TRANSCRIPT OF PROCEEDINGS

MEDICO-LEGAL SOCIETY OF VICTORIA

RACV CLUB

MELBOURNE

FRIDAY 15 NOVEMBER 2013

"The CSI Affect - How the modern media affects juries and their perception of forensic evidence"

PRESENTED BY: The Honourable Justice Elizabeth Hollingworth

MERRILL CORPORATION
4/190 Queen Street, Melbourne. Telephone: 8628 5555
Facsimile: 9642 5185

MS LYTHGO: It gives me great pleasure tonight to introduce our speaker the Honourable Justice Elizabeth Hollingworth. Her Honour was born, I gather in England, and I am told she was educated in Canberra and in Geelong. She studied law at the University of Western Australia where she was awarded a Blue for rowing and at Oxford on a Rhodes Scholarship. She was in fact the first Australian woman lawyer to be awarded a Rhodes Scholarship. She has also studied Human Bioethics at Monash.

After four years as a solicitor Her Honour went to the Bar in Victoria in 1991. She took Silk in 2004 and was appointed a Justice of the Supreme Court of Victoria in 2004. I think I have got it wrong, haven't I? She took Silk in 2002.

Since then she has sat in a broad range of civil and criminal trials at trial and at appeal level. She has also played an important part in leadership of the legal profession and in legal education.

She is a current or past member of various influential committees and she is a senior Fellow of Melbourne University.

When I first read the title of tonight I had no idea what CSI meant. It was some sort of legal jargon perhaps to keep us uninitiated in our place. But since then I have done my research, a form of due diligence and I watched an entire episode.

I must say I fail to understand how anyone can watch it for long enough to catch a CSI effect. It may well have been not one of the better episodes that I watched but I found myself absolutely hanging out for the commercial breaks.

We have great pleasure in inviting Justice Hollingworth to enlighten us on the CSI Effect - How the modern media affects juries and their perception of Forensic Science.

HER HONOUR: Thank you very much. I must say I had assumed that I would probably be addressing an audience of mostly ABC and SBS viewers so I will tell you a little bit more about the shows later on but I am heartened that Margaret at least has watched an episode and if I need to seek verification or support I know who to turn to.

Society has long been interested in forensic science and its potential to help solve crime either by implicating the guilty or by exonerating the innocent. Particularly during the Victorian period there was a great flourishing of interest in forensic science with some fairly way out theories. According to some of the different theories at the time, criminals had a variety of identifiable traits, not only the shape and size of skulls and limbs, their walk, their smell, their fingernails, their teeth, their senses of taste and hearing. A couple of the favourite scientific titles that I came across when I was doing the research for this paper, and these are real titles of scientific works, were On the Development of the Third Molar Tooth in Criminals. Who knew you could identify a criminal by their third molar tooth? Or the Morphology of Nails in the Degenerate.

There was an Italian physician some of you may be familiar with, someone called Cesare Lombroso. During the late 19th century he performed hundreds of post-mortems on dead criminals and during the course of his post-mortems he observed that they had a number of quite what he

regarded as distinct physical characteristics. The criminal characteristics included a receding hairline, forehead wrinkles, a broad nose, fleshy lips, sloping shoulders, long arms and pointy fingers. I am sorry but as I look around the room I think a few of you would have been in serious trouble in 19th century Italy.

In more recent times we have seen the development, obviously of a lot more scientific techniques, things like fingerprints, bloodstain patterns, handwriting, hair soil analysis et cetera. With the more modern technology we now can examine computers, photography, et cetera, mobile phones, geolocation, et cetera.

DNA has obviously been one of the most significant developments and it is something I will come back to because it is fraught with some particular problems in the area of the criminal law.

So why has the criminal law been so attracted or interested in forensic science? I think the answer should be fairly obvious. If there are witnesses in a case, witnesses to a crime, there is a possibility that they may be either mistaken or lying, and what forensic science offers us is apparent objectivity and reliability. And I stress apparent because of course as many of you in the room will be far more aware than I am, a lot of the science is very much up for debate. Some of the science as I mentioned earlier in my talk has clearly been debunked in more recent times, but even amongst the current science if I can call it that, there is broad debate within many of the scientific communities about the extent to which you can actually, through the science, link a particular individual or a particular source of a

specimen with what has been found at the scene. Of course even where the science itself is reliable it is only as good as the people and the techniques that are used at all of the stages, whether we are talking about collecting, sampling, testing, storing, analysing or reporting on the results.

And finally, and this may well be a source of frustration to many of you when you have to communicate with lawyers, trying to communicate the results of scientific testing, particularly statistical probabilities and so on, is full of challenges.

