R v Turaki* [2009] NZCA 310.

Bentley,[655] where there had been "purported recognition of a familiar face over a considerable time in perfectly good conditions of lighting." The English Court described in *Bentley* the dangers inherent in 'recognition' evidence, when it said:

> This is not however to say that what is sometimes called the recognition type of identification – as it was in this case – can be treated as straightforward or trouble free. It cannot. Each of us, and no doubt everyone sitting in this Court, has had the experience of seeing someone in the street whom we now, only to discover later that it was not that person at all. The expression 'I could have sworn it was you' indicates the sort of warning which the judge should give, because that is exactly what the witness does. He swears that it was the person he thinks it was. He may nevertheless have been mistaken even where it is a case of recognition rather than one of identification.
>
> There are even in the narrow field of recognition cases degrees of danger. There is perhaps less danger where, as in the present case for example, two people, the identifier and the so called identified, know each other and have known each other for many years; perhaps less danger where there is no doubt that the identified person was in fact at the scene at the time and was not somewhere else altogether. Even here it is at least advisable that the jury should be alerted to the possibility of the honest mistake and to the dangers of identification evidence, and the reason for those dangers.[656]

323. The extent of the risk of mistaken identification was illustrated by Richard A Wise, Clifford S Fishman and Martin A Safer in their article, published in the *Connecticut Law Review*, in 2009, "How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case",[657] when they said:

> Each year, thousands of men and women in the United States are wrongfully convicted of felonies that they did not commit. Experts estimate that eyewitness error plays a role in half or more of all wrongful felony convictions. A study published in 2006 showed that eyewitness error occurred in seventy-five percent or more of the first 180 DNA exoneration cases. In several of the DNA cases, more than one eyewitness made an erroneous identification, and a number of the defendants were sentenced to death.
>
> ...
> One of the principal reasons that eyewitness error is the leading cause of wrongful convictions is because it is one of the most powerful types of evidence that can be presented against a criminal defendant.[658]

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[655] *R v Bentley* (1994) 99 Cr App R 342.
[656] At 344 per Lord Lane CJ.
[657] *Connecticut Law Review*, December 2009, Vol 42, 435.
[658] At 440-1.

324. The authors note that the United States Supreme Court has recognized that "eyewitness testimony can be notoriously unreliable,"[659] and they suggest, "the State needs to minimize the number of criminal cases that it brings where the sole or primary evidence of the defendant's guilt is eyewitness testimony."[660]

325. The present case was certainly not one where there had been, to use the language in *Bentley*, "purported recognition of a familiar face over a considerable time in perfectly good conditions of lighting." Quite the contrary.

326. In the circumstances of this case I can have no confidence that "A" accurately recognized the claimant as being present at the second incident.

327. In saying this I must acknowledge that the jury in the claimant's trial obviously accepted "A's" evidence that she recognized Mr Redman as being present at the second incident. I have to observe, in this respect however, that the jury did not have the benefit of adequate evidence about the outside lighting; did not have the benefit of evidence that adequately clarified where "A" was when she purported to recognize Mr Redman; and did not have the benefit of specific attention being drawn to the significance of other young Polynesian men (of the same age) being present, whose hair style was similar to that of Mr Redman that night.

328. It was suggested, at the claimant's trial, that "A" had seen Mr Redman at the first incident and had confused this with the second incident.[661] In other words, she had, in terms of the presence of Mr Redman, conflated the two incidents. There is some support for this. Mr Redman admitted his presence at the first incident.[662] He conceded he had a piece of wood with him,[663] which was approximately 70 cm in length and had the potential to be used as a weapon.[664] He said he was holding it down against the side of his leg.[665] "A's" account of the second incident was that the claimant was holding a baseball bat,[666] which he was hitting on his hand as he walked

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[659] At 452.
[660] At 510.
[661] Summing Up of Judge Field, p 23.
[662] Statement to police of Tyson Gregory Redman, dated 11 November 2005, pp 4-5.
[663] Idem, p 8.
[664] Idem, p 9.
[665] Idem, p 11.
[666] Trial notes of evidence, pp 8, 10.

around.[667] When I interviewed Mr Redman he could not remember whether he had done that with the piece of wood, or not, at the first incident.[668] There is a similarity between "A's" description of Mr Redman, at the second incident, with a bat and Mr Redman's acceptance that he had a piece of wood at the first incident. The fact that "A" does not describe Mr Redman as doing more than tap the bat on his hand – and certainly does not suggest he was using it in any other way – suggests that this was more likely an account of Mr Redman's actions at the first incident – actions that would have been consistent with the first incident.

329. I consider the prospect of "A" having conflated the two incidents, in terms of the claimant's involvement, is significantly reinforced by my acceptance of some of the evidence from other persons[669] that establishes Mr Redman was not at the second incident. As well, the different accounts given by "A" on different occasions, about whether the claimant was throwing bottles and who was holding the bat,[670] lends support to the view she may have confused the two incidents, in some respects.

330. "A" claimed at the depositions hearing (during cross-examination) to have spoken to Mr Redman at both incidents.[671] She did not make this claim at the trial. Her failure to do so may, however, have been the result of the way her evidence-in-chief was led. It is therefore not possible for me to draw any firm conclusion from the omission of this evidence from the trial. I doubt, however, given that this assertion was not subjected to evidential scrutiny, and given the other evidence I have just considered, that it can detract from the prospect of "A" having conflated the two incidents, insofar as Mr Redman's involvement was concerned.

331. The ease with which this can occur has been described in the scholarly writing I have already made reference to. Richard A Wise et al describe how common it is for witnesses to crimes to reconstruct their memory of the crime and unknowingly fill in gaps based on factors such as their attitudes, beliefs and knowledge of similar events.[672] This is compounded by the frailty of memory, which can quickly fade, and change as a result of information learnt after the event, such as in discussions with others.[673]

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[667] Idem, p 13.
[668] Transcript of interview of Tyson Redman, conducted on 5-6 July 2016, p 110.
[669] Carol Redman, "K" and "M" .
[670] See the discussion of this at paragraph 316 of the report.
[671] Notes of evidence taken at deposition, p 35.
[672] Richard Wise, Clifford Fishman and Martin Safer, "How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case" (2009-2010) 42 Conn L Rev 435 at 455.
[673] Idem, at 457.

332. I have therefore concluded that there is a real risk of "A" having confused the two incidents and mistakenly concluded Mr Redman was at the second incident, because he was at the first. For this reason, and because of my concern, in other respects, about the accuracy of "A's" recognition of Mr Redman, I am unable to rely upon her evidence that the claimant was present at the second incident.

333. I have arrived at this conclusion without having to consider whether "A's" evidence as an eyewitness was contaminated by contact with "B". This is an issue that I consider in the passages of this report relating to "B" under the heading *Witness Contamination*. The conclusion I reach in relation to that issue reinforces my view concerning the reliability of "A's" identification evidence.

"B"

334. "B" was the second of two witnesses to claim at the trial that she saw the claimant at both the first and the second incidents.[674] She said she knew Mr Redman, because she had been drinking at his house previously.[675] Her identification of Mr Redman as one of those present at the second incident was therefore one of recognition. She claimed to have seen him throwing bottles.[676] She described him as one of a "big group" – of about 20 young men – at the first incident,[677] and agreed she saw "that group again" later, at the second incident.[678] Apart from "H" – who was carrying a "white table leg pole,"[679] – she did not see anyone carrying 'anything' at the second incident.[680] She said that the people in the group were not close – in terms of their proximity to her.[681] She thought the claimant was on "the other side of the garage," and "just outside the doorway."[682] She was inside the garage.[683] She had only seen the people in the group "for a very short period of time."[684] She agreed it was dark.[685]

335. I have real concerns about the reliability of "B's" visual identification of the claimant.

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[674] Trial notes of evidence, pp 142-3, 145.
[675] Idem, p 142.
[676] Idem, p 143.
[677] Idem, p 142.
[678] Idem, p 143.
[679] Ibid.
[680] Ibid.
[681] Idem, p 144.
[682] Ibid.
[683] Ibid.
[684] Idem, p 146.
[685] Ibid.

336. "B" was 15-years old at the time. She was intoxicated. She had "been drinking quite heavily"[686] and had consumed something in the order of 10 bottles of Steinlager beer.[687] She accepted she was "very drunk."[688] She had also smoked a lot of cannabis[689] - she agreed she was "stoned."[690] "B" accepted the proposition that by the time of the second incident the people attending the party were "well and truly wasted."[691]

337. I can have no confidence in the reliability of her purported visual identification of the claimant – given her state of intoxication, together with the short period of time she had the person she thought to be the claimant under observation; given the distance she was from this person; given also that she was inside the garage and he was outside it; and given the less than optimal lighting outside of the garage. I view it as significant that she described seeing the group who had attended the first incident "again" at the second incident. I consider there to be a real risk that "B", given her intoxicated state, assumed that Mr Redman was at the second incident, because she had seen him at the first. She may have confused, in her subsequent recollection, features of the two incidents.

338. There are, as well, other unsatisfactory features of her evidence (a term I use in this context to include her statement to the police), to which I now make reference. These serve to reinforce my conclusion concerning the unreliability of "B" as a witness.

