

# **PLEA BARGAINING AND MISCARRIAGE OF JUSTICE: A CASE STUDY OF THE PROSECUTION OF GABE WATSON, THE SO-CALLED ‘HONEYMOON KILLER’**

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## I INTRODUCTION

The high profile Queensland prosecution of Gabe Watson for the murder of his wife Tina, who died while the couple were scuba diving together on their honeymoon, ended without trial. Instead, the matter was dealt with in court by plea agreement to the offence of manslaughter. Serious questions remain in the public sphere about the conduct of the case, and the underlying merits of the murder allegations. The controversy has been aided by public statements made by the investigating police officers describing the evidence they allege supported the murder case as well as their personal belief in Gabe Watson’s guilt.

The criminal justice system can be divided into three steps – investigative, adjudicative, and appellate. The plea bargaining process replaces the adjudicative phase with an agreement, and curtails access to the appellate process. The adjudicative trial process, although imperfect, serves to identify and correct errors which may occur in the investigative phase of the criminal justice system. Errors at trial may be rectified in the appellate courts. Plea bargaining, which replaces the adjudicative trial process with agreement between the parties and which effectively forecloses access to the appellate system, creates the potential for errors to go uncorrected.

This article uses the evidence of the Watson case to make two arguments with broader applicability. The first is to argue that the plea bargain in the Watson case was a mistake which constituted a miscarriage of justice in itself. In particular, the plea bargain was based on factual errors and was not clearly grounded in law. However, the plea bargain cannot be considered in isolation, particularly in high-profile cases such as Watson. Any allegations of criminal conduct carry significant stigma, particularly when made by agents of the state. The second argument relates to a range of extrajudicial statements were made by agents of the state, statements which continued after the conclusion of the plea bargaining process. These statements were untested in criminal court and this article argues that some of the information contained in them appears to have been incorrect. Yet, through these statements, agents of the state continued to impugn Watson’s reputation. The Watson case is illustrative of the broader dangers that plea bargains may pose for the possibility of miscarriages of justice as the fact-finding process of the criminal trial is abandoned, allowing errors and speculation to replace evidence and unfounded assumptions to replace law.

## II THE WATSON CASE

On 22 October 2003, Gabe and Tina Watson, née Thomas, (referred to for ease of reference in the remainder of this paper as Gabe and Tina) were on the first day of a seven-day scuba diving trip on the Spoilsport, a live-aboard boat operating out of Townsville, Queensland. Gabe and Tina were diving together as ‘buddies.’ Tina was recently certified and had only completed 11 dives.<sup>1</sup> Gabe was more experienced than his

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wife; he had 56 logged dives<sup>2</sup> and four years previously he had taken a course in dive rescue.<sup>3</sup> Prior to diving, Gabe and Tina were interviewed by Wade Singleton, the trip director, who recommended that Tina complete an orientation dive with the boat staff. Tina declined the orientation dive, saying she ‘felt confident in her ability to dive without an instructor’.<sup>4</sup>

The first dive of the trip was on the wreck of the Yongala. The wreck lies in approximately 27 metres of water in a north/south orientation.<sup>5</sup> There is a ‘diver access point’ near the bow, which is a line secured at the surface and at the bottom which divers use to ascend and descend. The dive in question was set up as a drift dive in which the divers entered the water at the bow diver access point and were to be carried by the current to the exit point at the stern of the wreck.<sup>6</sup>

Gabe and Tina descended just before a group led by Singleton.<sup>7</sup> Less than eight minutes after descending,<sup>8</sup> Gabe surfaced without Tina and called for help.<sup>9</sup> He was prevented from descending again by a staff member of the boat.<sup>10</sup> Singleton found Tina unconscious on the bottom with her regulator in her mouth.<sup>11</sup> He brought her to the surface, but efforts to resuscitate her failed.<sup>12</sup> Tina’s equipment was found to be

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Columbia, Canada. She has no ties to any of the parties in the Watson case. The author is grateful for advice and critical comments on drafts by Heather Douglas, Philip Stenning, Ruth Walker, Phil Orchard, and Eric Colvin. Thanks are offered to Michael McFadyen for making documents associated with the case available and for his years of work on the Watson case: his conclusions are available online at Michael McFadyen, Tina Watson Death' 2015)

<[www.michaelmcfadyenscuba.info/viewpage.php?page\\_id=844](http://www.michaelmcfadyenscuba.info/viewpage.php?page_id=844)>. The author is also indebted to Asher Flynn and Kate Fitz-Gibbon, whose book *Second Chance for Justice* brought this case to the author’s attention. Although we disagree on aspects of the case, the author is indebted to them not only for their research of the case, but also their documentation of the grave distress suffered by both the Watson and the Thomas families in the course of these proceedings.

<sup>1</sup> ‘Statement of Wade Singleton’ (22 October 2003), available at Michael McFadyen’s Scuba Diving Web Site

<<http://www.michaelmcfadyenscuba.info/watson/Singleton%20various%20statements.pdf>>.

<sup>2</sup> Logbooks of Gabe Watson, available on ibid

<<http://www.michaelmcfadyenscuba.info/watson/Log%20Book%20Dive%2038%20to%2056%20mall.pdf>>. Michael McFadyen has analysed Gabe’s previous dives, some of which were of very limited duration. His conclusions are at Michael McFadyen’s Scuba Diving Website, ‘Gabe’s Diving Background’ <[http://www.michaelmcfadyenscuba.info/viewpage.php?page\\_id=791](http://www.michaelmcfadyenscuba.info/viewpage.php?page_id=791)>.

<sup>3</sup> Ibid.

<sup>4</sup> Statement of Wade Singleton, 22 October 2003, above n 1, [12]. Singleton describes having a subsequent conversation with both Gabe and Tina where ‘they’ stated that they would not be going on the orientation dive: at [22].

<sup>5</sup> Andrew Viduka, Museum of Tropical Queensland, ‘Managing Cultural Heritage: A Case Study of the SS Yongala’ <<http://www.aicomos.com/wp-content/uploads/vidukayongala.pdf>> 6-7.

<sup>6</sup> Statement of Wade Singleton, 22 October 2003, above n 1, [12], [22].

<sup>7</sup> Ibid [29]-[30].

<sup>8</sup> The duration of the dive is based on information recovered from Gabe’s computer by Adam White, a technician with the company who manufactured the computers: Statement of Adam White, 9 September 2007, 5 ‘Michael McFadyen’s Scuba Diving Web Site’

<<http://www.michaelmcfadyenscuba.info/watson/Adam%20White%202007%20statement.pdf>>. White produced both a table he called the ‘dive data’ and a graph of the dive profile: at 4. Since White describes the chart as an ‘approximate’ profile, this article relies only on the dive data: ‘Gabe Watson’s Computer Download – Second Dive (Table)’, ‘Michael McFadyen’s Scuba Diving Web Site’ <<http://www.michaelmcfadyenscuba.info/watson/dive%20computer%20downloads.pdf>>.

<sup>9</sup> Statement of Craig Haslet, 22 October 2002, 4, ‘Michael McFadyen’s Scuba Diving Web Site’ <<http://www.michaelmcfadyenscuba.info/watson/Haslet%202003%20statement%20&%20addendum%202004.pdf>>.

<sup>10</sup> Ibid.

<sup>11</sup> Statement of Wade Singleton, 22 October 2003, above n 1 [31]-[32].

<sup>12</sup> Ibid [38]-[45].

functioning properly and she had an ample supply of air.<sup>13</sup> The autopsy found she had drowned.<sup>14</sup>

In his statements to the police, Gabe told the police that shortly after they left the diver access point line, Tina gestured that she wanted to go back. They swam back with Gabe assisting Tina. She stopped swimming, and he tried to swim while supporting her in the water. Before they reached the line, she struck him in the face, flooding his mask with water and knocking the regulator from his mouth. He then saw her sinking and decided to get help.<sup>15</sup>

The investigating police officers formed the opinion that Gabe's story was a lie, and that he had murdered Tina.<sup>16</sup> Gabe was committed to stand trial for murder following a Coroner's Inquest,<sup>17</sup> and subsequently indicted for murder by the Office of the Director of Public Prosecutions (the 'ODPP').<sup>18</sup> However, on 9 June 2009, Gabe plead guilty to manslaughter and was sentenced to four and a half years imprisonment, suspended after 12 months.<sup>19</sup> On appeal by the Attorney-General, the sentence was increased to be suspended after 18 months.<sup>20</sup>

After serving his sentence in Queensland, and returning to the United States, Gabe was tried for the murder of Tina in his home state of Alabama. At the capital murder trial, the judge dismissed the prosecution's case for lack of evidence.<sup>21</sup>

#### A *What Motivated the Plea Agreement?*

On the prosecution side, the ODPP has provided limited information about why they did not pursue the murder charge in Queensland. The only statement<sup>22</sup> by the ODPP's office about the reason for the plea to manslaughter said that:

Given the complex circumstantial nature of the case, Mr Watson's admission that he breached his duty to render assistance to his wife ultimately meant that there was no reasonable prospect of proving, beyond a reasonable doubt, that he was guilty of murder.<sup>23</sup>

<sup>13</sup> Statement of Senior Constable Netting, 10 September 2004, 'Michael McFadyen's Scuba Diving Web Site', above n 1 <<http://www.michaelmcfadyenscuba.info/watson/Dive%20gear%20tests.pdf>>.