I touch a little bit on forensic science in the criminal law. Forensic science has also been used for quite a long period of time to solve crime in the fictional world. Some of you might be fans of Sherlock Holmes and Dr Watson. If so you will know that they used quite a variety of scientific techniques to solve crime. For instance in the Hound of the Baskervilles, Holmes was described as the second best expert in Europe at a particular technique called bertillonage. This was actually a real scientific technique that the Parisian police used in the 1870s and according to this theory you could tell if someone was a criminal, particularly a repeat offender, just by taking 11 different bone measurements. Very very simple.

Fans of Horace Rumpole of whom there are probably some in the room will recall his most famous case, the Penge Bungalow Murder where you will recall he used to speak very proudly of how he dazzled the jury with his knowledge of bloodstains and typewriters and so on.

Of course in more recent times there has been the

development of a whole genre of what you might call forensic science fiction, people like Patricia Cornwell, Kathy Reichs, Catherine Fox and others, so forensic science in literature is not particularly new. But what has been a relatively recent development and it leads into what I want to talk about this evening is the role of forensic science in shows on television.

Until about 10 or 15 years ago there was very little attention paid on television to forensic science. Occasionally Perry Mason that great defender that many of us grew up with would introduce some science into the show but actually by and large you will remember that his most famous technique was just interrogating or cross-examining the witness until they confessed that they were in fact the offender, and his client got off scot free.

What is actually interesting is that at the time when Perry Mason was first shown lawyers were not allowed when cross-examining to do what they do on television now which is march right up to the witness, stare them in the face and ask questions. Because the director could not get both the Perry Mason character and the witness in the same photo shot, the actor was told to come on up and lean on the witness box and in one of those strange examples of life imitating art it appears that that particular practice changed jurors and public perception and they thought it odd if the cross-examiner did not go up to the witness, so the idea of television influencing people's perception of the law is actually not entirely new. But as I say, Perry Mason mostly was not concerned with forensic science.

The start to my mind of the forensic science shows

are probably in the mid 80s in the UK. These are all on the ABC so I am assuming that many of you will be familiar with McCallum, or Silent Witness, both of which involve forensic pathologists who solve crime. More recently Waking the Dead has a specialist team of police and forensic experts.

Just as an aside, if like me you are a fan of French and Saunders they have done an absolutely brilliant spoof on Silent Witness. Their version is called Witless Silence and if you go on U Tube it will be amongst the seven best minutes you will have so I can thoroughly recommend that.

But back to the crime shows. We saw the British shows. They were largely quite realistic and they don't largely feature in the literature on the CSI effect because people tended to be appropriately dressed. They did not purport to do things outside their area of expertise, there was a degree of uncertainty et cetera. What we have seen since the early 2000s has been what many have called an explosion in these CSI type shows. The features of them are that the crime is solved almost entirely through forensic science. The original CSI crime scene investigation, it had a couple of spin-offs, CSI Miami, CSI New York and then there are other shows like Bones, Rizzoli and Isles, Numbers and a whole load of others that you can debate whether they fall into this category or not.

Now as demonstrated by the introduction, some of you may not have heard of these shows before, but I assure you that they are incredibly popular. In only its second season, CSI was rated the second most popular show in

America. It is consistently rated throughout the world as one of the most popular shows of the past decade. Depending on which ratings figures you use, somewhere between 40 and 60 million Americans watch one of those CSI shows every week and not only are there shows, but each of the three shows as happens these days, they have got their own website, you can go online, you can play detective, you can fully sort of leap into the whole science and the world that they create.

The shows have also been very popular in Australia, regularly rating in the top ten programs. They are not perhaps quite as popular but still very popular. I must say what was disturbing when I asked one of my Associates to check for the current ratings was how popular some of those ghastly shows, you know like Border Patrol and you know, the cars that pull people over for speeding on the side of the road, some of those real life shows are actually doing ridiculously well which, I must say, is very disappointing.

As I said, the British shows tend to be more realistic, they do not tend to feature in the literature of what I am going to refer to as the CSI effect. Let me tell you a bit more about the shows, like Margaret, I have only watched them for research purposes, I hasten to assure you, although I have watched a few more than one and I know exactly what you mean.

Perhaps the simplest way to describe what these shows are about is that there is one simple message that runs throughout the show. Forensic evidence is always available to a crime scene and forensic scientists are able to identify offenders quickly, easily and with

complete accuracy. It is a nice certain world in which the bad guy is always caught by the end of the show through forensic science.

They have got a couple of credos which appear repeatedly, it is probably what you have to do in the audition to get on the show, to show that you can with a straight face say any of the following. "Follow the evidence." It has got to be mentioned several times in every episode as sort of the imperative of what we are doing. "Inanimate objects tell stories." So for instance people will out loud say, "What does the table tell me? What does the car tell me? What does the dead body tell me?" Another very popular line is "People lie, the evidence does not." So it is all about the certainty of the science, the fallibility of humans and the ability of the scientists to solve crime. I think there are about three main problems with many, many sub-problems with that message. The first is and it is perhaps the most critical, the assumption that forensic evidence is readily available at all crime scenes. That is simply not true. For a variety of reasons, there is often no forensic material at all, or it has been degraded or it has been mixed or the expense of trying to gather it is not justified.