339. In her police statement "B" sought to markedly downplay the extent of her intoxication. She told the police: "I had been drinking NZ Lager during the party. I don't really like it so I didn't drink too much. I probably had about 8-9 bottles over the night. I was tipsy but not drunk."[692] She was largely accurate about the amount of beer she consumed, but failed to disclose the consumption of cannabis and misrepresented the position concerning her state of intoxication. This demonstrated an absence of candour.

340. In evidence-in-chief at the trial "B" identified the defendant "E" as being one of the persons throwing bottles at the second incident.[693] She reaffirmed this in cross-examination.[694] But, when reminded

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[686] Ibid.
[687] Idem, p 145; (see also Notes of evidence taken at depositions, p 88).
[688] Idem, p 146; (see also Notes of evidence taken at depositions, 88).
[689] Idem, p 145.
[690] Idem, p 146.
[691] Idem, p 145.
[692] Statement to police of "B", dated 25 October 2005, p 6.
[693] Trial notes of evidence, p 144.

of her statement to the police, she responded by retracting that assertion. She said, "Oh no sorry, I didn't see him chuck any bottles."[695]

341. In her statement to the police "B" had identified "H" and Mr Redman as people who were throwing bottles.[696] She repeated this at the depositions hearing.[697] At the trial, apart from incorrectly naming "E" as someone throwing bottles, she omitted to name "H" as someone who had been engaged in this activity,[698] (even though she had described, in evidence, "H" carrying a white pole,[699] and was thus focused upon his involvement in the incident in giving evidence) and did not do so even after she had retracted her incorrect claim that "E" had been throwing bottles.[700]

342. There was another failing in "B's" account of events, which concerned the identity of persons involved in the second incident. When naming in her statement to the police the people who were in the group of young men who went to s 9(2)(a) Avenue for the second incident, she said the "only guys [she] knew" were "H" , Tyson Redman and "E" [701] However, when she gave evidence at the depositions, she named two additional people: "D" and "Q" .[702] She actually named those two men in court, rather than just pointing them out as people she could identify. But at the trial "B" did not name "D" and "Q" as being present. She said Tyson Redman, "H" and "E" were in the group, but said she did not recognize anyone else.[703] This was inconsistent with her evidence at the depositions. It can't be said to be explicable on the basis that "B" had been consistent, up until the trial, in claiming that both "D" and "Q" were present, and had forgotten their presence at the incident by the time she came to give evidence at the trial – because she had not been consistent about this up until then. This invites the conclusion that when "B" named "D" and "Q" at the depositions she did so without a sound basis.

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[694] Idem, p 146.
[695] Ibid.
[696] Statement to police of "B" , dated 25 October 2005, p 4.
[697] Notes of evidence taken at depositions, p 83.
[698] Trial notes of evidence, pp 143-4.
[699] Idem, p 143
[700] Idem, p 146.
[701] Statement to police of "B" , dated 25 October 2005, p 4.
[702] Notes of evidence taken at depositions, p 82.
[703] Idem, pp 143-4.

Witness contamination

343. It is apparent that witnesses had discussed events with each other before their statements to the police were made. Obviously, such discussions may have affected their recollection of events. One example of this concerned an event at the second incident. "B" told the police in her statement that "H" had entered the garage with a white table leg, "held up like he was going to hit someone." She said "N's" cousin " "V" went up and grabbed the table pole from "H" (sic). I'm not sure what "H" (sic) did after that,"[704] she said. She then continued to describe the on-going events. This gave rise to the following cross-examination, at the depositions:

> Q. And "V" was at the party that night too wasn't she?
>
> A. Yes.
>
> Q. Did you see "V" walk up to "H" (sic) and take the white pole from him?
>
> A. No but she told me she did.
>
> Q. Do you remember talking about that to the police when you made a statement to them?
>
> A. I think it's in my statement.
>
> The witness was shown the statement and referred to the relevant passage.
>
> Q. Now you've told the police there that "N's" cousin, "V" , went up and grabbed the table pole from "H" , haven't you?
>
> A. Yep, that's 'cos "V" told me that she did.
>
> Q. Now you haven't said there that that's something someone else told you, have you?
>
> A. No.
>
> Q. So it reads as if something that you yourself have seen, would that be right?
>
> A. Yep.
>
> Q. But are you telling us that that's something that you didn't see?
>
> A. Yes.

[704] Statement to police of "B" , dated 25 October 2005, p 4.

Q. You sure about that?

Q Yes.

Q. But it's something that "V" told you herself?

A. Yes.

Q. Do you remember when she told you?

A. Afterwards.

Q. Same night?

A. Yep.[705]

344. There is another example of the witnesses discussing the events. "N" told the police, in his statement, that, prior to the arrival of the police and ambulance, "B" told him that "H" had hit her with the pole he was carrying.[706] Yet "B" did not mention this to the police, or in evidence. I would be prepared to infer from this omission that "B" was not hit with the pole. Not only were the events of the evening the subject of discussion, incorrect information was also imparted.

345. The dangers of witnesses discussing events before making a formal police statement are described by the Richard A Wise et al article, to which I have earlier made reference, as follows:

> Because an eyewitness's memory of a crime is a reconstructive process, it can be altered by information that the eyewitness learns after the crime from other sources such as other eyewitnesses, the police, the prosecutor, and the media. The eyewitness generally does not know that his or her memory of the crime has been changed and updated by post-event information, which may or may not be accurate.[707]

346. Hence, the authors say, "eyewitnesses may misattribute information to observing a crime when in fact they learned it from another source...."[708]

347. An eyewitness's memory of a crime is thus, the authors say, "highly malleable."[709]

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[705] Notes of evidence taken at depositions, pp 90-1.
[706] Statement to police of "N" , dated 17 October 2005, p 3.
[707] Richard Wise, Clifford Fishman and Martin Safer, "How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case" (2009-2010) 42 Conn L Rev 435 at 457.
[708] Ibid.
[709] Idem, at 458.

348. To guard against these risks the authors make a number of recommendations, the value of which is self-evident. They suggest:[710]

- When circumstances permit, the interview of the eyewitness should be held as soon as possible after the crime.
- The eyewitness interview should be videotaped.
- To prevent contamination of the eyewitness's memory the police should separate the witnesses and tell them not to discuss the details of the crime with other eyewitnesses.
- To assess whether the eyewitness's memory has been contaminated the interviewer should determine whether the eyewitness has spoken to another eyewitness or anyone else about the crime.

349. The police did not take a formal statement from "A" until 17 October 2005 – one month after the incident. They took a statement from "B" on 25 October 2005 – more than a month after the incident. The statements were not videotaped – but it would not be the practice of the New Zealand Police to do so. This means that it cannot be known whether the interviewer took any steps to determine whether the interviewee had spoken to anyone else about the crime.

350. The delay between the crime and the interview of the two eyewitnesses meant there was ample opportunity for contamination to have occurred. Moreover, there was nothing to indicate that the police had taken steps to emphasize to the eyewitnesses that they were not to discuss the events of the night.

351. I consider there to have been, as a result, a real risk of "A" and "B" having discussed, before making their police statement, whether Tyson Redman was present at the second incident, and of one having influenced the other. If one had mistakenly decided he was present, she could have influenced the other to the same view. It would be surprising if they had not discussed the events of the evening, as "B" was at the time the ss 9(2)(a) and 18(c)(i) . They lived at the same address.[711]

352. In another situation, where the risk of eyewitness contamination can be eliminated, if two people purport to recognize a person as present at the commission of a crime, the evidence of one may reinforce the evidence of the

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[710] Idem, at 475-80.
[711] Statement to police of "A" , dated 17 October 2005, p 1.

other. In this instance, however, for the reasons I have just canvased, I do not view the evidence of either as providing any reinforcement of the other.

353. I have concluded, for all of the reasons I have set out, that "B's" purported identification of the claimant as being present at the second incident cannot be relied upon.

"N"

354. "N" – who at the time was living at the same address as his then ss 9(2)(a) and 18(c)(i) and his sister "A" – told a police officer, approximately 15 hours after the second incident, that he was "definate" (sic) that Tyson Redman and "Q" "were amongst the guys who caused all the shit last night."[712] Thereafter, "N" made three written statements to the police.[713] In two he named Tyson Redman as being present at the incident where the violence occurred.

355. When giving evidence-in-chief at the depositions hearing "N" described the claimant as being present at the second incident;[714] however, in cross-examination, he accepted that it "could well be the case" that the claimant was not at the second incident, that he could have been there "previously", but "not at the time the bottles were thrown."[715] At the trial when asked, in evidence-in-chief, who he could recognize in the group that returned for the second incident, he said he was "not very sure about Tyson" or about "E" .[716]

356. The Crown, at the trial, was thus unable to rely upon the evidence of "N" to place the claimant at the second incident. But the Crown suggests the statements of "N" are "relevant to the current application for compensation."[717] The Crown contends that this was really a memory issue as far as "N" was concerned – at the trial he said he wasn't sure about whether the claimant was present and said he couldn't remember[718] - and points out that "N" was not given the opportunity at either the depositions or the trial to refresh his memory from his police statement.[719] I am implicitly invited to infer that had "N" been given the opportunity

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[712] Notebook entry of Constable Mark Lewers, dated 18.09.05.
[713] On 17 October 2005, 1 November 2005 and 4 November 2005.
[714] Notes of evidence taken at depositions, pp 97-8, 102.
[715] Idem, p 108.
[716] Trial notes of evidence, p 114.
[717] Crown Submissions in Response to an Application for Compensation for being Wrongfully Convicted, dated 23 December 2015.
[718] Trial notes of evidence, p 114.
[719] Closing Submissions of the Crown, dated 28 November 2016, para 14.

to refresh his memory from his statement the lapse of memory would have been overcome. I am unable, however, to view this as a memory issue that could have been remedied in this manner. Rather, it seems to me that the circumstances demonstrate that "N" realized that he was unable to assert with any confidence that the claimant was at the second incident.