<sup>14</sup> Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson* (Coroners Court, 124/03, Coroner Glasgow, 22 November 2007) 459-468 (Dr David Williams).

<sup>15</sup> Statement of Gabe Watson, 22 October 2003, 'Michael McFadyen's Scuba Diving Web Site', <[www.michaelmcfadyenscuba.info/watson/Gabe%20Watsons%20Statement%2022%20October%202003.pdf](http://www.michaelmcfadyenscuba.info/watson/Gabe%20Watsons%20Statement%2022%20October%202003.pdf)> [26]-[28].

<sup>16</sup> Asher Flynn and Kate Fitz-Gibbon, *A Second Chance for Justice: The Prosecutions of Gabe Watson for the Death of Tina Thomas* (Cambridge Scholars Publishing, 2013) 31-36.

<sup>17</sup> State of Queensland, 'Inquest into the death of Christine Mae Watson known as Tina Watson, Findings of Inquest' (2008) <[www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0003/86727/cif-watson-cm-20080424.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0003/86727/cif-watson-cm-20080424.pdf)> 11. The inquest took place under the *Coroners Act 1958* (Qld). The Queensland Coroner no longer has the power to commit in criminal matters: *Coroners Act 2003* (Qld).

<sup>18</sup> Flynn and Fitz-Gibbon, above n 16, 56.

<sup>19</sup> Transcript of Proceedings, *R v Watson* (Supreme Court of Queensland, Lyons J, 5 June 2009) 8.

<sup>20</sup> *R v Watson* [2009] QCA 279.

<sup>21</sup> Flynn and Fitz-Gibbon above n 16, 209-210.

<sup>22</sup> *Ibid* 9-11.

<sup>23</sup> *Ibid* 59, quoting Director Anthony Moynihan, cited in Cosima Marriner, 'DPP Defends Decision to Drop Bride Murder Charge', *Sydney Morning Herald* (New South Wales), 10 June 2009.

An admission of fact by the accused person dispenses with the need to prove the facts contained in the admission. It does not prevent the prosecution from leading evidence to prove further facts, such as evidence of intentional killing.<sup>24</sup> Traditionally, prosecutors have not provided public reasons for decision-making,<sup>25</sup> although practice on this point now differs between jurisdictions.<sup>26</sup>

The ODPP have declined to make further commentary on their reasons for agreeing to a plea to manslaughter. Flynn and Fitz-Gibbon have argued that the decision was made in the context of limited financial resources in the Queensland justice system<sup>27</sup> and the potentially high cost to the State of running a murder trial in the Watson case.<sup>28</sup> They suggest this may have influenced the ODPP's decision not to proceed with the murder charge.<sup>29</sup> The cost savings associated with obtaining guilty pleas without trial have been recognised as one of the main benefits to the State in plea negotiations.<sup>30</sup>

In a media interview in 2012, Gabe explained his decision to enter the plea to manslaughter in Queensland:

To fight the whole thing, I could have been held on remand for two, three, four, five years. The amount of money that it would have cost for a trial and the fact that the breach of duty of care – there was no way I could have been found not guilty.<sup>31</sup>

In addition, although not highlighted by Gabe in this passage, a wide differential in sentencing was present:<sup>32</sup> the punishment for murder in Queensland being mandatory life imprisonment,<sup>33</sup> while after the manslaughter plea the prosecution sought only five years imprisonment suspended after 18 months.<sup>34</sup> On its face, the plea to manslaughter offered substantial practical benefits to Gabe, and accepting the deal could be viewed as a rational response to his situation.

### B Plea Bargaining's 'Innocence Problem'

Plea bargaining refers to the offer of inducements by the prosecution to the defence to encourage a guilty plea, which may consist of a reduced proposed sentence on the original charge, or acceptance of a plea to a less serious charge. Plea bargaining has an

<sup>24</sup> See *Stuby v Western Australia* (2001) 207 A Crim R 202 (HCA); see also Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish, 2nd ed, 2004) 43-44.

<sup>25</sup> Sir Ken MacDonald, 'Coming Out of the Shadows' (Speech delivered at the inaugural Crown Prosecution Service lecture, London, 20 October 2008).

<sup>26</sup> *Ibid.* For further discussion on the policy considerations underlying the question of whether prosecutors should provide reasons, see J L J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 429-431 and Justice Goddard, 'Explaining Prosecution Decisions Publicly' [1996] *New Zealand Law Journal* 355.

<sup>27</sup> Flynn and Fitz-Gibbon, above n 16, 65-68.

<sup>28</sup> *Ibid* 68-70

<sup>29</sup> *Ibid* 70.

<sup>30</sup> See Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10, Parliamentary Library, Parliament of NSW, 2002) 52 and Asher Flynn, 'Fortunately We in Victoria Are Not in That UK Situation': Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform' (2011) 16:2 *Deakin Law Review* 361, 382-384.

<sup>31</sup> Ninemsn, 'Deep Trouble', *Sixty Minutes* (23 March 2012) interview (Gabe Watson) <<http://sixtyminutes.ninemsn.com.au/stories/8440110/deep-trouble>>.

<sup>32</sup> Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentence Rewards' [2000] *Criminal Law Review* 895, 897.

<sup>33</sup> *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 305.

<sup>34</sup> Director of Public Prosecutions, 'Submissions on Sentence', Submission in *R v Watson* (Supreme Court of Queensland, Lyons J, 5 June 2009) 1-35.

anomalous history. For much of the development of the English criminal justice system, not only was plea bargaining not recognized, but the practice of defendants entering guilty pleas was rare and often discouraged by the courts. It was only in the twentieth century, as procedural protections in the trial process resulted in longer trials, that the resolution of charges by plea became common.<sup>35</sup>

The practice of plea bargaining, and its effect on the adjudicative and appellate stages of the process, gives significant powers to the prosecutor. If unchecked by systems of accountability, these powers may lead to practices which may increase the likelihood of conviction of innocent accused. American scholars, for example, have linked the growth of plea bargaining in that jurisdiction to the growing power of prosecutors in the twentieth century, and their ability to select charges and therefore influence or control sentencing.<sup>36</sup> Thus, Adam Stern has noted the significance of the role of the prosecutor in the plea bargaining process:

Because the judge and jury are absent in the plea bargaining context, the prosecutor must bear the burden of avoiding punishing the innocent. This burden is made more difficult to bear because the plea bargaining process lacks the protections that contribute to the accuracy of trial convictions, in particular the beyond-a-reasonable-doubt standard, cross-examination, and witness impeachment. These protections guard the integrity of the criminal justice process and tend to expose weaknesses in the government's case which may not be apparent during plea bargaining.<sup>37</sup>

Oren Gazal-Ayal has argued that the insidious effect of plea bargaining on the plight of innocent defendants is not in the resolution of the case by plea, but in its impact on case screening by the prosecution.<sup>38</sup> Since many cases, even weak cases, can be resolved by plea if the inducements are strong enough, the prosecutor may be less inclined to screen out weak cases, leading to more innocent defendants facing charges. Further, there is a particular risk when there is a significant 'sentencing differential', referring to the difference between the potential sentence which the defendant might receive after conviction if the matter goes to trial, and the sentence given on plea.<sup>39</sup>

The impact of plea bargaining on innocent accused has been debated. Some scholars have argued that the practice offers the same benefits to the innocent accused as it does to the guilty, namely, allowing them to avoid harsh sentences on conviction.<sup>40</sup> Others have noted that the practice shifts the focus of the process from the state's duty to prove its case to the accused's ability to resist pressure to plead.<sup>41</sup>

The innocent individual is not well positioned to resist state power to plead. The financial burden of conducting a trial can be a significant inducement encouraging guilty

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<sup>35</sup> Albert W Alschuler, 'Plea Bargaining and Its History' (1979) 13(2) *Law & Society Review* 211.

<sup>36</sup> Lucian E Dervan, 'Bargained Justice: Plea-Bargaining's Innocence Problem and the *Brady* Safety-Valve' [2012] *Utah Law Review* 51, 61-62.

<sup>37</sup> Adam N Stern, 'Plea Bargaining, Innocence, and the Prosecutor's Duty to "Do Justice"' (2012) 25 *The Georgetown Journal of Legal Ethics* 1027, 1035.

<sup>38</sup> Oren Gazal-Ayal, 'Partial Ban on Plea Bargains' (2005) 27 *Cardozo Law Review* 2295.

<sup>39</sup> Dervan, above n 36, 64.

<sup>40</sup> Josh Bowers, 'Punishing the Innocent' (2008) 156:5 *University of Pennsylvania Law Review* 1117.