Even if there is forensic evidence, the portrayal of forensic science in the shows is completely flawed. A lot of the tests that they do simply do not exist. According to the Victoria Police Forensic Science website, only about 60 per cent of the tests shown on these shows actually exist and of the ones where the science is real, the portrayal is generally unrealistic. As you would

expect for a show, everything is very simplified. Test results are always unambiguous, accurate, able to be explained in very simple terms. They are performed in a fraction of the time they take in real life.

Forensic scientists never have backlogs or funding problems and they have only ever got one case at a time. Now if anyone has tried to get any DNA testing or any forensic testing out of the Macleod Forensic Science Centre in a day, good luck. One is often told in court cases that it is going to be months, sometimes up to a year to get forensic tests back because of backlogs and so on.

There is a particularly irritating feature of the shows which you may or may not have observed in only one show, but for dramatic effect everybody stumbles around in dark crime scenes with a little pencil torch held like that. Apparently this enables you to find the single hair or the single fingerprint that is going to enable you to solve the case. I must say it is probably the single thing that got me most irritated and I just wanted to yell out, you know, "Turn the bloody lights on for goodness sake" but it is very dramatic and look, it is actually quite a nice sort of soft lighting if you ever want to try, you know, dramatic but soft lighting.

Which leads to the third main area of unreality which is the forensic scientists themselves. They are always glamorous, male or female, they have got fabulous budgets, they all wear designer clothes, drive sports cars or Hummers. They trample all over the crime scene in large numbers, usually devoid of any protective clothing although I have seen the odd pair of gloves. Female

scientists are particularly annoying, they have all got long hair which they flick around the crime scene, shedding further hair no doubt and teetering around in blood and other unmentionable substances in these designer stilettos.

The scientists often carry guns. They are often involved in shootouts and car chases and perhaps the most unreal thing is, unlike in real life they examine the crime scene, they take all necessary samples, they go back to the laboratory and perform a wide range of tests across many areas of science, they interview the witnesses and the suspects themselves and they solve the crime and this is all done in under an hour.

What is interesting about how these shows came about is that they represent a shift from the traditional police model of crime show and some researchers have suggested that a sort of disillusionment with the police after Rodney King and other similar debacles, has led to you know, a shifting to a sort of a purer solver of crime.

What is interesting is not only are the forensic scientists driving things, but police are actually portrayed in a very negative way, they have completely reversed the roles. So what you see in the CSI type shows are police officers who are these sort of bumbling clueless functionaries who are barely tolerated by these brilliant scientists and if the police are given tasks at all, they are usually ones that call for very low cognitive ability. They are allowed to tape off the crime scene, drive the suspect down to the station, keep the bystanders at bay, but they are not actually involved in any way with the solving of the crime.

On the other hand the forensic scientists are always very sexy, quirky, fast and remarkably certain. With apologies to any forensic scientists in the room, it ain't necessarily like that in real life, certainly not in my court.

The popularity of these shows goes broader than just the legal system. If any of you have been shopping for kids or grandkids you are probably aware of the huge range of CSI type toys that are now available and indeed if any of you are stumped for Christmas ideas for Christmas, you could always get a CSI DNA kit, you could get the kiddies a handwriting kit. You might even think that a facial reconstruction kit would be a nice stocking filler.

Schools have now started teaching forensic science. There are schools that run forensic science camps. Universities have reported increased enrolments in forensic science courses. Now this increased interest in forensic science is not itself a bad thing, but insofar as it brings perceptions into the legal system and particularly inaccurate perceptions, that obviously is a problem. Even in the universities, people tell me they spend a lot of time now in first year debunking - you know, saying to this room full of fresh faced first years who all think they are going to be like on CSI, explaining that they are going to be picking one field of expertise and they are going to spend years in front of a microscope and it is nothing like that.

Indeed the police have to do it as well. I went onto the Victoria Police Forensic website and the first page is spent telling you it is not going to be like on television, it is going to be pretty dull, you will be

doing all the following.

My concern though of course is what effect this has on jurors. Now some people say well of course jurors know this is just entertainment and at one level they do, they know they are just seeing a Hollywood version of forensic science, but I would suggest that whilst they know that what they are seeing is not real, they really don't understand just how unreal it actually is. There is a lot of science and a lot of research that supports that.

The CSI effect and its existence is something that is hotly debated. The term itself was first used within a couple of years of the shows first being aired. Perhaps unsurprisingly, it was the media themselves who first coined the term and they have driven a lot of the debate about its continued existence. But once the media had started running articles about it, it was a term that was rapidly picked up by academics and police and judges and lawyers et cetera.