357. The first circumstance to demonstrate this is the manner in which "N" revised his position on this issue. He did not claim a memory issue in his evidence-in-chief at the depositions. Rather, he claimed to have seen the claimant as one of the group of "at least 20" who had arrived at the garage at the second incident.[720] The manner in which he accepted in cross-examination that it "could well be the case" the claimant was at the first incident, but not the second, suggests not a memory issue, to be remedied by reference to an earlier statement, but a realization that his position on the issue had a flimsy basis.

358. "N's" opportunity to observe the members of the group of 20 or so young men at the second incident was limited by the short time he had to observe them and by the fast-moving events, as well as the compromised lighting. When the group arrived at the entrance to the garage "N" was in the garage – facing towards the rear of it.[721] He turned to see them, and started to walk towards them to tell them to leave.[722] He had only reached the middle of the garage – about one or two metres from the group – when he was hit on the head by a bottle thrown from outside of the garage.[723] He did not know who threw the bottle.[724] He fell to the ground.[725] He was dazed.[726] Thereafter, he found himself outside, but he did not know how he got there.[727] Moreover, "N" accepted that his memory of the second incident was adversely affected by his having been hit on the head by the bottle – making it more difficult to remember who was at that incident.[728]

359. "N's" consumption of alcohol and cannabis during the day may have added to difficulties with both recognition and recollection. He had been at the party since around 5 pm or 6 pm.[729] He had consumed 10 bottles of

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[720] Notes of evidence taken at depositions, p 97.
[721] Idem, p 113.
[722] Idem, p 114.
[723] Notes of evidence taken at depositions, p 101.
[724] Trial notes of evidence, p 114.
[725] Ibid.
[726] Idem, pp 116, 121.
[727] Idem, p 114.
[728] Idem, pp 121-2.
[729] Idem, p 109.

Steinlager[730] – maybe more[731] – and was drinking as well a bourbon and cola pre-mix. In addition, he had smoked a couple of cannabis cigarettes.[732]

360. After the incident "N" had talked with his sister "A" about the events.[733] There was thus scope for this discussion to have influenced "N's" initial view that the claimant was present at the second incident.

361. There was opportunity in "N's" oral and written statements to the police for confusion to arise concerning the attendees at the two incidents. The oral comments made to the police the following day made no mention of the first incident. They may reflect an assumption on "N's" part that people he had seen at the first incident were also at the second. Had a full statement been taken at this time, with the two incidents being explored by an interviewer, this may have become apparent.

362. In his first written statement to the police[734] "N" described both the first incident and the second incident, without separately describing who was at each. When describing the second incident he said, "the same guys came back,"[735] although he had not previously (in that statement) named any of those 'guys.' It was only after describing the two incidents that he gave some names of people (including the claimant) he knew who "were there."[736] But it is not clear which incident he was referring to, when he provided those names. In my view, the interviewer should have clarified this. Had he done so "N" would have been encouraged by the process to focus his mind on whom he could remember being present on each of the two occasions. Instead "N" described " "H" and about 20 other guys" as attending the first incident; while his assertion that the "same guys" returned for the second incident left scope for there to have been a variation in the make-up of the two groups, with an erroneous assumption being made that the claimant was in both groups. In other words, "N" was not discouraged from mistakenly assuming that because Mr Redman was in the first group he would have been in the second.

363. This danger is compounded by the second statement,[737] which makes no mention at all of the first incident, but was apparently intended to "go into some more detail about the names and descriptions of the people that caused

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[730] Notes of evidence taken at depositions, pp 106-7.
[731] Idem, p 107.
[732] Ibid.
[733] Idem, p 108.
[734] Statement to police of "N" , dated 17 October 2005.
[735] Idem, p 2.
[736] Idem, p 3.
[737] Statement to police of "N" , dated 1 November 2005.

all the trouble."[738] Had "N" made the error I have described in the preceding paragraph of this report, the process adopted by the interviewer taking the second statement would have been unlikely to have corrected it.

364. It was only when "N" was challenged on the point, in cross-examination at the depositions, that he was alerted to the possibility of the error. Hence, at the trial "N" described, in evidence-in-chief, recognizing Mr Redman as a member of the group at the first incident – during which time (or part of it) "N" was outside the garage[739] - whilst not being sure that the claimant was present at the second incident.[740]

365. It would simply not be possible for me to place any reliance upon "N" initial assertion that the claimant was present at the second incident, given his subsequent acceptance that he could be mistaken; given the less than ideal conditions he had to see who as at the incident; given the challenges to memory from alcohol and drug consumption, and from being hit on the head; given the discussion with his sister, after the event and the risk of contamination presented by that; and given the manner in which his statements were taken. That "N" was later prepared to concede the possibility of mistake is a reflection of the weaknesses inherent in his initial view and of his integrity in relation to the issue.

366. I therefore conclude that "N's" evidence does not contribute to the negation of the claimant's innocence.

"I"

367. "I" was a co-defendant at the claimant's trial. The police conducted a video recorded interview of him, over a period of three hours, immediately prior to his arrest.[741] In that interview he said the claimant was present at the second incident: he named him as one of several who, he said, were there.[742] He said the claimant was "fired up" at the incident,[743] after having earlier described him as "pretty much of a girl."[744] "I" continued in the interview to say that after the second incident the group –

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[738] Idem, p 1.
[739] Trial notes of evidence, pp 112-3.
[740] Idem, p 114.
[741] Transcript of video interview of "I", conducted on 9 November 2005 (erroneously described in the transcript of the interview as 9 November 2006).
[742] Idem, pp 24, 50.
[743] Idem, p 71.
[744] Idem, p 69.

including the claimant – returned to s 9(2)(a) Road,[745] where two of the group (not including the claimant) talked about what had happened.[746]

368. I have mentioned earlier in this report[747] that the judge, at the claimant's trial, directed the jury that this was not evidence against Mr Redman. I interviewed "I" , for the purposes of this report, about his claim, in his police interview, that Mr Redman was present at the second incident. Had he adhered to that claim I would have been entitled to view that as evidence against Mr Redman. As it transpired, "I" resiled from that position, in his interview with me. He said Mr Redman was not at the second incident; he said the claimant had earlier gone home; he said he was 100% sure about this and that claims that Mr Redman was present and "fired up" at the incident were "all bullshit."[748] He said that it had been playing on his mind that he had "put somebody in prison that shouldn't have been there."[749] He said he had told his trial lawyer that the claimant was not present at the incident[750] and that he wanted to give evidence at the trial to "make things right," but his lawyer had "not allowed [him] to."[751]

369. I have endeavoured to determine which of these competing accounts is correct. That process has been confounded by demonstrable lapses of veracity in both "I's" interview with the police and his interview with me. I will now describe these, but before doing so I should record that contact was made with counsel who acted for "I" at his trial, Mr John Gerard, of Auckland, to inquire whether he had any record on his file, or any recollection, of having been told by "I" that Mr Redman was not present at the second incident and that "I" wished to give evidence to that effect. "I" agreed to waive privilege in respect of that inquiry (he said he had "nothing to hide.")[752] Mr Gerard's response was that he had no record on his file of any such discussion and nor did he have a recollection of one. Given that any such discussion would have taken place nine years ago, I would not regard it as surprising that Mr Gerard had no recollection of it, if indeed it took place. Nor would I necessarily expect there to be a file note or other written record of it. I have therefore treated the result of my inquiry of Mr Gerard as neither supporting nor refuting "I's" assertion on this issue.

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[745] Idem, p 93.
[746] Idem, p 104.
[747] See paragraph 69 of the report.
[748] Transcript of interview of "I" , conducted on 7 July 2016, pp 23-6, 41, 57, 64-5, 69, 134, 135-6
[749] Idem, pp 24, 57.
[750] Idem, pp 27, 61-2.
[751] Idem, pp 61, 105.
[752] Idem, p 104.

370. "I's" first untruthful assertion to the police occurred in the police car on his way to the police station. At that time he denied being present at s 9(2)(a) Avenue at all – he said he had only heard about the events.[753] That, of course, was inconsistent with his acceptance, in the formal interview with police, that he had been present at the second incident.[754]

371. He said in the police interview that he had not been drinking on the day of the incident. He said, "I don't drink."[755] "I" admitted, when I interviewed him, that this was untruthful:[756] he said he had been drinking – beer over the course of the day, although he said he was not drunk.[757] Maybe this untruth was the result of "I" being concerned because he was on bail at the time (on another matter) and subject to a condition of bail that he was not to consume alcohol;[758] but it was a lie nonetheless.