<sup>41</sup> John Baldwin and Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson, 1977) ch 4, quoted in Asher Flynn and Kate Fitz-Gibbon, 'Bargaining With Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35 *Melbourne University Law Review* 905.

pleas.<sup>42</sup> Not only does the individual lack the state's resources, they are also subject to the risk of serious penalty if they attempt to dispute accusations and fail. Experimental studies have suggested that the innocent may have a tendency to admit guilt in order to reduce punishment. In 2012, Lucian Dervan and Vanessa Edkins conducted a study in which college students were falsely accused of cheating on an exam: over half of the innocent students admitted guilt in return for a reduced penalty rather than dispute the allegation.<sup>43</sup> The accused person's 'voluntary' participation in the process makes it difficult for the party most directly affected, and likely having the best knowledge of the case, to question the merits of the bargain they have entered into.<sup>44</sup>

### C The Legal Basis for the Watson Manslaughter Plea

Manslaughter is an unlawful killing which does not constitute murder.<sup>45</sup> Per s 293 of the Queensland Criminal Code (QCC), a person who causes the death of another is deemed to have killed that person.<sup>46</sup> Gabe's plea to manslaughter was made pursuant to s 290 of the QCC, which states:

When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is the person's duty to do that act: and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.<sup>47</sup>

The basis for criminal liability to manslaughter under s. 290 is significantly different from murder. The police investigation focused on the question of whether Gabe intentionally ended Tina's life. The prosecution's plea bargain, however, rested on the premise that Gabe did nothing to cause the Tina's problems in the water, but that he committed a criminal act by failing to rescue her.

For Gabe to have caused Tina's death by failing to rescue her pursuant to s. 290, two conditions would have to be met. The first is that there was a duty to act recognised in law. Specifically there would have to be a duty on Gabe as Tina's dive buddy to bring her to the surface in the circumstances which occurred on the fatal dive. The second is that the failure to act amounts to gross negligence; that a failure to bring the buddy to the surface in the circumstances faced by the Watsons would be grossly negligent.

The sentencing was based on an agreed statement of facts (the 'Agreed Statement').<sup>48</sup> The Agreed Statement specified several breaches of duty by Gabe, which Lyons J summarized as the failure to bring Tina to the surface when she was in distress.<sup>49</sup>

Divers are trained to ascend in normal circumstances, and in most emergencies, by swimming to the surface while maintaining neutral buoyancy, releasing air from their buoyancy control device, or BCD (a jacket with an adjustable air bladder) if necessary.<sup>50</sup>

<sup>42</sup> Duncan Watson, 'The Attorney General's Guidelines on Plea Bargaining in Serious Fraud: Obtaining Guilty Pleas Fairly?' (2010) 74 *Journal of Criminal Law* 77.

<sup>43</sup> Lucian E Dervan and Vanessa A Edkins, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' (2013) 103:1 *The Journal of Criminal Law & Criminology* 1.

<sup>44</sup> Mike McConville and Chester Mirsky, 'The Skeleton of Plea Bargaining' [1992] *New Law Journal* 1373, 1381.

<sup>45</sup> *Criminal Code (Qld)* s 303.

<sup>46</sup> *Ibid* s 293.

<sup>47</sup> *Ibid* s 290.

<sup>48</sup> 'Statement of Facts', Exhibit One, *R v Watson*, SC 438/2009, 5 June 2009, 20 ('Agreed Statement').

<sup>49</sup> Transcript of Proceedings, *R v Watson* (Supreme Court of Queensland, Lyons J, 5 June 2009) 3.

<sup>50</sup> See, ie, Scuba Schools International, *Open Water Diver Manual* (SSI, 2007) 3-31 to 3-34 ('SSI Open Water Diver Manual').

Although a diver can ascend by inflating a BCD to create what is called positive buoyancy, this is an emergency procedure which carries a risk of serious injury to the diver.

This is because of how air under pressure affects a scuba diver underwater. Buoyancy is the result of the interaction of two forces: an upward force equivalent to the weight of the water displaced by the diver<sup>51</sup> and the downwards force of the diver's weight. The net balance of these two forces will determine if the diver's buoyancy is positive, negative, or neutral. Divers can alter their buoyancy by adding or removing weights or by increasing or decreasing their volume using the BCD.<sup>52</sup> However, as a diver ascends, the water pressure reduces,<sup>53</sup> and any air in or on the diver's body expands.<sup>54</sup> If there is unreleased air in the BCD, the expanding air displaces more water, making the diver more buoyant and potentially causing an uncontrolled accelerating ascent.<sup>55</sup> If an ascending diver holds his or her breath, or on a fast ascent fails to exhale quickly enough, the expanding air in the diver's lungs may cause the lungs to rupture. A lung expansion injury can be fatal.<sup>56</sup>

These issues are either minimized or ignored within the Agreed Statement. First, the Agreed Statement notes incorrectly that 'When the diver wishes to ascend they increase the inflation of the BCD causing them to rise.'<sup>57</sup> Further, the Agreed Statement is entirely silent on the risk of a buoyant ascent. Finally, it does not identify any other risks associated with underwater rescues.

This is at considerable variance from standard training within the dive industry. For example, the PADI rescue diver manual notes the danger to the rescuer in dealing with a panicked diver underwater:

Assisting a diver with active panic underwater poses a serious situation for both you and the victim. ... As with panic on the surface, the victim may claw, grab and struggle with tremendous strength, possibly yanking out a rescuer's second stage or knocking off the mask.<sup>58</sup>

If Gabe had been prosecuted for manslaughter on the standard of criminal negligence, evidence by a properly qualified expert on scuba diving rescues would have

<sup>51</sup> This is known as Archimedes Principle: Marlow Anderson, *The Physics of Scuba Diving* (Nottingham University Press, 2011) 17. Displacement is determined by the volume of the diver's body and equipment.

<sup>52</sup> Dennis Graver, *Scuba Diving* (Human Kinetics, 4<sup>th</sup> ed, 2010), 74-76.

<sup>53</sup> Each 10 metres of water is the equivalent of an atmosphere ('atm') of pressure. Therefore, a diver at 10 metres is subject to 2 atm of pressure (10 metres of water, plus an atmosphere of air on the surface), and a diver at 30 metres is subject to 4 atm of pressure (3 atm due to the 30 metres of water, plus the surface): Anderson, above n 51, 27-29.

<sup>54</sup> The volume of gas varies inversely with changes in pressure. Boyle's law is that if temperature remains constant, the pressure and volume of a gas in a flexible container will vary inversely. In mathematical terms,  $P_1V_1 = P_2V_2$ : Anderson, above n 51, 29-31.

<sup>55</sup> The expanding air would displace a greater volume of water, and according to Archimedes' principle, increase the upwards force on the diver caused by the displaced water. See Anderson, above n 51.

<sup>56</sup> Michael B Strauss and Igor V Aksenov, *Diving Science: Essential Physiology and Medicine for Divers* (Human Kinetics, 2004) 290-295.

<sup>57</sup> *Ibid.*, above note 49 [18].

<sup>58</sup> *PADI Rescue Diver Manual, Revised Edition* (PADI, 2008) 133. PADI is the Professional Association of Diving Instructors. It is the world's largest certification agency: 'PADI History, The PADI Story' <<http://www.padi.com/scuba/about-padi/padi-history/Default.aspx>>. Other such training organizations exist, including SSI, or Scuba Systems International.

been required as a component of the Crown's case. That expert would have been made available for cross examination, and their testimony would provide context which would create a significantly more detailed factual foundation for the conclusions. By contrast, the Agreed Statement, seemingly written by non-experts, contained errors and omissions which combined to create a misleading picture of the challenges of an underwater rescue. This artificial picture was then adopted as 'fact,' pursuant to the agreement.

The problematic factual foundation created by the Agreed Statement of Facts carried over into appellate proceedings, when the Attorney General appealed the sentence. In deciding to increase Gabe Watson's sentence, Chief Justice de Jersey described the act of bringing Tina to the surface as 'simple to accomplish',<sup>59</sup> while Justice Chesterman described the options open to Gabe as including holding his wife, inflating his BCD and "floating to the surface."<sup>60</sup>

The conclusions reached by the court of appeal were neither purely based in agreement nor in adjudication. No evidence was heard, and the Agreed Statement of Facts provided an inadequate foundation. In these circumstances, the court was led into speculation in areas requiring specialized knowledge – how Gabe's conduct compared to ideal practice, to that of other divers in real-world situations, to his training, and most critically, to the risks inherent in the conduct he was criminally censured for failing to perform.

#### D Do Scuba Buddies 'Undertake' to Rescue?

The conviction for manslaughter in the Watson case, achieved by plea bargain, was a result which it is suggested could not have been established at trial. The plea bargain did not give the court the benefit of legal submissions made on the basis of an evidentiary foundation regarding scuba diving practice. Nor did it reveal the issues with the Agreed Statement of Facts.