Just to give you an idea of how widespread the term has become, when I did a Google search a couple of days ago for the CSI effect and this is just a Google Australia search, I got more than 18 million hits in a fraction of a second. So it has taken on - it is one of those terms that has taken on a life of its own and much of the debate and this is what I will come to, is about exactly what the effect is, whether it is real, whether you can measure it and so on.

So what is the CSI effect? Well in the legal context it broadly refers to the creation of unrealistic expectations of jurors for that there will always be conclusive and reliable forensic evidence. Does the

CSI effect exist or is it just a media construct? I am afraid the answer depends on how broadly or narrowly you define the term and as academics are want to do and apologies to any academics in the room, a whole load of the debate in the literature is definitional and depending on how you define it you can answer with an unequivocal yes or an unequivocal no.

Probably the most common use of the term in the academic literature is what I call the narrow definition. The narrow definition focuses on whether the CSI effect leads to wrongful verdicts. So the narrow view perceived that the CSI effect, the effect of these shows would have one of two consequences. The first consequence was that it was believed that juries would be more likely to acquit if there was no forensic evidence, so no forensic evidence, jury more likely to acquit. That obviously is a consequence which favours the defence and harms the prosecution. But just as many people said, no, no, the CSI effect has exactly the opposite effect. Juries would be more likely to convict if there was forensic evidence, the CSI effect favours the prosecution and harms the defence. In some of the literature that second perceived consequence is referred to as the reverse CSI effect, in others they are both called the CSI effect. You can see that at its narrowest definition the concern was either these types of shows are fundamentally changing the nature of a trial and making it either harder or easier to get a conviction, depending on the presence or absence of forensic evidence.

So since the early 2000s there have been a lot of attempts to actually test empirically whether the

CSI effect does exist and whether it is leading to wrongful convictions or wrongful acquittals. Unfortunately and this is probably partly the nature of the task and the nature of what you are looking at, there is no study which has definitively established in what scientists would describe as a rigorous manner rather than an anecdotal manner, that has established that jurors who watch CSI programs do or would decide a case based solely on the presence or absence of forensic science.

The fact that they have not found that particular empirical evidence has led a lot of people to conclude there is no CSI effect. Some of those people have said, look if there is any change in jurors' perceptions, it is probably due to some broader technological effect or Tech effect as it is called. That is that a society gets more advanced as we become more computer literate, as people look at things on the internet, people just get a greater awareness of technology, a greater awareness of science and so on.

I think it is a mistake to write off the CSI effect so quickly and I do not personally favour the narrow definitional view because I think it prevents one looking at what I think are some real problems. Let me just point out there are a couple of limitations on the research. Much of it has been conducted on hypothetical juries, university students and I must tell you, the CSI viewing rates for university students are alarmingly high. There are an awful lot of people wasting time watching this stuff.

They are often also performed on people who are eligible for jury duty, not actual juries themselves and

there is a practical reason for that. In America as you have probably seen on television, there is no inhibition on jurors talking about their experience, indeed I think one of the more unseemly aspects of the American criminal justice system is the moment the jury have returned their verdict, you have got media talking to jurors asking them why they decided as they did, you have got jurors signing up for book deals and doing television interviews and so on.

You are not allowed to do that in Australia and in Canada where a lot of the research has been done as well, it is actually illegal for a juror to discuss or for you to discuss with a juror why they came to the decision that they did and that is not just in the immediate aftermath of the trial, that is for good.

Indeed in Australia in this State, if you want to do research on a jury you have to get advance approval from the Attorney General, from the court and it is quite a cumbersome process and does not happen terribly often. To some extent that probably explains why we do not have empirical evidence certainly in this country of actual jurors being affected because of this prohibition. There is a lot of anecdotal evidence and I will come to it in a moment.

To my mind, another significant problem, whether you are doing research in America or in Australia or anywhere else, is the collective nature of a jury decision. What we do is we pick 12 random people from the community, they are just people who were not able to be excused, disqualified or challenged because of their occupation, personal association, criminal record or for other

reasons. I must say sometimes one sees academics and others cynically say that the jurors were the 12 people who were not smart enough to manage to find a way to get off jury duty, but I do not share that particular cynicism.

What we do is we take 12 random people, we put them in a room, we make them listen to evidence for days or weeks or perhaps months and then we say, now just come up with a unanimous decision. Basic human nature is such that some people in the jury are going to play more significant roles than others. It might be because of force of personality, it might be and this is where the CSI issue comes in, it might be because they have either actual or perceived knowledge or understanding of some particular area that is relevant to the case. So for instance if the case involves complex scientific evidence, it is reasonable to assume that anybody on the jury who appears to understand what the hell is going on, and to be able to explain it to the others is likely to have more persuasive power in relation to that evidence. Of course whether you have got your knowledge from television or because you have got a science degree or you actually know something about it, may or may not be apparent to the other members of the jury.