372. "I" invented a person, who he said was throwing bottles at the second incident. His name was said to be 'Peter.' "I" said, in the interview with the police, 'Peter' was Polynesian and sought to describe where he lived.[759] When I interviewed "I" and asked him about Peter, he responded, "I think I made him up."[760] He said he did not know anyone by that name.[761]

373. Perhaps the most significant lie told by "I" to the police concerned his purpose whilst at the second incident. He said he had gone to s 9(2)(a) Avenue to prevent trouble. His efforts, he said, were directed at trying to stop the others from engaging in the violence[762] - to "pull them back,"[763] and hold them back.[764] He was endeavouring, he claimed, to "grab [his] boys" and get them to go home.[765] But, he said, no one would listen to him.[766]

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[753] Note book entry of Detective Constable Joanna Chalmers.
[754] Video interview of "I" , conducted on 9 November 2005, pp 6, 21 et seq.
[755] Idem, p 13. See also p 15.
[756] Transcript of interview of "I" , conducted on 7 July 2016, p54.
[757] Idem, pp 54-7, 116.
[758] Idem, pp 67-8.
[759] Transcript of video interview of "I" , conducted on 9 November 2005, pp 87-8.
[760] Transcript of interview of "I" , conducted on 7 July 2016, p45.
[761] Idem, p 46.
[762] Transcript of video interview of "I" , conducted on 9 November 2005, pp 8, 10, 22, 23, 28.
[763] Idem, p 23.
[764] Idem, p 25.
[765] Idem, p 22.
[766] Idem, p 28.

374. When I interviewed "I" he acknowledged this was untrue.[767] He said he had actually gone to s 9(2)(a) Avenue to "sort the problem out" and to give someone a hiding.[768] He said that what he had claimed to the police to be doing himself was in fact what "L" was doing. He described "L" as "a good guy" who "didn't want us to get in trouble" and said that he himself was "telling the [police "L's"] story," "trying to say it was me."[769]

375. "I's" interview with the police thus contained several untruths.

376. My principal concern about "I's" honesty with me, when I interviewed him, centred upon the explanation he gave for having told the police Mr Redman was at the second incident, when, "I" now says, he was not there. That explanation, frankly, I find somewhat unlikely. That is a separate issue, however, from that of whether Mr Redman was, in fact, at the second incident. "I" may have incorrectly told the police that the claimant was at the second incident, but his explanation – which I will now discuss - for having done so, is not convincing.

377. "I" said that he incorrectly claimed Mr Redman was at the incident because the police gave him "a feed", let him have "a smoke" and told him he would not be charged with anything.[770] He told me that whilst he was in a video interview room at the Avondale Police Station Detective Sergeant Baldwin (as he then was) entered the room and inquired of "I" whether he was hungry and whether he wanted a smoke.[771] He was then taken, he said to the top of the police station for a cigarette and food.[772] "I" said he was told that if he named people who were present at the incident he would not face charges himself and would be able to go home and carry on with his rugby career (he played rugby at the time for North Harbour).[773] He said he then named 15 people without regard to whether they were present or not.[774]

378. The detail of what "I" says happened at the top of the police station is important, as it has a bearing upon whether the events could have taken place as he describes them. "I" claims Mr Baldwin asked him what kind of food he wanted and gave him a cigarette. He said Mr Baldwin

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[767] Transcript of interview of "I" , conducted on 7 July 2016, pp 20-2.
[768] Idem. pp21-2.
[769] Idem, pp 126-8.
[770] Idem, p 26.
[771] Idem, pp 29-30.
[772] Idem, pp 35-6.
[773] Idem, p 40.
[774] Idem, pp 40-54.

sent another police officer to get the food. He said that whilst that officer was away Mr Baldwin discussed rugby with him.[775] When the second officer returned with the food "I" "had a feed" still at the top of the police station.[776] After that he requested another cigarette. Whilst he was having the second cigarette – the second officer having been sent away – Mr Baldwin allegedly told him that if he "sa[id] a few names" he'd "just go home."[777] After smoking the second cigarette he was returned, he said, downstairs to the interview room.[778]

379. The issue is when this series of events occurred (if they occurred at all), and whether there was enough time for them to have occurred. Obviously, the discussion about providing names (were it to have occurred) must have taken place before "I" named the claimant as being present. The claimant was first named, as one of those at the second incident, before the first break in the police interview occurred.[779] The interview commenced at 7.46 am and the first break was at 8.47 am, to change the videotape. [780]

380. Initially "I" asserted he had not named the claimant before the first break in the police interview.[781] But that, as I have just noted, was incorrect. He then developed his position to say the discussion with Mr Baldwin could have been before the interview commenced.[782] That is really the only time it could have taken place. That, however, requires it to have occurred in a time frame that is simply too narrow. A police job sheet prepared by the detective constable who took "I" from his home to the police station, and who then conducted the formal interview with him, records that the officer and "I" arrived at the station and went to the interview room at 7.35 am. The job sheet records that the interview commenced 11 minutes later at 7.46 am.[783] It is within this window that the events would have to have taken place. I find it difficult to believe that 11 minutes was sufficient time for Detective Sergeant Baldwin to have entered the interview room and to have asked "I" if he was hungry and whether he wanted something to eat as well as a cigarette; to then have taken "I" to the top of the police station; to have asked "I" what sort of food he wanted; to have given him a cigarette, which "I"

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[775] Idem, p 86.
[776] Ibid.
[777] Idem, pp 86-7.
[778] Idem, pp 87-8.
[779] Transcript of video interview of "I", conducted on 9 November 2005, p 24.
[780] Idem, p 59. The time given in the transcript for the change of the tape was 7.47 am, but the clock on the machine had not been advanced to accommodate daylight saving time.
[781] Idem, pp 31-3.
[782] Idem, pp 32-3.
[783] Police Job Sheet of Detective Constable Joanna Chalmers, dated 10 November 2005.

then smoked; to have sent another officer away to get the food – which presumably was takeaway food; to have discussed rugby with "I" , whilst the second officer was away obtaining the food; to have waited while "I" ate the meal; to have given "I" a second cigarette, which he then smoked, whilst the detective sergeant allegedly urged him to name the persons who had been at the incident; and to have returned, after the second cigarette was smoked, to the lower level of the police station where the interview was to take place. I therefore cannot accept that these events occurred. I note, as well, that neither the notebook entry made by Detective Constable Chalmers, nor her job sheet, make any reference to Detective Sergeant Baldwin removing "I" from the interview room. While I would not have regarded this on its own to be decisive, I would have expected such an entry had the detective sergeant removed "I" from the room.

381. Detective Senior Sergeant Baldwin has prepared a statement[784] responding to "I's" assertion about the alleged interaction between them. By referencing documentation prepared by other police officers, in relation to the operation that was being conducted that day, the detective senior sergeant established that he was at a particular address at 7.15 am – at which there were three 'targets,' including one who was "somewhat agitated."[785] His recollection[786] is that he did not leave the address until the three suspects had left for the police station, each in the company of a different police officer. One of those officers recorded leaving the address at 8.10 am. Mr Baldwin recalls watching that officer get into a police car at the address, with the suspect, but not himself leaving at that time. Another officer has recorded that he left the address with one of the suspects after 7.52 am. The detective senior sergeant does not believe, as a result, that he could have been at the Avondale Police Station at 7.35 am, and he believes it would have been later in the morning that he returned to the police station.[787]

382. To compound the difficulties associated with "I's" account I note that, at one point in my interview with him, "I" suggested that Detective Sergeant Baldwin had spent eight hours talking with him.[788] That could not have happened. As Mr Baldwin puts it, he simply did not have the time – he was busy, as officer-in-charge of the case, coordinating "numerous staff deployed at a number of addresses," in apprehending and interviewing a number of suspects.[789] Even if "I's" suggestion of an eight-hour

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[784] Statement of Glenn Edward Baldwin, dated 1 November 2016.
[785] Idem, p 8.
[786] Ibid.
[787] Idem, p 9.
[788] Transcript of video interview of "I" , conducted on 9 November 2005, p 38.
[789] Statement of Glenn Edward Baldwin, dated 1 November 2016, p 9.

conversation was simply hyperbolic, and "I" was trying to emphasize that the discussion took some time, it strengthens the conclusion that these events could not have occurred in 11 minutes.

383. My skepticism concerning "I's" explanation is reinforced by another feature. "I" asserted that Mr Baldwin told him, in the discussion, that the claimant had by that stage "told on [him]."[790] That seems unlikely, as the police did not interview Mr Redman until two days later.[791]

384. I do not accept "I's" explanation for naming Mr Redman as one of those present at the second incident. If he incorrectly asserted the presence of the claimant at the incident it was not the result of any inducement from the police, but rather a lack of care in naming those present, borne of a pre-occupation with casting his own involvement in the best possible light.

385. Not only are there real issues about "I's" veracity, there are also concerns about the reliability of his accounts. This is illustrated by one example. He told me that "K",[792] "L"[793] and "M"[794] were not at the violent incident, when in fact they were. After initially saying he was sure "D" wasn't there – when in fact he was – he then said he could not remember.[795]

386. I need also to note, insofar as issues of credibility are concerned, that s 9(2)(a)

387. I conclude, for the reasons given, that "I" lacks credibility and that I cannot rely on his assertion, when interviewed by the police, that the claimant was present at the second incident, or his assertion, when interviewed by me, to the contrary. I therefore put to one side his statements on the issue.