In common law and under the *QCC*, an omission to act does not create criminal liability other than in narrowly defined circumstances where there is a duty to act.<sup>61</sup> Section 290 is part of Chapter 27 of the *QCC*, 'Duties Relating to the Preservation of Human Life'. The courts have recognised that the provisions of Chapter 27 were 'probably originally designed to cater for questions of causation arising out of cases of "pure" omission or failure to act'.<sup>62</sup>

Under s. 290, there is a duty to act only if there is an undertaking. The term 'undertaking' is not defined. There are no reported cases applying s 290 in Queensland and the term undertaking as used in s 290 does not appear to have been judicially interpreted by the Queensland courts. Historically, the common law recognised a duty to act in certain circumstances, one of which was where there was an undertaking to act. This could arise from contractual duties.<sup>63</sup>

<sup>59</sup> *R v Watson*, [2009] QCA 279, [37].

<sup>60</sup> *Ibid* [84].

<sup>61</sup> *Burns v The Queen*, (2012) 246 CLR 334 (HCA), [97], [128]-[131] and the *Criminal Code (Qld)* s 23.

<sup>62</sup> *R v Patel* (2012) 86 ALJR 954 (HCA) [14].

<sup>63</sup> In *R v Pittwood* (1902) 19 TRL 37, a railway gate keeper had failed to close the gate at a railway crossing, with the result that a cart was struck by a train. His responsibility as an employee of the railway was to ensure that the gate was closed. See also PR Glazebrook, 'Criminal Omissions: The Duty Requirement in Offences against the Person, (1960) 56 *Law Quarterly Review* 386 and authorities cited therein. Andrew Ashworth has questioned whether breach of contract should give rise to criminal liability: Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 51.

A section with similar wording to s 290<sup>64</sup> was interpreted in the Canadian case of *R v Browne*, a decision of the Ontario Court of Appeal. The court found that the term ‘undertaking’ required a commitment ‘clearly made, and with binding intent’.<sup>65</sup>

Per the Agreed Statement, the undertaking was based on Gabe’s role as Tina’s dive buddy, not as her spouse.<sup>66</sup> Is a diver’s agreement to act as another diver’s buddy an undertaking within the meaning of s. 290? The term ‘buddy system’ has been criticised as not clearly defined by most diving reference works.<sup>67</sup> ‘Buddies’ may not be known to each other prior to the dive, and they may not be familiar with each other’s skills and abilities.<sup>68</sup> Although the Watsons were spouses, Tina’s limited experience suggests they had not completed numerous dives together, nor did they necessarily have extensive familiarity with each other’s abilities as scuba divers. Nor is the assistance buddies are expected to provide to each other underwater precisely specified in diving texts and manuals.<sup>69</sup> In the SSI Manual, it includes numerous aspects other than assistance in emergencies.<sup>70</sup>

Generally, one of the purposes of diving in pairs is safety. However, there are no specifics as to the nature of assistance expected in an emergency, or degree of risk buddies should undertake for each other. On emergencies, the SSI manual says:

[A] reason for always diving with a buddy is that, naturally, it is safer. In case of a problem, you may need someone there to assist you. Conversely, you are needed as a possible helpmate for your buddy. You make a difference to your buddy; you make his or her dive more comfortable just by being there.

If you both know what you are doing, if you have planned your dive and you are following the plan, and if you are both ready to deal with something unexpected, you will have assured yourselves of a comfortable dive.<sup>71</sup>

The manual also provides a ‘Responsible Diver Code’ which includes, inter alia, ‘Respecting the buddy system and its advantages’ and ‘Accepting the responsibility for my own safety on every dive’.<sup>72</sup>

This lack of consistency around what the ‘buddy system’ requires in accepted training protocols is problematic. Notably, this would also go against the High Court’s emphasis of the need for certainty in the interpretation of the criminal law:

The principles of criminal responsibility stated in the Code proceed from the view that the criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it.<sup>73</sup>

<sup>64</sup> Section 217 of the Canadian *Criminal Code*, RSC, 1985, c C-46, states: ‘Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.’

<sup>65</sup> *R v Browne*, 1997 CanLII 1744 (ONCA) [16].

<sup>66</sup> Agreed Statement, above n 48, [4].

<sup>67</sup> Bob Halstead, ‘Line Dancing and the Buddy System’ (2002) 30:1 *SPUMS Journal* 9.

<sup>68</sup> Andy Davis, ‘How to Dive with “Insta-Buddies”’, *Scuba Tech Philippines* (23 October 2012) <[http://scubatechphilippines.com/scuba\\_blog/how-to-dive-with-insta-buddies](http://scubatechphilippines.com/scuba_blog/how-to-dive-with-insta-buddies)>; Alex Brylske, ‘The Buddy System Re-examined’ (September 1996) *Scuba Diving – New Jersey and Long Island New York* <[http://njscuba.net/gear/trng\\_07\\_buddy.html](http://njscuba.net/gear/trng_07_buddy.html)>.

<sup>69</sup> See, eg, Graver, above n 52, 156-157.

<sup>70</sup> These include planning the dive together, assisting with pre-dive checks, remaining together during the dive, assisting with exiting the water if necessary, and sharing in the social aspects of diving. *SSI Open Water Diver Manual*, above n 50, 4-17-4-22.

<sup>71</sup> *Ibid* 4-18.

<sup>72</sup> *Ibid* 6-8.

A further question would be what circumstances would be covered by the alleged undertaking to rescue. The situations in which an emergency could arise are unpredictable, as this is the very nature of emergencies. A diver could not be expected to follow a reckless buddy into dangerous situations such as the unlighted interior of a wreck, or to initiate a buoyant ascent if the circumstances were such that the rescuer was at serious risk of suffering decompression sickness. If an undertaking to rescue is found in the buddy relationship, it would have to be constructed as a promise to perform specific acts of rescue in relation to emergency situations which could not be known at the time the undertaking was made.

#### E *Was the Standard of Gross Negligence Met?*

If the Watsons' agreement to act as dive buddies is assumed to have constituted an undertaking within the meaning of s 290 of the *QCC*, then the state would have to prove a breach of duty to establish manslaughter. This would require evidence on dive training and emergency procedures, including areas where appropriate diving practice and training may be controversial. For example, John Lippmann has suggested that dive agencies should increase the training time devoted to buoyant ascents due to the number of fatalities where divers fail to exercise this option.<sup>74</sup> Even without extensive information about the factual nexus of the sort that would have been required at trial, there would be significant problems with establishing a breach of the duty of care on the criminal standard.

In relation to other offences in Chapter 27, the courts have established that the breach must be assessed on a higher standard than negligence in civil law; what must be proven is 'gross' or 'criminal negligence'.<sup>75</sup> In *R v Hodgetts* the Queensland Court of Appeal noted that 'appropriate directions upon the nature of proof of criminal negligence are not well established ... They require, inter alia, recklessness involving grave moral guilt'.<sup>76</sup> In *Patel v The Queen*, the majority noted that the test for criminal negligence was objective, and did not take into account 'the subjective intentions of the accused or the accused's appreciation of the risk involved in his or her conduct'.<sup>77</sup> The possession of specialised knowledge may mean a person is held to a higher standard, although that standard will still be objective.<sup>78</sup> Gabe's rescue course from 1999 could fall into this category, although this conclusion presumes that Gabe could be considered actually to possess specialised knowledge as a result of training taken four years previously, with no refresher course. Even if he was held to possess some degree of specialised knowledge, thereby raising the standard to which he was held, the question would still be whether his decision-making in the circumstances was so far below the standard as to warrant criminal consequences.<sup>79</sup>

Gabe's decisions were made in a pressured, emergency situation which occurred very shortly after entering the water and which deteriorated within minutes. In *Yace v Dushane*,<sup>80</sup> a decision of the Court of Appeal of California, the deceased and Dushane

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<sup>73</sup> *Commonwealth Director of Public Prosecutions (Cth) v Poniatowska* [2011] HCA 43 at 44. See also *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20.

<sup>74</sup> John Lippmann, 'Diving Deaths Downunder: A Review of 34 years of Compressed Gas Diving Deaths in Australia' [2012] January-April *Alert Diver* 10, 15.

<sup>75</sup> *Patel v The Queen* [2012] HCA 29, [17]-[18]; *Callaghan v the Queen* (1952) 87 DLR 115; *R v Bateman* [1925] All ER Rep 45.

<sup>76</sup> *R v Hodgetts* [1990] 1 Qd R 456, 4.

<sup>77</sup> *Patel v The Queen* [2012] HCA 29, [87].

<sup>78</sup> *Ibid* 88.

<sup>79</sup> *Ibid* [89]-[90].