So to my mind what a lot of the research really can't evaluate because many of the jurors won't themselves be aware of it, is the extent to which the whole collective decision making process and other people's knowledge is factored into their assessment and understanding of the evidence.

Let me turn to some of the anecdotal evidence that

supports the existence of a CSI effect. Judges and lawyers in all the research I have read and it is certainly been my experience, have regularly reported instances of jurors bringing into the room information that they did not get during the course of the trial. For example one study of US prosecutors, about 40 per cent of the cases surveyed had jurors asking questions about things such as mitochondrial DNA, latent prints, trace evidence or ballistics, even though those terms had no relevance whatsoever to the trial and nobody had mentioned them. Where are they getting that sort of terminology from? Well watch a couple of episodes of CSI and you will become quite familiar with all of those.

A lot of the research is also full of, particularly in America, anecdotes from actual jurors. Jurors often complained, why have not the scientists done a particular type of test? Why did not they take nail scrapings? Why did not they try to get fingerprints off the car? Why did not they test for gunshot residue? Well GSR as those in the know, know that it is referred to on these shows.

There have been cases in the US, although they are not statistically significant which is why a lot of the researchers ignore them, but there have been cases where even in the face of an otherwise strong prosecution case, the jury have acquitted and some of the jurors when asked afterwards have expressed sentiments like, "We did not think the prosecutors did enough forensic testing" or "We expected so much more from the prosecution."

I turn to DNA evidence because that presents particular problems. It presents particular problems because to be perfectly frank, I do not think most lawyers

and judges understand it. I think the cross-examination of witnesses in relation to it is pretty woeful. If any of you have given evidence you have probably wondered what half the questions you were asked were meant to be getting at, and the moment you get into statistical probabilities, without proper explanation jurors can turn what is actually a remote possibility into an almost certainty through a misunderstanding of the science.

So let me tell you a bit about what some of the research says about DNA evidence. I should indicate I am just briefly mentioning studies. When a written version of my paper is produced I will give some of the sources and if anybody is interested they can look at it themselves. What is clear from the studies is that when DNA evidence is produced by the prosecution juries are significantly more likely to convict than acquit, so juries really believe in DNA evidence and there is evidence that viewers of CSI type shows place particular weight on DNA evidence.

For example in one of the surveys 76 per cent of the respondents who watched CSI type shows believed that a DNA match was the best piece of evidence in any type of case. If you compare it with the non CSI watchers only 12.6 believed that a DNA match was the best piece of evidence. 76 versus 12.6, that is quite a gulf in perception about how important DNA evidence is in solving cases.

There was another significant Australian study done a couple of years ago where they got a whole load of mock jurors and they put them through a mock trial process and interestingly, before the jurors actually sat, they were given a short tutorial on DNA evidence. They were then

asked to hear all the evidence and return a verdict. Although the researchers found that there was no influence – sorry, I should have said that about half the mock jurors were frequent CSI watchers, the other half were not. What the evidence showed was that whether or not you watched CSI didn't affect how likely it was that you would convict or acquit so it did not have a direct impact on conviction rates but it did have a number of very significant impacts.

This is one that was particularly interesting to me. Those people who had watched CSI learned less from the tutorial than other jurors. They knew it all already clearly, so they were like, "Oh yeah, whatever." Whereas those who hadn't watched the shows were actually paying attention so there were quite significant differences in your ability to understand and apply what you had learned in the tutorial, depending on whether you already had knowledge.

Also what was interesting was that frequent CSI viewers had much higher results in a number of areas. They had much higher expectations that criminal trials would have forensic evidence, much higher trust in expert evidence, they were far more motivated to serve as jurors. They really thought they were going to be able to bring something to the table. They were far more likely to misinterpret statistical probabilities. The nice thing, the really nice thing about CSI is they do not muck around telling you about possibilities and who can be excluded. They have this wonderful DNA testing where they just announce that this is John Brown's DNA which of course is the one thing you can't do, so they had much greater

confidence in what DNA testing could produce.

They also – and this is perhaps both disturbing but not surprising – they had much greater confidence in the correctness of their verdict. They really felt like they were experts after they had been watching CSI and they had got it right.