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[790] Transcript of video interview of "I", conducted on 9 November 2005, p 89.
[791] "I" was interviewed on 9 November 2005; Mr Redman was interviewed on 11 November 2005. See discussion of this issue at pp 141-2 of the interview of "I" on 7 July 2016, pp 142-3.
[792] Transcript of interview of "I", conducted on 7 July 2016, p 41.
[793] Idem, pp 49-50.
[794] Idem, p 62.
[795] Idem, p 42.
[796] Idem, p 62.

Evidence suggesting the claimant could have left his home in the early hours of the morning, had he returned home earlier.

388. I have found as a fact that when Mrs Redman went to bed at about 2 am she saw her son asleep on his bed[797] and that she saw him there again, still asleep, when she got up the next morning at about 6 o'clock.[798]

389. The Crown has submitted that in the event of such a finding the claimant must prove that he remained home between 2 am and 6 am.[799]

390. The Crown submits he cannot do so and points to the following:

a) The claimant's associates wanted the claimant to return at some point during the night.

b) The claimant's concession that he could have left the house, if he wished to.

c) Suggested weaknesses in Mrs Redman's claim that it would have been difficult for her son to leave the house without her knowledge, and to return had he done so.

d) The evidence of "D" that he had found the claimant asleep in the garage, when "D" went there, following the second incident.

e) The opportunity the claimant had to re-enter the house either when his father left for work early in the morning, or alternatively by climbing in through the window that he could have used to exit the house in the first place.

391. I now assess the evidence relating to each of these points.

Associates sought claimant's return

392. It was established that texts and a phone call were sent to some young men asking them to go to s 9(2)(a) Road. "I" described receiving a phone call, asking him to go to s 9(2)(a) Road.[800] "L" said he

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[797] See paragraphs 199 and 200 of the report.
[798] See paragraph 200 of the report.
[799] Closing Submissions of the Crown, dated 28 November 2016, at 70.
[800] Transcript of video interview of "I" , conducted on 9 November 2005, p 7; Transcript of interview of "I" , conducted on 7 July 2016, pp 116-7.

"clearly remembered" receiving a text.[801] He said that during the night there was a request for a text to be sent to the claimant asking him to return to s 9(2)(a) Road.[802] Mr Redman said that he woke in the morning to find several texts on his phone that had come in overnight, asking him to go out.[803]

393. The claimant said he did not go out in response to the texts.[804] "K" supports him in this. "K" said he drove to the claimant's home and sent him a text saying he was outside; but there was no response to the text, so "K" returned to s 9(2)(a) Road without the claimant.[805]

394. Although the claimant's associates may have wanted him to return there is no evidence that he did so (other than the identification evidence relating to the second incident, which I have found to be unreliable) and the evidence of the claimant and "K" is to the contrary.

Claimant's concession that he could have left the house

395. Mr Redman acknowledged that he could have left the house, if he wanted to – but insisted he did not do so.[806] The issue, however, was not whether he could have left the house, speaking generally, but rather how he would have done so, given the security his mother had in place in the house and given the difficulties that would have confronted an intoxicated person seeking to leave through a window; and how he would have been able to return to his bedroom, had he left the house. A related issue asks whether he could have left the house or returned without his mother knowing. As Mr Redman put it, to get out of the house, it would "have to be past her [his mother][807] and whether he could have returned to the house would have depended on whether "everything" was locked.[808]

396. I do not, therefore, attach much significance to Mr Redman's acknowledgement that he could have left the house. Rather the focus has to be on how he would have been able to leave the house and return, given the security of the house and the difficulties that would face an inebriated person seeking to leave or return and how he could have accomplished either without his mother being aware of it.

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801 Transcript of interview of "L" , conducted on 10 September 2016, p 117
802 Idem, pp 118, 120.
803 Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 103-6.
804 Idem, p 107.
805 Affidavit of "K" , sworn 18 December 2008, paras 11-3; Notes of evidence p 20.
806 Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 89-99.
807 Idem, p 94.
808 Idem, p 93.

397. These issues I consider under the next heading.

Could the claimant have left the house and returned to it without his mother's knowledge?

398. Mr Gregory Redman agreed his wife "ran a very tight ship at home." She was in control in the home and liked to be aware of the movements of family members.[809]

399. Mrs Redman said that she was "security conscious," and was brought up to be so.[810]

400. There were three points of ingress and egress for the house: the front door, a side door and a sliding door in the lounge. There was also a sliding door from the master bedroom onto a deck – but that was not a means of ingress or egress, other than to or from the deck.[811]

401. A couch was positioned in front of the sliding door in the lounge (the door was secured by two bolt locks, which could only be unlocked with a key[812]), so the sliding door was not in use.[813]

402. A security door was in place at the front door and at the side door. The security door attached to the side door remained locked, as a matter of course. The side door was only used for specific purposes and the security door attached to it was unlocked only as required.[814] Mrs Redman locked the security door attached to the front door each night when she went to bed[815] and unlocked it in the morning, when she got up.[816] This was said to be her invariable practice.[817] There was only one key to the security door, and Mrs Redman had that in her possession.[818] At night the key was in her bedroom.[819] Other occupants of the address may have had a key to the front door, but not the security door. They could use their key (if they had one) to access the

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809 Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 72.
810 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 171.
811 Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, pp 5-16.
812 Trial notes of evidence, p 205.
813 Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 8.
814 Idem, p 13. See also Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 193.
815 Greg Redman, idem, p 14.
816 Idem, p 15.
817 Idem, p p14, 40.
818 Idem, p 12. See also Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 50, 99, and Trial notes of evidence, p 216.
819 Greg Redman idem, p 50. See also Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 200.

house during the day, but not at night when the security door was locked. Any family member wishing to enter the house at night, after Mrs Redman had locked the door, would have to wake Mrs Redman or her husband up, to gain access.[820] This meant that at night no one could enter the house or leave it through the front door without Mrs Redman's knowledge.[821] Hence, Mrs Redman has maintained that it would have been difficult for her son to leave the house through the door without her being aware of it.[822]

403. Crown counsel questioned whether Mrs Redman could be certain she had locked the security door on the night the claim is concerned with. He put to her that this was something she normally did, but she could not be certain she did so that night.[823] It was submitted there was an inconsistency in her account about whether the door was locked when the claimant arrived home. It is said by the Crown that this must undermine Mrs Redman's assertion the security door was locked that night. Mrs Redman had initially said, in the interview, that when she became aware her son was arriving home she went to the bedroom to retrieve the key to unlock the security door.[824] Later in the interview, however, she conceded she could not recall having done that, as it was a long time ago.[825] Mrs Redman explained that she would not lock the security door until everyone was "inside the house."[826]

404. Mrs Redman would not accept the possibility she had not locked the security door that night and had mistakenly thought she had done so, because that was something she normally did. She was adamant she locked the security door before she went to bed. She reinforced this by saying she was particularly concerned about security when "T" was staying with her,[827] as he had a tendency to open the doors and run outside.

405. Both Mr and Mrs Redman were subject to criticism by the Crown for not having told the police, when interviewed by them, about the security door and the practice of locking it.[828] Mrs Redman responded to this by saying she had not been asked about the issue and she only answered the questions she

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820 Idem, p 14.
821 Ibid.
822 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 98.
823 Idem, pp 200-5.
824 Idem, p 51.
825 Idem, pp 203-4.
826 Idem, p 203.
827 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 48-9. See also Trial notes of evidence, p 208.
828 Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, pp 44-7; Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 198-200; Closing Submissions of the Crown, dated 28 November 2016, at 79.1

was asked.[829] I see nothing unusual about that. In any event both Mrs Redman and her husband described the practice of locking the security door in their draft briefs,[830] copies of which were supplied to the Crown prior to trial.

406. On the basis of the accounts given by both Mrs Redman and Mr Gregory Redman I am satisfied Mrs Redman locked the security door at or before the time she went to bed on the night in question, and that she held the only key to it in her bedroom. I am reinforced in this view by her heightened concern for security because "T" was staying in the house. Mrs Redman's uncertainty about whether the security door was locked at the time her son arrived home does not undermine my conclusion.

407. To have left the house through the security door, soon after his mother had gone to bed, the claimant would have to have retrieved the key from his mother's bedroom. Mrs Redman was apparently a light sleeper, who would be woken by sounds at night.[831] She said she would have been alert for "T" , had he woken and started crying, or if he had an asthma attack.[832] I am satisfied that had the claimant gone to his parents' bedroom to retrieve the key he would, in his intoxicated state, have disturbed his mother, who after all had only just gone to bed. I am satisfied he did not go to his parents' bedroom in search of the key.

408. It follows that the claimant did not leave the house during the night, through a door.

409. In this event the Crown submits the claimant must establish he did not leave through a window.[833] He is adamant he did not. What is the other evidence touching upon this issue?

410. It was generally accepted that a person of moderate ability could have got through a window.[834] More to the point, however, were the impedimenta (of varying degrees, according to the window) of doing so, particularly in the case of an intoxicated person, at night.

411. It is unlikely the claimant would be able to leave through his bedroom window. The window was some distance from the ground - Mr Gregory

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829 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 199-200.
830 Draft brief of evidence of Carol Redman, pp 6-7; Draft brief of evidence of Gregory Alfred Redman, pp 2-3.
831 Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 33.
832 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 223-4.
833 Closing Submissions of the Crown, dated 28 November 2016, at 79.3
834 Job Sheet of Detective Sergeant G E Baldwin, dated 20 July 2007; Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, p 92.