<sup>80</sup> *Yace v Dushane* (Court of Appeal of California, Second Appellate District, Division Eight, No. B162789, 16 December 2003).

were scuba diving buddies. When the deceased reached for Dushane's air he panicked and ascended without helping her. The court denied her children's civil suit, saying:

Unlike most other sports, the possibility of a life-threatening emergency in scuba diving is apparent, and indeed anticipated. Just as an emergency problem with air supply is itself an inherent risk of the sport, so also is the reaction to that emergency of one's diving buddy.<sup>81</sup>

The court noted that for Dushane to be liable for his buddy's death, a buddy would have to have a duty not to panic in emergencies, which the court decided it could not find.<sup>82</sup>

To prove a breach of the duty, the state would have to establish that in all the circumstances, Gabe not approaching Tina and dropping her weights or inflating her BCD to bring her to the surface was objectively grossly negligent. The state would also have to address the question of danger to the rescuer: Even where a duty to rescue has been recognized, the law has not extended it to situations where the rescuer is legally obligated to risk their life.<sup>83</sup>

### III THE CASE FOR MURDER

This article has argued that there are significant grounds to conclude that the plea bargain for manslaughter could not have been sustained if the state had been required to prove its case in a court of law. However, the deficiencies in the manslaughter case were only part of the picture. Gabe would not have been brought into the criminal justice system if not for the murder allegations, and the prospect of a life sentence on that charge was likely a significant inducement to enter into the manslaughter plea. The allegation of murder and public questioning of his guilt or innocence on that charge continued after the plea bargain. In this context, it is argued that the murder investigation and public statements made by the police about the evidence uncovered in that investigation gave rise to a misuse of state power in the Watson case.

An inter-departmental dispute between the police and the ODPP led to agents of the state taking inconsistent positions. The prosecutors determined that the charge of murder should not be taken to court, while the police subsequently made public assertions about their perceptions of the strength of the case for murder. The failure of the process to ensure that the police officers' beliefs about the evidence were tested on the criminal standard and ensured to be correct before they were aired in the media resulted in the state engaging in 'trial by media'. It is argued that this constitutes a separate form of miscarriage of justice, although occurring outside of the court process, when errors which occurred at the investigative stage were perpetuated in the public forum. The term 'extra-territorial injustice' is proposed for this form of state conduct.

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<sup>81</sup> Ibid 8.

<sup>82</sup> Ibid 10.

<sup>83</sup> Alexander McCall Smith, 'The Duty to Rescue and the Common Law' in Michael A Menlowe and Alexander McCall Smith (eds) *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth Publishing, 1993) 55, 71.

### A Extrajudicial Statements

The statements made by the police about the murder case raise questions of safeguards on the process by which public statements are made to ensure that the contents of such statements are not misleading or erroneous, and of fairness to an accused who has surrendered his or her right to contest charges by agreement with the state.

In exercising its prosecutorial function, the State and its agents should not have an interest in conviction, and they are bound by a duty of fairness to the accused in presenting the case in court.<sup>84</sup> It is well established that the Crown is expected to act as a model litigant,<sup>85</sup> and that this obligation applies to the State acting in its prosecutorial function.<sup>86</sup> The rationale for this rule has been variously attributed to the interests of the State in upholding the rule of law, to the public interest, and to the imbalance of power between the individual and the State.<sup>87</sup> Although the precise limits of this duty are not clearly established,<sup>88</sup> the scope of the obligation has been said to consist of ‘the old-fashioned, traditional and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary’.<sup>89</sup> The duties of a model litigant have been described as including placing no unfair burden on the other party, legal accuracy, and even the obligation to consider ‘common humanity’.<sup>90</sup>

The ethics of extra-judicial statements following trial is an area that has received little judicial or scholarly attention in the Commonwealth. Arguments may be made for and against openness in the criminal justice system. In the context of allowing cameras to record court proceedings it has been recognized that the public has a legitimate interest in the functioning of the criminal justice system, and access may serve the interests of transparency and accountability.<sup>91</sup> However, parts of evidence may be taken out of context and repeated, potentially damaging the image of organizations such as the police and the reputation of individuals. The office held by public officials and their knowledge of the case gleaned from their role as investigators potentially lend extra-judicial statements an authority they would not otherwise possess. Where these statements are poorly founded, there is the potential for injustice to the individual.

The potential effect of media coverage, particularly in high-profile cases such as the Watson case, on the public image of the police raises the problem of a potential conflict of interest.<sup>92</sup> The officials or organization making the decision to make public statements may have reputational interests at stake.<sup>93</sup> Murray Lee and Alyce McGovern have described how police organizations manage their relationship with the media in increasingly sophisticated ways.<sup>94</sup> At the same time, in a media environment where investigative journalism is becoming increasingly rare, statements such as press releases are less likely to be questioned, and may be repeated verbatim.<sup>95</sup>

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<sup>84</sup> Libke [71].

<sup>85</sup> Gabrielle Appleby, ‘The Government as Litigant’ (2014) 37:1 *UNSW Law Journal* 94.

<sup>86</sup> *Burrell v The Queen* (2008) 238 CLR 218 and *R v Taufahema* (2007) 228 CLR 232.

<sup>87</sup> Appleby, above n 85, 95-99.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Melbourne Steamship Co Ltd. v Moorehead* (1912) 15 CLR 333, 342.

<sup>90</sup> Zac Chami, ‘The Obligation to Act as a Model Litigant’ (2010) 64 *Australian Institute of Administrative Law Forum* 47, 50-55.

<sup>91</sup> Bruce A MacFarlane, ‘Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency’ (2001) 45 *Criminal Law Quarterly* 272.

<sup>92</sup> Frank Leishman and Paul Mason, *Policing and the Media* (Willan Publishing, 2003) 139-141.

<sup>93</sup> See discussion in Rita M Glavain, ‘Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What about the Duty of Confidentiality?’ (1995) 63 *Fordham Law Review* 1809.

<sup>94</sup> Murray Lee and Alyce McGovern, *New Directions in Critical Criminology: Policing and Media: Public Relations, Simulations and Communications* (Taylor and Francis, 2013).

<sup>95</sup> *Ibid.*

Statements which may damage the accused's reputation are particularly problematic where the accused person has entered into a plea agreement with the state. The accused in these circumstances has surrendered his or her right to demand that the prosecution prove all elements of their accusation of criminal conduct beyond a reasonable doubt. The question of fairness is invoked here. The state accepts the benefit of the deal, being relieved of the cost of running a trial and securing a conviction without being put to the obligation of proving its case beyond a reasonable doubt. For agents of the state to make poorly founded assertions about evidence the state has declined to call brings into question whether the state has conducted itself in accordance with its duties of fairness or instead has created a form of injustice. Given the high stigma associated with the crime of murder, the potential for injustice due to reputational damage is enormous.

### B *The Legal Basis for the Watson Murder Case*

The case for murder against Gabe was based on the theory that he had intentionally killed Tina underwater by turning off her air. In 2010, after the conclusion of the Queensland sentencing, the lead investigators Detective Campbell and Detective Gehringer participated in a two-part ABC examination of the case titled 'Unfathomable',<sup>96</sup> in which Detective Campbell explained the police theory of the case:

I believe Gabe has pulled Tina face first onto his chest and from there he has turned her air off. I believe she has fought back and probably one of the few truths that Gabe has said underwater, she did damage some of his diving gear, um, has probably dislodged his mask and or regulator in a very short time though, she has been rendered unconscious. He then realises that he has to turn her air back on and he swims down onto her descending body and ... turns the air tank back on.<sup>97</sup>

Detective Gehringer stated that 'I honestly think that just prior to her death she was fighting for her life'.<sup>98</sup>

In interviews, the investigating officers emphasised several elements of the case for murder against Gabe. This section will consider each of the following issues in the murder case which were emphasized in publicly made statements by the investigating officers:

- A re-enactment: Police divers attended the Yongala and carried out a re-enactment of the fatal dive, the results of which were said to be inconsistent with Watson's description of what occurred.
- Computer evidence of Gabe's ascent rate: Gabe's dive computer allegedly showed a slow ascent from the deepest point of the dive, which was thought to be inconsistent with his story that he was urgently attempting to get help for Tina.
- Gabe's computer battery problem: Gabe and Tina aborted their first dive after Gabe's computer beeped to indicate a battery problem. The suggestion was that Gabe had lied about the problem to delay entering the water until after the majority of divers had descended.<sup>99</sup>

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<sup>96</sup> ABC, 'Unfathomable: Part One', *Australian Story*, 2 August 2010 <<http://www.abc.net.au/austory/specials/unfathomableone>> and ABC, 'Unfathomable: Part Two', *Australian Story*, 9 August 2010 <<http://www.abc.net.au/austory/content/2007/s2978042.htm>>.

<sup>97</sup> 'Unfathomable: Part Two', *ibid*.

<sup>98</sup> 'Unfathomable: Part One', *ibid*.

<sup>99</sup> Flynn and Fitz-Gibbon above n 16, 21.

- The observations of Dr Stanley Stutz: A witness saw two divers believed to be Gabe and Tina under water. The police believed his evidence was inconsistent with parts of Gabe's story, and they suggested that what the witness observed was Gabe turning Tina's air back on.
- The opinions of Kenneth Snyder and Douglas Milsap: two divers who were on the boat who said that Gabe's story of what had occurred was implausible as an account of a diving accident.

### C The Circumstantial Case

This article argues that the case for murder depended on evidence of questionable admissibility and probative value, and that at a minimum it was insufficient to overcome a reasonable doubt as to guilt. It will be argued, further, that some of the evidence discussed suggests Gabe was factually innocent of the charge of murder. The case, however, was not only convincing to the investigating officers: the Coroner committed Gabe to stand trial for murder and the ODPP initially indicted him for murder. Much of the evidence discussed here depended on poorly founded assumptions about scuba diving, an area requiring specialized knowledge. However, there are also questions about the nature of the circumstantial case constructed against Gabe, particularly the probative value of lies, the question of motive, and the issue of how accidental explanations for Tina's death were excluded.