There is a particular Victorian case that some of you might be familiar with which I think raises some interesting questions about DNA and CSI. In 2008 a Victorian man called Farah Jama was convicted of rape, wrongfully convicted of rape, I should say, and it was based solely on DNA evidence. What happened in that case was this. A large middle aged woman collapsed in a toilet cubicle at a nightclub. It was only about half an hour after she had arrived. She had only had one or two drinks. One possible cause for her collapse was the combined effect of – she was drinking Frangelico which I am afraid – I think you have got anything coming to you if you can drink Frangelico – but she was drinking Frangelico, mixing it with her prescription medication which is apparently not a good idea. She passed out, did not know what had happened to her. Some time later after she had regained consciousness she started to worry. Maybe she had been drugged and raped. This was a case where actually the alarm bells should have been ringing loudly for a number of reasons. First of all Mr Jama had an alibi for that night and he lived about 15 miles away from the suburb where the nightclub was. Put the alibi to one side. Sometimes alibis stack up, sometimes they do not. But there are a number of other features that are notable. The nightclub was an over 20s venue. It was in

the suburbs. It was mostly attended by Caucasian people.

Mr Jama was a 19 year old Somali man. Thin, dark skinned, clearly of African appearance. Pretty memorable and identifiable description in the context of that particular nightclub. Neither the victim, the alleged victim, any of the witnesses saw a man fitting that description that night. Nobody fitting that description appears on any of the security video so he would have to have found a way to sneak in and around the club without being caught on the multitude of cameras that all clubs and bars have these days. The alleged victim was in a toilet which was locked from the inside, dusted for fingerprints. His fingerprints did not appear anywhere on the toilet so he must have managed to climb out if he was the attacker, without leaving any prints.

Notwithstanding that lack of any evidence that he was there, notwithstanding his alibi, based solely on the fact that his DNA was found on one of four swabs taken from the alleged victim, he was convicted and sentenced to gaol and served quite a bit of time.

Subsequently it was discovered that the reason why his DNA appeared on the sample was due to contamination. The medical officer who had taken the swabs from the alleged victim had on the previous day taken some samples from another woman who had indeed had sex with Mr Jama and somehow through inadequate procedures a tiny tiny amount of his DNA had ended up on one of the four slides.

About a year and a half later after Mr Jama had been languishing in prison all that time the Court of Appeal finally overturned his conviction when the prosecution agreed that the possibility of contamination could well

have occurred.

A later report by one of my retired colleagues Frank Vincent not only concluded that Mr Jama had been wrongfully convicted but that almost certainly no rape or sexual activity had taken place at all.

Because of the restrictions we have on interviewing jurors in this State it is not possible for us to go and ask the jury in the Jama case why they placed so much weight on the DNA evidence. It is not possible for us to find out how many of them watch CSI type shows et cetera but it is disturbing that for whatever reason, the jury regarded the DNA as infallible and convicted on the basis of that evidence alone.

Given what we know about the CSI effect I think it is not unreasonable to at least have some real concerns from a case like that about its possible operation.

One of the interesting things is that even though most of the researchers have said the CSI effect does not exist in terms of influencing juries in their verdicts most of them still nevertheless agree that the so called CSI effect has fundamentally changed how many of the people in the criminal justice system operate. For example, police and investigators – and they do this with a degree of frustration – they report that people have become far more demanding of tests. There are numerous instances of police carrying out testing and victims or bystanders telling them off because they are not doing the tests the right way, or they have not done this particular type of test or they should be performing other tests. Police report that this has affected how they go about crime scene investigations, they do a lot more testing.

They take more samples. They spend more time explaining why they are not doing particular testing. And it appears that there is, at least with some police, considerable role strain associated with this. They are getting rather frustrated at having to explain themselves.

There has certainly been, and this is something I have observed myself, quite a change in the way that prosecutors run trials. For example they will now often call for more tests to be done or they might produce forensic evidence in a case, even where it is not strictly necessary because it might be perceived that the jury might want to see it. One particular thing they do these days is they call what we call negative evidence. They will get an expert witness to come along and explain why no forensic evidence was found, you know, we did not get to the crime scene until it had been outside for a month and there had been rain and wind and you just can't get forensic samples. I have had instances of that sort of negative evidence where you call someone just to say why there is no evidence.

The prosecution often have to do that because the prosecution of course have to present their case first and a particular defence tactic that has become quite popular is for the defence, after the prosecution have closed their case to stand up and say, "Look, there isn't even any DNA or forensics to link them to the scene, he must be innocent." So there has certainly been a change both reported and observed in the way prosecutors run cases.

In America they do jury selection quite differently. As you probably know, they grill jurors, or prospective jurors often for days about their views, their beliefs, et

cetera and one of the things that they do pretty much across the whole of the States now is to ask prospective jurors about their television viewing habits. So now part of the questionnaire is, "What shows do you watch? How often do you watch? How have they impacted on your beliefs? What do you believe about certain things?" That of course is not possible here in Australia because we do not do that sort of vetting and that means we have to deal with the possibility of the CSI effect without knowing whether particular jurors watch these shows or have particular opinions.

What people do often say and this is referring both to barristers and judges, people often say, "Look it is not like CSI" and we often do this in quite a dismissive way. It is sort of like the expert gives their evidence and then someone will come out, "Well it is not like CSI". I must say to any lawyers in the room, as a result of looking at a lot of the research I have looked at and the impact of these sorts of shows, I would certainly be doing a lot more than that, both if you were prosecuting or defending or as a judge.