Redman thought 10 to 12 feet.[835] To access it from inside the room the claimant would have had to pull out a large entertainment unit (including a cabinet with a TV on top of it) that was positioned in front of the window.[836] It would not be surprising if the noise associated with this would disturb his mother.

412. The distance from the window to the ground[837] in the case of the other bedrooms was estimated by Mr Gregory Redman to be between 7 and 8 feet. The bathroom window was said to be 6 feet from the ground, while the window in the study was estimated to be 6 to 7 feet from the ground. The kitchen window was estimated to be 4 feet from the deck. The photographs produced of the windows indicate that a person seeking to exit the house through a window would have to climb to the base of the window to do so.

413. Detective Sergeant Baldwin (as he then was) noted on his visit to the address in July 2007 that a City Council rubbish Wheelie bin was positioned adjacent to the left rear bedroom (the bedroom next to the claimant's) and this would have allowed "easy access for a person of moderate ability to climb in or out of the window."[838] It would not have aided a person to climb from the claimant's bedroom, however, unless it was first moved into position under his window, from outside. Were it to be moved (assuming it was at the address in 2005) it could have aided re-entry to the house.

414. I conclude that there would have been a window in the house that an agile young person could have climbed out of. The question I consider as the last issue in this chapter of the report is whether it is likely an intoxicated claimant would have been able to do so, especially without his mother being alerted to what he was doing.

"D's" *evidence that claimant in garage*

415. "D" asserted in his affidavit[839] in support of the royal prerogative application, and in evidence in the Court of Appeal, that after the second incident he returned to s 9(2)(a) Road for a short time, and then went to the claimant's address, intending to sleep in the garage, where he found the claimant asleep in the garage, and thereupon woke the claimant and

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[835] Transcript of interview of Gregory Alfred Redman, conducted on 6 July 2016, p 17; Draft brief of evidence of Gregory Alfred Redman, p 3.
[836] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, pp 100-5.
[837] Draft brief of evidence of Gregory Alfred Redman, p3.
[838] Job Sheet of Detective Sergeant G E Baldwin, dated 20 July 2007, p2.
[839] Affidavit of "D" , sworn 18 December 2008, paras 17 and 18.

told him what had happened.[840] "D" was "quite sure" the claimant was in the garage.[841]

416. The Crown submits this evidence is of significance, and is "irreconcilable with the applicant's case and, if correct, most logically suggests that the applicant had left home during the night and returned to sleep in the garage."[842]

417. In support of its contention the Crown points to "D's" ' evidence that he found the door to the garage partially open,[843] which the Crown submits accords with the claimant's account that he saw the door partially open the next morning when he looked out of his bedroom window towards the garage.

418. Even if I were to accept that "D's" ' claim in evidence that he found the garage door partially open was correct (which I am unable to do, given my adverse findings earlier in the report on the reliability of "D's" account of events[844]) it would not follow that the claimant must have partially opened the door. There is nothing to indicate when it was partially opened, or by whom.

419. The Crown further submits that because it was "D's" practice to ask before staying in the garage he was more likely to have stayed had he found the door already open and the claimant inside.[845] The evidence is that "D" stayed on a regular basis; I do not consider he would have thought it necessary to ask when arriving in the early morning before the occupants of the address were out of bed, and especially given the inebriated state he was in.

420. Nor do I accept that Mrs Redman would necessarily have heard the garage door being opened by "D" . The Crown submits the alternative to the door being partially open would be for "D" to force the door open, and suggests Mrs Redman would have heard this. There is nothing to indicate how much noise the opening of the door would generate, but in any event Mrs Redman's bedroom was on the opposite side of the house from the location of the garage.

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[840] Notes of evidence, pp 104, 105.
[841] Idem, p 138.
[842] Closing Submissions of the Crown, dated 28 November 2016, at 74.
[843] Appeal notes of evidence, p 105.
[844] See paragraph 234 of the report.
[845] Closing submissions of the Crown, dated 28 November 2016, at 75.2.

421. To me the most telling point is this. "D" claimed to have woken the claimant up in the garage and told him what had happened at the second incident. Had the claimant been at the second incident there would have been no need for "D" to tell the claimant what had happened at that incident – the claimant would have known. "D" ' notion that he told the claimant what had happened would simply not have survived, because the claimant could have been expected, were he to have been at the incident, to have acquainted "D" with that.

422. When dealing earlier in this report with the issue of the reliability of "D's" account of events I concluded I could not rely upon it, and that there was no basis to conclude the claimant had slept in the garage at any point of the night. I also accepted "L's" view – tentative though it was – that he did not see the claimant in the garage, when "L" arrived there with "D" . This conclusion is reinforced by the observation in the preceding paragraph of this report.

423. Accordingly, for the reasons I have just set out, and for the reasons set out in paragraphs 228 to 234 and 303 to 307 of the report, I find that the claimant did not sleep at any time during the night in the garage.

424. What in my view happened is this. "D" consumed a substantial amount of alcohol. He appears to have had substantial memory blanks and he claimed to have been relying on memory "flashbacks." When he claims to have woken the claimant in the garage, and told him about what happened at the second incident, he was confusing this with what happened the next morning, according to the claimant. Tyson Redman says he woke up on his bed, inside the house; took the phone call from "H's" mother, inquiring about her son's whereabouts; noticed the garage door was ajar; went to the garage, to discover "D" and "L" inside it asleep; and was told then, after waking them, about the second incident. "D" is mistaken about when the conversation took place and how it came about.

Opportunity to re-enter house when father left for work

425. The Crown notes that Mr Gregory Redman left for work early on the Sunday morning. It submits that had the claimant been in the garage at that point (from having returned from the second incident) he could then have taken the opportunity to re-enter the house through the front door.[846]

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[846] Closing Submissions of the Crown, dated 28 November 2016, at 79.4

426. Mrs Redman said that she and "T" were up before Mr Redman left for work. She said that if her husband had left earlier she would have unlocked the door for him and locked it again, because "T" was there. She was adamant, "there's no way that door would have been left unlocked."[847]

427. I conclde from this that the door would only have been unlocked briefly, to allow Mr Redman to leave for work, and that there would have been no opportunity for the claimant to enter, unobserved, through the door, had he at that point been in the garage and sought to take the opportunity then presented to re-enter the house. In any event, Mrs Redman was up before her husband left for work: I have already found as a fact that on getting up that morning Mrs Redman saw the claimant asleep on his bed.[848] I therefore find as a fact that the claimant did not enter the house at this time, either from the garage or anywhere else.

Likelihood of claimant leaving and re-entering house through a window

428. On the basis of the findings of fact I have made I must explore the issue of whether the claimant has established that he did not leave the house, and return, through a window. The likelihood of his having done so is a factor that will weigh in the balancing of the probabilities, in the next chapter.

429. The claimant is adamant he did not leave the house.[849] How likely is it that he would have done so, given the condition he was in at the time he arrived home; and how likely is it, given that condition, that he could have negotiated a window exit and subsequent re-entry, and done so without waking his mother? The answer becomes apparent on a review of the evidence relating to the condition the claimant was in when he got home, and the reasons for that condition.

430. Tyson Redman had been drinking for 24 hours. He started at his mother's surprise 50th birthday party, on the Friday night.[850] He was drinking beer, spirits and wine.[851] After his mother's party he met up with friends and drank through the night until dawn.[852] He got no sleep during that night, as he did not go to bed.[853] His drinking then continued throughout the Saturday – in the morning (apart from a time when he briefly went home),[854] the afternoon

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847 Carol Redman interview, p 235.
848 See paragraph 200 of the report.
849 Interview of Tyson Gregory Redman, conducted on 5-6 July 2016, pp 72, 91-103.
850 Idem, pp 45, 47.
851 Idem, p 48.
852 Idem, pp 49-50.
853 Idem, p 50
854 Idem, p 56.

and the early evening. By the time of the first incident he was, as he put it, "pretty buggered."[855] Throughout the Saturday he appartently had nothing to eat – he thought he'd had nothing to eat since the Friday, before he started drinking.[856]

431. On his arrival home on the Saturday night Mr Redman was intoxicated. He could not, as his mother put it, "walk a straight line" and she had to "help him through the door."[857] She described him as falling against the wall as he approached the front door.[858] His speech was slurred.[859] He stumbled though to his bedroom, fell on his bed and went to asleep.[860] Mrs Redman had not previously seen her son in that condition[861] and was "very angry with him."[862]

432. I find it to be unlikely that a 17-year-old who arrived home in that condition – without sleep the previous night and so affected by alcohol that he stumbled to his bedroom and did not get undressed or get into bed before falling asleep – would have, in the middle of the night, woken up and left the house. He could be expected to have slept for some time. This conclusion, as well as telling against the Crown submission that the claimant could have left the house in the middle of the night through a window, must also reinforce the finding I have earlier made that he did not leave through a door.

433. Likewise, I consider it to be unlikely, given his condition, he would have been able to negotiate an exit from the house through a window, as well as a later re-entry, and do so without disturbing his mother.

434. I have earlier noted[863] that there would have been a window in the house that an agile young person could have climbed out of. I doubt that the claimant in a fatigued and inebriated condition would have qualified as such.