In 'Unfathomable', the investigating officers placed emphasis on their inability to verify Gabe's version of events. They described the alleged lies as an important point convincing them of his being guilty of murder.<sup>100</sup> However, even taking the construction of the evidence most favourable to the police and assuming some lies could have been established, this would not necessarily be probative of murder.

A lie is a form of post-offence conduct taken to indicate consciousness of guilt.<sup>101</sup> However, people tell lies for numerous reasons such as fear, embarrassment, or guilt relating to something other than the offence under investigation.<sup>102</sup> David Hamer suggests that the broad inference that a lie establishes guilt requires multiple inferential steps: that the lie had 'no innocent explanation, and was motivated by consciousness of guilt', that the guilt was guilt regarding the charged offence, and that the consciousness of guilt could be correlated to actual guilt in law (as a belief in guilt might be formed in ignorance of potential defences).<sup>103</sup> Given the frailties of this type of evidence, Andrew Palmer has questioned whether a case based solely on consciousness of guilt without other evidence can amount to proof beyond a reasonable doubt.<sup>104</sup> On the facts of the Watson case, even if the alleged lies could be proved they would have an obvious explanation: Gabe was having feelings of guilt, shame, or embarrassment for having failed to rescue his wife. Using the language of consciousness of guilt, he had reason to feel guilty.

A further question is whether there was a motive. Coroner Glasgow found that some evidence of a 'possible motive' would be admissible based on Tina's life insurance. Although Gabe was not the beneficiary of this insurance,<sup>105</sup> Tina's father Tommy Thomas said that Tina had told him Gabe asked her to make him the beneficiary of her insurance.

<sup>100</sup> 'Unfathomable: Part One', above n 96.

<sup>101</sup> Andrew Palmer, 'Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime' (1997) 21 *Melbourne University Law Review* 95, 123.

<sup>102</sup> *Edwards v The Queen* (1993) 178 CLR 193 (HCA).

<sup>103</sup> David Hamer, "'Hoist With His Own Petard'?: Guilty Lies and Ironic Inferences in Criminal Proof" (2001) 54 *Current Legal Problems* 377, 382.

<sup>104</sup> Palmer, above n 101, 107, contra *Woon v The Queen* (1964) 109 CLR 529.

<sup>105</sup> Flynn and Fitz-Gibbon, above n 16, 142.

Mr Thomas said he told Tina to wait until after the honeymoon, but that if Gabe asked she should tell him it was done.<sup>106</sup> Coroner Glasgow said Mr Thomas' evidence was that 'it was resolved that Tina would tell Gabe' that the change had been made.<sup>107</sup> However, Mr Thomas did not appear to say Tina actually expressed agreement with her father's suggestion.<sup>108</sup>

The conclusion that this evidence would be admissible is arguable. Gabe's alleged request, if admitted for the truth of its contents, would be hearsay.<sup>109</sup> Per *R v Walton*, statements by a deceased person about a future intention may be admissible.<sup>110</sup> The evidence then is not hearsay but direct evidence seeking to establish the intention of the deceased. However, this authority may not be applicable to Mr Thomas' evidence since Tina does not appear to have expressed agreement with his suggestion. Further, to reach the conclusion that Gabe believed he was the beneficiary of Tina's insurance, several inferences would have to be drawn. It would have to be found that Tina had actually formed the intention to lie to Gabe, requiring the conclusion that Tina was being honest with her father, despite her alleged willingness to lie to her fiancé. It would also have to be found that Gabe actually asked Tina about the insurance. Finally, it would have to be found that Tina's intention remained fixed and did not change after her conversation with her father. Even if the evidence were admissible, there is a further question of what weight the evidence of insurance, without more, would possess given that spouses do commonly name each other beneficiaries of life insurance and other benefits on death.

Further, for a case based entirely on circumstantial evidence to amount to proof beyond a reasonable doubt, the facts cannot be consistent with an alternative rational explanation for the event in question.<sup>111</sup> The question then would be how the prosecution could conclusively exclude the possibility of a diving accident.

#### D *The Re-enactment*

In September 2006, the police dive squad conducted a re-enactment in which they attempted to reproduce the circumstances of the fatal dive to test Gabe's story.<sup>112</sup> Dives were conducted over three days on which the currents were believed to be similar to the fatal dive. A diver playing the role of Tina allowed himself to drift, from the place on the wreck at which Gabe and Tina were believed to have separated, to the bottom.<sup>113</sup> Singleton dived with the police squad and identified a location on the bottom where he said he had retrieved Tina. The police diver playing Tina conducted five drifts. Three were

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<sup>106</sup> Statement of Tommy Thomas, 'Michael McFadyen's Scuba Diving Web Site' (27 April 2007) <[www.michaelmcfadyenscuba.info/watson/Thomas%20Tommy%20statement%202007.pdf](http://www.michaelmcfadyenscuba.info/watson/Thomas%20Tommy%20statement%202007.pdf)>. See also Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson* (Coroners Court, 124/03, Coroner Glasgow, 25 January 2008) 68-69 (Tommy Thomas).

<sup>107</sup> State of Queensland, above n 17 [52].

<sup>108</sup> Statement of Tommy Thomas, 27 April 2007, above n 106. See also *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson*, above n 106, 68-69 (Tommy Thomas).

<sup>109</sup> Gans and Palmer, above n 24, 178-180.

<sup>110</sup> *R v Walton* (1989) 166 CLR 283 (HCA).

<sup>111</sup> *Martin v Osborne* (1936) 55 CLR 367; *Plomp v The Queen* (1963) 110 CLR 234; *Doney v The Queen* (1990) 171 CLR 207 (HCA); *Shepherd v The Queen* (1990) 51 A Crim R 181 (HCA).

<sup>112</sup> Running Sheet for Operation Charlie-Oswald, 20-22 September 2006, available on 'Michael McFadyen's Scuba Diving Web Site' <[www.michaelmcfadyenscuba.info/watson/Police%20Re-enactment%20Running%20Sheet.pdf](http://www.michaelmcfadyenscuba.info/watson/Police%20Re-enactment%20Running%20Sheet.pdf)>.

<sup>113</sup> *Ibid* item 15.

conducted above the wreck, at what was believed by the police to be the point of separation. On each, he landed on the wreck,<sup>114</sup> around 16 metres from the place Singleton said he retrieved Tina.<sup>115</sup> Another two drifts were conducted, one from the bow, and the other from a point 10 metres perpendicular to the wreck off the diver access line. Each time the police diver playing the role of Tina, Senior Constable Joshua Kinghorn, landed between seven and eight metres from the point identified by Singleton.<sup>116</sup>

In interviews with Flynn and Fitz-Gibbon, Detective Gehringer emphasized the re-enactment as evidence which persuaded him of Gabe's guilt:

And that was probably the point for me ... [I thought] he's definitely—he's murdered her. Because in my mind, there is absolutely---and from everything that Gabe told me—there is no reason for him to have taken Tina out 15-16 metres away from the Yongala.<sup>117</sup>

Regarding his perception of the probative value of this evidence, he said:

I used to think to myself ... if I was a member of the jury and I've seen all the evidence ... that [the dive re-enactment] was probably the clincher for me. Why would you take someone that distance away?<sup>118</sup>

The five drift dives conducted by the dive squad did not attempt to simulate a separation 15-16 metres from the Yongala. In addition, Gary Stempler, who was diving with Singleton, said in a statement given on the day of the fatal dive that he estimated Tina was 20-25 feet (6.1-7.6 metres) from the wreck, closer than Detective Gehringer seems to be suggesting she was found.<sup>119</sup>

Demonstrations and re-enactments can be admissible as evidence in a criminal trial,<sup>120</sup> but the prosecution must establish that the conditions under which the demonstration/experiment was undertaken were sufficiently similar to the event being replicated to justify reliance on the results.<sup>121</sup> Experiments may have to be conducted by an expert, depending on the subject matter of the experiment and the 'degree of precision claimed for the results of the experiment'.<sup>122</sup>

The dive squad re-enactment involved complex movement in a literally fluid three dimensional environment. For the results to be reliable and therefore admissible at trial, a number of factors had to be accurate:

1. The point of separation had to be accurately identified. How the dive squad pinpointed this place from Gabe's statements is unclear. However, the place the police determined to be the point of separation relied on the supposed fact, or presumption, that Gabe was in fact accurate in his estimation. Yet Gabe had never dived on the Yongala before, and he was on the wreck for only minutes in

<sup>114</sup> Ibid.

<sup>115</sup> Ibid items 15 and 20.

<sup>116</sup> Ibid item 20.

<sup>117</sup> Asher Flynn and Kate Fitz-Gibbon, 'Interview with Detective Senior Constable Kevin Gehringer', quoted in Flynn and Fitz-Gibbon, above n 16, 31.

<sup>118</sup> Ibid 168.