I do not think simply saying, "It is not like CSI" truly conveys to the jurors the gulf between their perception and reality.

Finally, before I allow a few minutes for questions and this is a challenge to us as lawyers, I think. We need to make sure we understand the science better. We often muddle our way through the science I think, particularly where statistical probability evidence is concerned and I must say if we do not understand the science ourselves, we have no hope of countermanding the

CSI effect, making sure that the jury are not giving the evidence inappropriate weight et cetera. I say this as something of a mea culpa for the legal side of the profession, I fear that all too often we do not understand the science and I think if the CSI effect tells us anything, is that we have probably got to do better in this area, because the juries certainly - those who watch these shows perceive that they do understand the science. Thank you.

MS LYTHGO: Her Honour has offered to take questions, if anyone has any questions. We do nOt have a microphone do we, tonight, so could you speak loudly.

SPEAKER: I would love to, my wife is always telling me to stop talking so loud. I thank you very much for your talk, it HAs given a lot of insight and it Is probably quietened down a lot of anger that I have because of it. I was involved with peer review many years ago, I am from the medical side and then I started to hear about the lawyers getting very anxious about suing doctors for everything left, right and centre and I thought, you know, you have to understand where we are coming from before you start suing us, because your tenet is that ignorance is not innocence. So you can't ignorantly accuse us of all the wrongs that you would like to accuse us of. So we have been down that track of over ordering tests on the basis that that is going to prevent us from thinking about our cases. In the research I did for this it says that forensics is where you present yourself before a quorum. So it is actually critical thinking and we are forgiven - we have moved away from the classics and critical thinking to where we are thinking in short quick answers. Medicine

has been through all that by thinking we can do a battery of tests and that will tell us the diagnosis. Now we are saying, "No, we must do the critical thinking of what are the possibilities of a patient's disease and we need the tests to verify our critical thinking." So the tests come as a challenge to our thinking, not to just give us, you know, an answer out of our dumb thoughts. So when you talk about CSI that is art trying to reflect life and they are trying to create a genre and within that genre you can then start creating all your imaginations and your intricacies and everything else, provided you have practised within that genre. Well that genre does not exist in real life. So what I am fascinated by the law is that it is starting to move towards evidence based which we have been pushing to move towards and it is looking for evidence based, and part of the forensics is that it is just a tool that tries to bring critical thinking to the jury, and the fascinating thing is that part of the CSI, as in say, a series like Luther is that he is a profiler and I think, well you know, if you expect an outcome by profiling, how many of the juries do you profile to see if they really can give the outcome that you want, but rather than just, you know, putting it to them. So the English did many years ago a sort of a study to see are the jury really the peers of the people they are trying to convict and they are not. They are, as you said, people who are just available for jury service who do not - and so, in the law, in the medical situation - - -

SPEAKER: What is your question?

HER HNOUR: Do I agree?

SPEAKER: Why did we move away from critical thinking, to a

very sort of lazy way of thinking that a whole lot of you know, facts and figures which we are now pretending are forensic and can be used as tools, are going to replace critical thinking.

HER HONOUR: I am not sure that I would agree with the premise of your question, that we have thrown away critical thinking. I think all I was trying to address is that science is a new way within the legal framework and particularly the criminal framework, science is a new way of looking at the evidence and what I am trying to suggest is that we probably haven't in examining the scientific evidence, developed our critical thinking about that far enough because it is still a relatively new discipline within the criminal law and all I am trying to say is - I do not accept that we throw critical thinking out, I am suggesting that for a particular new type of evidence, we have not yet developed it far enough and in particular we have not developed our critical thinking far enough to deal with preconceptions and information that jurors are bringing into the room. So I am not sure if there is anything more I can probably say in relation to that. I think there was another question, the gentleman near you.

SPEAKER: Just a comment on the Farah Jama case. In Frank Vincent's report he said that during the cross-examination of the forensic witness on DNA, asked what the rates of the examination were in the lab in DNA results in Victoria, which was a question that no one else asked at that time. Then they were told this is not an examination of the case - - -

HER HONOUR: Yes I know - - -

SPEAKER: The jurors of all these people involved in that case were actually quite alerted to the problem and that is a terrible miscarriage but on reading Frank Vincent's report my opinion was that every other part of the system failed other than the jury.