435. I have earlier concluded[864] it would be unlikely the claimant would have exited the house through the window in his bedroom, given that he would have to pull out a large entertainment unit to do so. I doubt that he could have done this in his inebriated state. The noise created by any attempt to do so could be expected to have woken his mother.

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855 Idem, p 52.
856 Idem, p 53.
857 Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 48.
858 Idem, p 202.
859 Idem, pp 53, 55.
860 Idem, pp 43-4.
861 Idem, p 47.
862 Idem, pp 43, 47.
863 Paragraph 414 of the report.
864 Paragraph 411 of the report.

436. Mrs Redman said there was furniture underneath the windows in all of the bedrooms.[865] It is unlikely the claimant would have attempted to climb through the window in the bedroom occupied by his sister and her partner, without disturbing them; and it is unlikely he would have tried to climb through the window in the room occupied by "T" without, in the condition he was in, either waking the boy, or creating a noise that would have alerted Mrs Redman, who had only recently retired to bed.

437. The windows in the toilet, bathroom and study were described as being small[866] and narrow.[867] Mrs Redman opined that the claimant would not have been able to fit through those windows. She described him as weighing "over 100 kg"[868] at that time and said he was "a real roly-poly."[869] I accept that was the case. I also accept Mrs Redman's claim that if her son had tried to get out any of those windows "he would've got stuck."[870]

438. That only leaves the kitchen windows. The kitchen sink unit and stove were under those windows.[871] To have exited the house through the kitchen windows the claimant would have had to climb onto the kitchen sink unit or stove. I doubt he would have been capable of that, given that on arrival home earlier he could not walk a straight line and had to be helped through the door. Similarly, I am satisfied that any attempt to do so would have created enough noise to alert his mother.

439. Similar difficulties would have confronted any attempt to re-enter the house through a window.

440. To be added to this, on the issue of whether the claimant left the house, is the evidence of "K" , who described driving to the claimant's home and sending him a text saying he was outside; but when there was no response to the text returning to s 9(2)(a) Road, without the claimant.[872]

441. I consider it to be unlikely the claimant left the house.

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[865] Draft brief of evidence of Carol Redman, p 8.
[866] Ibid.
[867] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 231.
[868] Draft brief of evidence of Carol Redman, p 8.
[869] Transcript of interview of Carol Redman, conducted on 7-8 July 2016, p 232.
[870] Ibid.
[871] Draft brief of evidence of Carol Redman, p 8
[872] Affidavit of "K" , sworn 18 December 2008, paras 11 – 13. See also paragraph [216] of the report.

CHAPTER V: THE PREPONDERANCE OF PROBABILITIES

442. The Court of Appeal in its 2013 judgment recorded, "the Crown case against Tyson was not particularly strong."[873] The comprehensive review of the identification evidence undertaken for the purposes of this report[874] has led to my conclusion that that evidence is unreliable and would not have been sufficient to sustain the convictions.

443. In particular, I concluded:

a) I could have no confidence "A" accurately recognized the claimant as being present at the second incident; and that there was a real risk of her having confused the first and the second incidents, and mistakenly concluded the claimant was at the second incident, because he was at the first.

b) I could not rely upon "B's" assertion the claimant was at the second incident. There were real concerns about the reliability of her identification of the claimant. There were a number of unsatisfactory features to her evidence.

c) There was a real risk the evidence of identification witnesses was contaminated by discussions between them, before their statements were made to the police.

d) "N's" evidence was not probative of the claimant having been at the second incident. While he asserted in police statements that the claimant was at the incident, he said, when giving evidence at the trial, he could not be sure and accepted, in evidence at the depositions, the claimant may not have been at the second incident.

444. My conclusion that the identification evidence is unreliable cannot, on its own, of course, determine the claim for compensation. The claimant must, on the preponderance of the evidence, establish his innocence.

445. Having assessed the material bearing on this issue in chapter IV of the report, I now turn to the ultimate issue.

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[873] *Redman v R* [2013] NZCA 672 at [54].
[874] Paragraphs 309 to 366 of the report.

446. I record first that the claimant is not assisted in seeking to establish his innocence by the following persons, who, for reasons I have earlier described, I could not rely upon:

- "C"
- "D"
- "E" .
- "F" .
- "G" .
- "H" .
- "I" .

447. Aside from the claimant himself – who I found, when I interviewed him, to be genuine and authentic – the following persons provided assistance to the claimant in meeting the burden upon him:

- Carol Redman.
- Gregory Redman.
- "K"
- "M" .
- "L" .

448. My conclusions concerning the persons named in the preceding paragraph are summarized as follows:

a) Carol Redman was honest and genuine. Her account of her son arriving home and the time that he did so is accurate and her account of the principal events she describes is reliable.

b) Gregory Redman was responsible and measured in his approach to the issues raised with him.

c) "K's" assertion in his statement to the police and his affidavit that he recalled "C" giving the claimant a lift home from s 9(2)(a) Road lends some support to the evidence of alibi given by Mrs Redman and provides some support to Mr Redman's claim he was not at the second incident.

d) "M's" account in his police interview of the events of the evening was reliable. His assertion in his affidavit that the claimant was not at the second incident can be relied upon.

e) "L" was honest and doing his best when I interviewed him to recall events and to assist. While "L's" assertion that the claimant was not at the second incident is insufficient on its own to be persuasive, it is available to be considered along with the other material bearing on the issue.

f) "L's" assertion that he did not see the claimant in the garage when he arrived there, with "D" , and his recollection of the claimant waking him in the garage, later on the Sunday morning, provides substantial support for the claimant's account that he went to the garage, from his bedroom, after receiving a phone call from "H's" mother; and that after waking "L" and "D" , he received from them an account of the events at the second incident.

449. I have made the following findings of fact, on substantial issues:

a) The claimant arrived home on the Saturday evening around 10.35 pm.

b) Mrs Redman retired to bed sometime around 2 am.

c) When doing so she saw the claimant on his bed, asleep.

d) Mrs Redman again saw the claimant asleep on his bed, when she got up later that morning at about 6 o'clock.

e) Mrs Redman locked the security door at, or before, the time she went to bed. Having retired to bed, she held the key to the security door in her bedroom.

f) The claimant did not go to his parents' room in search of the key.

g) The claimant did not leave the house during the night, through a door.

h) It would have been possible for the claimant to leave the house during the night through a window.

i) The claimant did not sleep at any time during the night in the garage.

j) The claimant did not enter the house though the door in the morning at the time his father left for work.

450. I have concluded, as well, that it is unlikely the claimant left and re-entered the house during the night, through a window. That conclusion, when combined with my findings of fact, and in particular my findings that the claimant went home before the second incident, and was asleep on his bed at around 2 am, together with "M's" assertion – which I have found I can rely upon – that the claimant was not at the second incident, with the support that assertion derives from "K" and from "L" (to the limited extent earlier described – in the case of "L" – on the direct issue of whether the claimant was at the second incident, but the more substantial support "L" gives to the claimant's assertion he woke "L" and "D" next morning in the garage, to then learn about the second incident) combines to markedly outweigh the unreliable identification evidence that purported to put the claimant at the second incident.

451. I therefore conclude, on the basis of having weighed all the probative material bearing on the matter, that it is more likely than not that the claimant was not at the second incident.

452. It follows that the claimant has established, on the balance of probabilities, his innocence of the charges that related to the second incident.

453. I certify accordingly.

Donald Stevens QC

SCHEDULE TO REPORT

Material received and considered for the purposes of the report

Instructions

1. Letter of Instructions from Minister of Justice, the Honourable Amy Adams MP, dated 2 July 2015.
2. Cabinet Guidelines – *Compensation and Ex Gratia Payments For Persons Wrongly Convicted and Imprisoned in Criminal Cases*; *Additional Guidelines on Quantum of Future Compensation*.

Police Enquiry Documents

3. Police Statement of Tyson Gregory Redman, dated 11 November 2005.
4. Police Statement of "C" (unsigned), dated 23 July 2007.
5. Police Statement of Carol Redman (handwritten with corrections), dated 19 July 2007.
6. Police Statement of Gregory Alfred Redman (together with house floor plan), dated 19 July 2007.
7. Police Statement of "D", dated 9 November 2005.
8. Police Statement of "P", dated 10 November 2005.
9. Police Statement of "J", dated 12 November 2005.
10. Police Statement of "W", dated 26 October 2005.
11. Police Statement of "A", dated 17 October 2005.
12. Police Statement of "B", dated 25 October 2005.
13. Police Statement of "B", dated 30 July 2007.
14. Police Statement of "N", dated 17 October 2005.
15. Police Statement of "N", dated 1 November 2005.
16. Police Statement of "N", dated 4 November 2005.
17. Police Statement of "O", dated 25 October 2005.
18. Synopsis of police Video Interview of "K" dated 11 November 2005.
19. Synopsis of police Video Interview of "M", dated 10 November 2005.
20. Transcript of police Video Interview of "E" dated 9 November 2005.
21. Transcript of police Video Interview of "H" dated 9 November 2005.
22. Transcript of police Video Interview of "F" dated 16 November 2005.
23. Transcript of police Video Interview of "G" dated 9 November 2005.
24. Transcript of police Video Interview of "M" dated 10

November 2005.