<sup>119</sup> Statement of Gary Stempler, 22 October 2003, 'Michael McFadyen's Scuba Diving Web Site', <<http://www.michaelmcfadyenscuba.info/watson/Stempler%20statement%2023%20Oct%202003.pdf>> [21].

<sup>120</sup> A demonstration may include a reconstruction of an event, while an experiment involves testing an hypothesis: Gans and Palmer, above n 24, 6.6.2-4.

<sup>121</sup> *Scott v Numurkah Corporation* (1994) 91 CLR 300 (HCA); *Grosser v South Australian Police* (1994) 63 SASR 243; *R v Fernandez* (1996) 133 FLR 477; *R v Kelly* [1996] TASSC 44 (15 May 1996).

<sup>122</sup> *R v Ireland (No 2)* (1971) SASR 6, 14.

an emergency situation. Immediately prior to separation, he had been towing his wife through the water, then replacing his mask and regulator.

2. Singleton had also accurately to identify the point where he found Tina. Singleton describes his identification as 'within a metre or two'.<sup>123</sup> Singleton was also responding to an emergency situation: he saw Tina on the bottom, went directly to her, and brought her to the surface as quickly as possible.<sup>124</sup>
3. The current direction and speed had to be very similar to the fatal dive. The Yongala is known for currents which can change quickly.<sup>125</sup> The police consulted with an oceanographer who provided dates over three months where the tidal effects on the currents would be 'as similar as possible'.<sup>126</sup> This oceanographer noted that the actual currents would be affected by other factors such as the weather, which would be less predictable than the tides.<sup>127</sup> Otherwise, the police depended on Singleton's advice that the current was similar.<sup>128</sup> Again, this depends on the accuracy of Singleton, who was in the water for only minutes, three years previously.<sup>129</sup> Other divers' descriptions of the currents around the time of the fatal dive varied.<sup>130</sup>
4. Senior Constable Joshua Kinghorn, who played the role of Tina, had to have the same physical characteristics at Tina, particularly relating to buoyancy. Kinghorn weighed 77.5 kg and was 163 cm tall. Tina weighed 63 kg and was 174 cm tall.<sup>131</sup> This suggests significant differences in body composition.

<sup>123</sup> Statement of Wade Singleton, 30 August 2007, 'Michael McFadyen's Scuba Diving Web Site' <[www.michaelmcfadyenscuba.info/watson/Singleton%20various%20statements.pdf](http://www.michaelmcfadyenscuba.info/watson/Singleton%20various%20statements.pdf)> 1.

<sup>124</sup> The police referred to a photograph taken by Gary Stempler, showing Tina on the bottom: Michael McFadyen's Scuba Diving Web Site, 'The Photo' <<http://www.michaelmcfadyenscuba.info/images2/stempler-photo.jpg>>. The photo has a shape in one corner which they attempted to correspond to part of the wreck: Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson* (Coroners Court, 124/03, Coroner Glasgow, 26 November 2007) 711-712 (Joshua Kinghorn).

<sup>125</sup> Statement of David Lemsing, 22 October 2003, available at Michael McFadyen's Scuba Diving Web Site, 'Tina Watson - Death Evidence from Witnesses and Other Persons' <<http://www.michaelmcfadyenscuba.info/watson/Lemsing%20Statements.pdf>> [125]. See also Viduka, above n 5, 4-5 <<http://www.aicomos.com/wp-content/uploads/vidukayongala.pdf>>.

<sup>126</sup> Flynn and Fitz-Gibbon, above n 16, 169.

<sup>127</sup> Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson*, (Coroners Court, 124/03, Coroner Glasgow, 30 November 2007) 1051-1063 (Dr Richard Brinkman).

<sup>128</sup> The drift part of the re-enactment occurred over two days. On the first Singleton is described as saying the current was 'near identical ... however, current was a little bit stronger over the top of the wreck.': Running Sheet, above n 113, item 15. The second day he is described as being present in the water, but observations of the current are not recorded: at items 18-22.

<sup>129</sup> Statement of Christopher Coxon, 12 November 2003, available on 'Michael McFadyen's Scuba Diving Web Site' <<http://www.michaelmcfadyenscuba.info/watson/Coxon%20statement.pdf>>.

<sup>130</sup> See Michael McFadyen's comments on the evidence on the current: Michael McFadyen, 'The Current' <[http://www.michaelmcfadyenscuba.info/viewpage.php?page\\_id=817](http://www.michaelmcfadyenscuba.info/viewpage.php?page_id=817)>.

<sup>131</sup> Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson*, (Coroners Court, 124/03, Coroner Glasgow, 26 November 2007) 694 (Joshua Kinghorn). At the coroner's inquest, Kinghorn testified that he would

Although Detective Gehringer described the re-enactment as ‘very mathematically correct and distances were exact’,<sup>132</sup> this reflects careful documentation of the results of a flawed experiment. The challenges in recreating the fatal dive raised issues rarely encountered by the law other than in aviation cases. The re-enactment could be compared to an attempt to reconstruct a plane crash three years later based on one pilot’s report of his position in the air, and another pilot’s subjective recollections of wind speed, direction, and crash location, while flying a different plane. However, the re-enactment was treated as key evidence of guilt by the police.

#### E *The Computer Evidence of Gabe’s Ascent Rate*

Another factor which led the police to conclude Gabe was guilty of murder was the speed of his ascent to the surface after separating from Tina as determined by his dive computer. In ‘Unfathomable’, the investigating officers said:

Gehringer: One of the really big things that we focused on was Gabe’s version where he said he rocketed to the surface to seek help for Tina.

Campbell: When we compared it to the [computer test] results ... we found that Gabe had only descended to 15 metres and it took him between two and three minutes to reach the surface to raise a call for help. Speaking to various people in the dive industry ... that was classed by some as literally pedestrian under the given circumstances.<sup>133</sup>

There are a number of factors which make the assumptions about the ascent rate questionable.

Gabe’s ascent is variously described by the police as taking two and a half minutes,<sup>134</sup> and two to three minutes,<sup>135</sup> presumably based on Gabe’s computer data. Gabe’s computer had significant limitations, including recording events only in minutes, not seconds.<sup>136</sup> The computer data showed him reaching the deepest point in the sixth minute and the surface in the eighth minute of the dive, meaning that the ascent could have taken less than two minutes.<sup>137</sup>

Gabe told the police that he initially swam at an angle to reach two divers on the descent line, and only proceeded directly to the surface after he was unable to communicate the problem to them.<sup>138</sup> The police concluded that this was a lie because none of the divers on either of the two boats present at the dive site confirmed Gabe’s story.<sup>139</sup> Alternative explanations might be that the other divers did not recall the contact,

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have been more buoyant than Tina because he was larger: at 695. This does not take into account his greater weight, which would have affected how his buoyancy compared to Tina’s.

<sup>132</sup> Detective Senior Constable Kevin Gehringer quoted in Flynn and Fitz-Gibbon, above n 16, 31.

<sup>133</sup> ‘Unfathomable Part One’, above n 96.

<sup>134</sup> Flynn and Fitz-Gibbon, above n 16, 168, quoting Queensland Police Service, ‘Investigation into the Death of Christina Mae Watson Nee Thomas whilst Scuba Diving off Townsville – 22<sup>nd</sup> October 2003’, Operation Charlie Oswald QPS Report (Townsville), 15 November 2007.

<sup>135</sup> ‘Unfathomable: Part Two’, above n 97 (Detective Sergeant Gary Campbell).

<sup>136</sup> ‘Gabe Watson’s Computer Download – Second Dive (Table)’, above n 8.

<sup>137</sup> Carl Edmonds, ‘Case report: A forensic diving medicine examination of a highly publicised scuba diving fatality’ (2012) 42(4) *Diving and Hyperbaric Medicine* 224, 228.

<sup>138</sup> Statement of Gabe Watson, 27 October 2003, available on Michael McFadyen’s Scuba Diving Web Site,

<[www.michaelmcfadyenscuba.info/watson/Gabe%20Watson%20Police%20Interview%2027%20Oct%202003.pdf](http://www.michaelmcfadyenscuba.info/watson/Gabe%20Watson%20Police%20Interview%2027%20Oct%202003.pdf)> tape 2, 21.