HER HONOUR: You are quite right and I did not want to confuse things by starting pointing fingers as to who within the process might have been to blame because there are different theories about what the prosecution did, what the defence did, what the judge did and all sorts of other things. The jury actually asked two questions that dealt with the possibility of contamination. Both of them were answered in a particular way because contamination had not - they were answered in a literal and narrow way because contamination had not been raised as a possibility by anyone and in the context of the trial they were speculating. Having then been told by the trial judge that is not relevant in this case because both the parties agree it is not - this is an area where the defence were not saying it is contaminated, but as I say, the purpose of my comment is not to point fingers at any particular person, it is rather to say that having one type of evidence only, having been told do not concern yourself with that, they were prepared to convict in the absence of any other evidence, in the face of some evidence that suggested his innocence, because DNA is God as far as this jury were concerned. DNA once our concerns about it have been allayed is God, and all I was really trying to say is that is a very very strong belief.

There are very few other types of evidence that we have in our courts where you would convict someone of

something as serious as rape on a single piece of evidence, given all the other evidence to the contrary. So really the only point I was trying to make is it exemplifies or probably two points, it exemplifies just how how important lay people think DNA is and it is frustrating for us that because of the limits on our research, we can't ask of that jury, why. Why did you think it was so important and in particular, have many of you watched television, have you seen things on the internet? Why do you hold that belief that this single piece of evidence outweighs all the other evidence? That was the only point I was really wanting to make, but you raise a very valid point which is there were probably a series of things that could have been done an awful lot better and I certainly was not suggesting the jury were idiots or were not appropriate, I just wanted to point out that they really placed all their faith in DNA and I think it would be interesting to know why. Nice to see someone else has read the Vincent report, it is a fairly long report.

MS LYTHGO: I think we have time for one more question before we eat.

SPEAKER: Your Honour I am a lawyer. Many years ago I read a book about Sir Bernard Spilsbury who was a forensic pathologist in the United Kingdom. Now it is slightly off the tangent of what you are talking about, but what I got from that is was he was discredited, from my memory, it was many years ago that I read it and the reason he was discredited was because he was very powerful and everyone believed him, it was sort of the CSI effect. So he would give evidence, evidence by Sir Bernard Spilsbury therefore

this would occur. So I am just wondering whether you have read it, but to me it is the same type of influence as the CSI effect. So it is actually not new, depending on how powerful the evidence is or the person giving the evidence.

HER HONOUR: But if all you are saying is that a really persuasive expert or a really persuasive barrister is more likely to carry weight with the jury than someone who is less persuasive or less credentialed or whatever, that is probably self-evident. You are right it exists, but it is self-evident and we think and have strategies for dealing with it. So they have got a top gun on their side. If we can, we get a top gun on the other side. That is a known risk and it is absolutely right, some experts are just fabulous and carry the day and others just - they might be brilliant scientists but they can't explain themselves.

The thing about the CSI effect I think is that whereas we understand that some people are more persuasive than others, we really do not understand and particularly, you know, joking aside most of us who are involved in the legal process are not watching the CSI type shows. We don't actually understand just what might be in jurors minds, just how unreal their expectations are so that when we slightly glibly and as a throwaway comment say, "Look it is not like CSI", we have really no idea just how far from reality this is. So I think it is a slightly different phenomenon but I am not suggesting it is unique. We have always got to be aware of possible influences on juries, but it is one that I think we have not grappled with and particularly now with people placing so much weight in science and the perception which is actually a

false one, that it is absolutely certain and that it allows you to identify a particular offender or a particular individual with a crime scene.

There are very few types of technology that actually allow you to do that and yet you watch these shows, you are absolutely convinced that it is just a matter of doing the right tests, getting the right samples and QED.

MS LYTHGO: I think we should get on with our food now but could I just invite Magda Simmonis to come up and thank Her Honour.

MS SIMONIS: Thank you, Your Honour, for a wonderful presentation this evening, which has raised lots of provocative questions in terms of how fiction can be misconstrued as documentary and truth and it brings to mind an idiom that I have been using when I think of various patients that I deal with and that is, do not confuse me with facts, my mind is made up. Perhaps the CSI effect and its overall effect is concerning because of that particular point in particular, in that really we should probably look at informing people perhaps when they are watching these programs before the program starts, that this is fictitious, that this is not truth. What would you say about that?

HER HONOUR: Don't you remember those American television shows where they say, "The persons and events depicted in this are not real or are fictional" or whatever. I just think it is part of the drama. Let them watch it and think it is fun, I do not want to kill the show or keep interrupting saying "This test does not exist." Perhaps we could have, you know, like those irritating tweeting, perhaps you could have "This one does not exist either" or

"This guy is a real jerk and would not be allowed to do this in real life." I think probably let them watch their entertainment, the point at which we need to interfere is when they are in the court system, but we are open to all suggestions.

MS SIMONIS: Screening the jury would be great for one, that would be really good and in fact also I think that in terms of the jury, looking at the role of the jury overall, which has been questioned many times over hasn't it and I think that our system is a very good system, however how we select our jury is probably also something that needs to be examined. Thank you very very much, Your Honour, for your wonderful presentation tonight.

- - -