25. Transcript of police Video Interview of "L" dated 14 November 2005.
26. Transcript of police Video Interview of "I" dated 9 November 2005.
27. Police Event Chronology – 111 Call, dated 18 September 2005.
28. Draft of letter containing Alibi Notice, dated 7 June 2006.
29. Letter containing Alibi Notice, dated 12 June 2006.
30. Letter containing Alibi Notice, dated 3 July 2007.
31. Police Job Sheet of Detective Sergeant Glenn Edward Baldwin, dated 20 July 2007.
32. Police Job Sheet and notebook entries of Constable Rawea Greenwood.
33. Police Job Sheet of Detective Constable Joanna Charmers, dated 4 November 2005.
34. Police Job Sheet of Constable Kelly Corby, dated 14 November 2005.
35. Police Job Sheet of Constable Fred McGraw, dated 11 November 2005.
36. Police Job Sheet of Constable J R Hemingway, dated 12 November 2005.
37. Police Job Sheet and handwritten notes of Constable Julia Bixley, dated 14 November 2005.
38. Police Job Sheet of Detective Sergeant A D King, dated 14 November 2005.
39. Police Job Sheet of Constable Darrel Watt, dated 10 November 2005.
40. Police Job Sheet of Constable D Egen, dated 10 November 2005.
41. Police Job Sheet of Constable Pita Fuafiva, undated.
42. Notebook entry of Constable Mark Lewers, dated 18 September 2005.
43. Notebook entry of Constable D Egan, dated 10 November 2005.
44. Notebook Entry of Constable J Carlisle, undated.
45. Police record of criminal convictions of "P" .
46. Police record of criminal convictions of "L" .
47. Police record of criminal convictions of Carol Redman.
48. Police record of criminal convictions of "K"
49. Police record of criminal convictions of "M" .
50. File Note of Detective Sergeant Glenn Edward Baldwin, undated.
51. Affidavit of Detective Senior Sergeant Glenn Edward Baldwin, dated 2 December 2013 (including four attachments, which are listed elsewhere in this schedule).
52. Police Photographs and location map – Operation Kent.
53. Summary of Facts.

Trial & Appeal Documents

54. Notes of Evidence taken at depositions hearing in Auckland District Court in *Police v* "M" , "R" , "I" , *Tyson Redman,* "E" "Q" "P" "H"

, "F" "D" , "G" , on 22 to 26 May 2006.

55. Oral ruling No.10 of Judge C J Field.
56. Notes of evidence on Voir Dire taken before Judge CJ Field.
57. Opening address at trial of Crown counsel.
58. Opening address at trial of defence counsel for "Q" , Mr C Wilkinson-Smith.
59. Notes of Evidence taken before Judge C J Field in Auckland District Court on 24 July to 14 August 2007 – *R v* "M" , "R" , "I" , *Tyson Redman,* "E" "Q" .
60. Closing address at trial of Crown prosecutor.
61. Closing address at trial of defence counsel for "Q" , Mr C Wilkinson-Smith.
62. Summing Up of Judge C J Field, on 16 August 2007 – *R v A* "R" , "I" , *Tyson Redman,* "E" , "Q" .
63. Indictment (with verdicts recorded in handwriting).
64. Department of Corrections Pre-Sentence Report on Tyson Gregory Redman, together with letters of reference, filed with the Auckland District Court on 19 November 2007.
65. Sentencing Submissions by Counsel for Tyson Gregory Redman, dated 23 November 2007.
66. Supplementary Sentencing Submissions by Counsel for Tyson Gregory Redman, dated 29 November 2007.
67. Sentencing Remarks – *R v* "H" District Court Auckland, (CRI-2005-004-2729), 4 November 2007.
68. Notes of Judge C J Field on Sentencing, 4 November 2007.
69. Combined Criminal and Traffic History – Tyson Gregory Redman.
70. Parole Assessment Reports on Tyson Gregory Redman, dated 22 October 2008, 15 April 2009, 30 June 2009, 18 December 2009.
71. Parole Board Decisions – Tyson Gregory Redman, dated 28 October 2008, 22 April 2009, 20 August 2009, 23 September 2009, 21 January 2010.
72. Submissions of Tyson Gregory Redman and "Q" in support of appeal against conviction, dated 25 February 2009.
73. Submissions on behalf of Respondent on appeal against conviction by Tyson Gregory Redman and "Q" , dated 2 April 2008.
74. Judgment of the Court of Appeal: *R v Tyson Redman,* "Q" CA441/07, CA717/07 [2008] NZCA 117, delivered on 5 May 2008.
75. Application of Tyson Gregory Redman for an exercise of the Royal Prerogative of Mercy, dated 25 February 2009.
76. Affidavits attached to Application of Tyson Gregory Redman for exercise of the Royal Prerogative of Mercy, dated 25 February 2009, as follows:

1. Affidavit of "F", sworn 23 February 2009.
2. Affidavit of "K", sworn 18 December 2008.
3. Affidavit of "C", sworn 21 January 2009.
4. Affidavit of "D", sworn 18 December 2008.
5. Affidavit of "E", sworn 6 January 2009.
6. Affidavit of "G", sworn 19 January 2009.
7. Affidavit of "M", sworn 9 December 2008.
8. Affidavit of "H" sworn 6 January 2009.

77. Advice from Ministry of Justice to the Honourable Judith Collins, Minister of Justice, on Application by Tyson Gregory Redman for Exercise of the Royal Prerogative of Mercy, dated 28 February 2012.
78. Order in Council, dated 29 October 2012.
79. Submissions in Support of Appeal Against Conviction by Tyson Gregory Redman, dated 12 June 2013.
80. Submissions on behalf of Respondent on appeal by Tyson Gregory Redman, dated 22 October 2013.
81. Notes of Evidence taken in Court of Appeal, on 30 and 31 October 2013.
82. Affidavit of Katie Margaret Suzzanne Alison, sworn on 2 December 2013, together with annexures, as follows:

    1. Letter from Mr Geoff Wells to Meredith Connell, dated 12 June 2006.
    2. Facsimile coversheet and enclosures (x2) dated 3 July 2007.
    3. File note by Ms Bell, dated 4 July 2007.
    4. Handwritten signed statement of "C", dated 23 July 2007.
    5. Letter from Mr Geoff Wells to Meredith Connell, dated 7 August 2007.

83. Judgment of the Court of Appeal: *R v Tyson Redman* CA728/2012 [2013] NZCA 672, delivered on 19 December 2013.

Claim Documents

84. Claim by Tyson Gregory Redman, dated 23 July 2014, for Compensation for Wrongful Conviction and Imprisonment.
85. Annexures attached to Claim for Compensation for Wrongful Conviction and Imprisonment, dated 23 July 2014, as follows:

    A. Order in Council, dated 29 October 2012.
    B. Letter dated 2 April 2012 from Niels Holm, Official Secretary to the Governor–General, to Belinda Sellars, Barrister.
    C. Judgment of the Court of Appeal: *R v Redman* CA728/2012 [2013] NZCA 672, delivered on 19 December 2013.

D. Letter dated 4 July 2014 from Julie Miller, Department of Corrections, to Ms Victoria Moss.

E. Department of Corrections Criminal and Traffic Conviction History – Tyson Gregory Redman, dated 2 July 2014.

86. Memorandum of Submissions of Counsel for Tyson Gregory Redman on Claim for Compensation for Wrongful Conviction and Imprisonment, dated 18 November 2015.
87. Crown Submissions in Opposition to Application for Compensation for Wrongful Conviction, dated 23 December 2015.
88. Memorandum of Submissions of Counsel for Tyson Gregory Redman on Claim for Compensation for Wrongful Conviction and Imprisonment, dated 28 November 2016.
89. Crown Closing Submissions in Opposition to Application for Compensation for Wrongful Conviction, dated 28 November 2016.

Inquiry Generated Documents

90. Memorandum – "The Four Occurrences."
91. Timeline – Carol Redman.
92. Map of s 9(2)(a) Rd and s 9(2) Ave, Mt Roskill, Auckland.
93. Transcript of Interview of Tyson Gregory Redman, on 5-6 July 2016.
94. Transcript of Interview of Carol Redman, on 7-8 July 2016.
95. Transcript of Interview of Gregory Alfred Redman, on 6 July 2016.
96. Transcript of Interview of "I" , on 7 July 2016.
97. Transcript of Telephone Interview with "L" , on 18 August 2016.
98. Transcript of Interview of "L" , on 10 September 2016.
99. Email of Detective Senior Sergeant Glenn Baldwin, concerning outcome of charges against "P" .
100. Email dated 2 August 2016 from Detective Senior Sergeant Glenn Baldwin, concerning "L" conviction.
101. Operation Kent – Schedule of Evidence.
102. Notice of Bail – Tyson Gregory Redman.
103. Waiver of Privilege by "I" , dated 21 September 2016.
104. Email to Jeremy Sutton by Geoff Wells, dated 3 November 2016.
105. Statement of Detective Senior Sergeant Glenn Baldwin, dated 10 November 2016, together with job sheets, notebook entries and Police Land Vehicle Log for vehicle RD5590.
106. Draft Brief of Evidence for Carol Redman and Gregory Redman prepared by Geoff Wells, with attached photos of dwelling, TV3 schedule and floor plan of dwelling, undated and unsigned.
107. Email of John Gerard to Donald Stevens QC, dated 9 October 2016.
108. Correspondence concerning claim.