<sup>139</sup> Flynn and Fitz-Gibbon, above n 16, 26. Tina’s father Tommy Thomas suggested to Flynn and Fitz-gibbon that in the sentencing Gabe admitted that his story of approaching other divers was a lie: at

did not understand Gabe was seeking help, or were reluctant to acknowledge that they did not assist in an emergency.<sup>140</sup>

Gabe's (assumed) ascent rate was compared to Singleton's ascent with Tina.<sup>141</sup> In 'Unfathomable', Detective Campbell says:

We compared that dive profile of [Gabe] to the dive profile of Wade Singleton. Wade Singleton had gone to twice the depth and from the point that he has picked up Tina on the ocean floor and gone to the surface, he has covered twice the distance in nearly half the time. In addition to that, he was carrying Tina, who was not assisting in her own ascent.<sup>142</sup>

However, the comparison between the two ascents is misleading. Gabe told the police that he swam up.<sup>143</sup> Singleton, an experienced professional diver, had removed his weight belt<sup>144</sup> and inflated Tina's BCD<sup>145</sup> thereby using buoyancy to aid in the ascent. Singleton's skill as a diver would affect his ability to control the ascent. Further, Detective Campbell's statement that Tina was not assisting in her ascent is inaccurate; although she was not consciously assisting, Singleton was using the buoyancy of Tina's BCD to aid in the ascent.<sup>146</sup>

#### F *Gabe's Computer Battery Problem*

Prior to the fatal dive, Gabe and Tina aborted their first attempt at a dive and came back to the boat after Gabe had a problem with a battery in his dive computer. In 'Unfathomable', Detective Campbell said Gabe had told:

absolute lies, like when he said his dive computer beeped and he had to return to the dive boat ... and discovered the battery was in backwards ... His actions in relation to the dive computer were a straight out lie and that then raised the question with us, what was he trying to hide?<sup>147</sup>

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92. However, the relevant paragraph of the Agreed Statement reads: 'The prisoner stated [to Detective Gehringer] that he swam back over the anchor rope and started going up. At about 20 feet he saw some people hanging onto the rope. He tapped them to gain their attention and pointed in the direction of the deceased however he had no way of telling them what he needed. The Crown allegation is that the prisoner did not approach anyone on the line. His point of surfacing was inconsistent with being on or close to the access line: 'Statement of Facts', Exhibit One, *R v Watson*, SC 438/2009, 5 June 2009 [45]. The Agreed Statement notes competing stories and describes the Crown's allegation rather than containing an admission of lying.

<sup>140</sup> Assuming the angled ascent, Dr Carl Edmonds has calculated Gabe's swimming speed as ranging from fast to very fast depending on the strength of the current he was swimming against: Edmonds, Case Report, above n 138, 228. Edmonds further notes that the dive computer records of Gabe's air consumption during the dive indicate it was very high, indicating anxiety and effort: *Ibid*, 227.

<sup>141</sup> Flynn and Fitz-Gibbon, above n 16, 168, quoting Queensland Police Service, above n 135.

<sup>142</sup> 'Unfathomable: Part One', above n 96 (Detective Sergeant Campbell).

<sup>143</sup> Statement of Gabe Watson, 27 October 2003, above n 139, tape 2, 21.

<sup>144</sup> Statement of Wade Singleton, October 22, 2003, above n 1, [33].

<sup>145</sup> Flynn and Fitz-Gibbon, above n 16, xix.

<sup>146</sup> Although Watson in theory could have initiated a buoyant ascent with Tina if he had remembered the procedure, as a much less experienced diver than Singleton the risk his ascent would be uncontrolled (ie by adding too much air to the BCD) was much greater. This would also have required Gabe to dispassionately accept the risk of rupturing his wife's lungs on the ascent.

<sup>147</sup> Detective Campbell, quoted in Hedley Thomas, 'Early Error Blinded Police On Dive Death', *The Australian* (Sydney), 11 December 2010 'http://www.theaustralian.com.au/opinion/early-error-blinded-police-on-dive-death/story-e6frg6zo-1225968580848.

The assumption Gabe had lied was based on a misunderstanding about which battery he had said was in backwards.

The primary function of a dive computer is to monitor the diver's depth and time underwater and calculate the absorbed nitrogen in the diver's body. This function is performed by a module commonly worn on the diver's wrist (the 'wrist computer'). Gabe's computer was an air-integrated model which also monitored his air consumption during the dive via a component attached to his tank (the 'tank transponder'). The tank transponder communicated wirelessly with the wrist computer. Both the wrist computer and the tank transponder were battery powered. If the wrist computer's battery were inserted backwards the wrist computer would display a blank screen and it would not beep.<sup>148</sup> If the tank transponder battery were inserted backwards, it would not transmit a signal to the wrist computer. The wrist computer would then beep to alert the diver that it was not receiving the signal from the tank transponder. Although the wrist computer was seized by the police, the tank transponder was not.<sup>149</sup>

Gabe gave a statement to police on the day of Tina's death which simply refers to his 'computer':

Tina and I started to go down and my computer started beeping at about 5 feet ... [On the boat] I went over to [a staff member] to get a coin to open up my battery compartment on my computer. I popped the battery out and realised it was in there backwards so I swapped it around and closed it back up. After that I hooked the transponder part back up to my regulator to make sure it was working.<sup>150</sup>

However, he clarified the nature of the problem several times in a statement given to the police five days later.<sup>151</sup> He said:

my computer beeped at me ... you know 'gas alarm' which is basically it's not, means it's not registering with the cylinder, either you know out of air, or it's not working or whatever ...<sup>152</sup>

it was still beeping gas alarm and you know I put it back behind my head next to the transmitter seeing if maybe it wasn't getting a signal ...<sup>153</sup>

after the tank fill was done I screwed the transponder back on and ... turned my air back on held my computer next to it and it showed the pressure ...<sup>154</sup>

the computer goes in one way, the responder or the transponder goes in the other way and I changed both the batteries before I left and I basically just stuck them in ...<sup>155</sup>

Unfortunately, the police did not request a clarification of these statements. At some point they formed the belief that Gabe had said the battery of the wrist computer was in

<sup>148</sup> See Statement of Adam White, above n 8 and Statement of David Griffiths, 18 February 2005, available on Michael McFadyen's Scuba Diving Web Site, <<http://www.michaelmcfadyenscuba.info/watson/Griffiths%20statement%2018%20Feb%202005.pdf>>.

<sup>149</sup> Flynn and Fitz-Gibbon, above n 16, 22-27.

<sup>150</sup> Statement of Gabe Watson, 22 October 2003, above n 15 [26]-[28].

<sup>151</sup> Statement of Gabe Watson, 27 October 2003, above n 139.

<sup>152</sup> Ibid tape 1, 7.

<sup>153</sup> Ibid tape 3, 9.

<sup>154</sup> Ibid tape 3, 10.

<sup>155</sup> Ibid.

backwards. When testing of the wrist computer with the battery in backwards produced a blank screen and not a beep, they concluded that he had lied.<sup>156</sup>

The investigating officer asked two experts to test the computer. Dr Griffiths, the Director of Hyperbaric Medicine at Townsville Hospital, tested the wrist computer in the hyperbaric chamber. In his statement to police dated 18 February 2005, he describes the computer beeping when submersed:

The computer was turned on and observed to self test normally. The dive computer was then immersed in salt water in a bucket and slowly pressurized within the chamber. At a pressure of about 10Kpa (3 feet or 1 meter of sea water (MSW) pressure) the computer began to ‘beep’ as observed by myself and the police who viewed and recorded the computer display from outside the computer through a viewport. A message flashed on the screen indicating ‘low air pressure’ whilst the chamber pressure was increased.<sup>157</sup>

Dr Griffiths tested the computer with the battery in the main computer reversed, and observed no beeps and a blank screen.<sup>158</sup> He went on to say:

However the computer *does* emit “beeps” if not correctly connected to a source of compressed air, when its battery is fitted correctly (emphasis in original).<sup>159</sup>

Adam White, the technician who examined the wrist computer in 2005, was alert to the existence of the tank transponder and referred to it in his report.<sup>160</sup> When questioned at the coroner’s inquest in 2007, White confirmed that if the battery of the tank transponder were in backwards, and the battery of the wrist computer were inserted correctly, the wrist computer would indeed beep.<sup>161</sup>

The misunderstanding about the computer was reported in the media in 2010.<sup>162</sup> In an interview with Flynn and Fitz-Gibbon, Detective Gehringer attributes his error to Gabe gesturing at his wrist during their interview:

Gabe’s – you know the word he’d always use was computer. His body language always led me to believe he was talking about the computer that he’d worn on his wrist. He’d spoken, in the times that he had given me those versions, he’d spoken about his transmitter or his transponder which denoted that that was the part that was on his tank. So to me, I’d never even thought that there could possibly be any confusion about whether he was talking about his transmitter or the receiver. To me, it [the wrist module] was always, that’s what he’d been talking about.<sup>163</sup>

<sup>156</sup> Flynn and Fitz-Gibbon, above n 16, 22.

<sup>157</sup> Statement of David Griffiths, 18 February 2005, above n 149.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid (emphasis in original). In addition, the police officers who were present at the testing by Dr Griffiths both provided statements where they describe the beeping as a ‘gas alarm’, the same wording used by Gabe to describe the problem in his 27 October statement. See Statement of Constable Robert Enchong, 21 March 2006, available on Michael McFadyen’s Scuba Diving Web Site, <<http://www.michaelmcfadyenscuba.info/watson/Enchong%20statement%20re%20computer.pdf>> [5 ii]; Statement of Senior Constable Louisa Egerton, 19 February 2006, available on ibid [7].

<sup>160</sup> Ibid.

<sup>161</sup> Transcript of Proceedings, *Inquest into the death of Christina Mae Watson* (23 November 2007) 588 (Adam White, Steven Zillman QC).

<sup>162</sup> Hedley Thomas, ‘Early Error Blinded Police on Death Dive,’ *The Australian* (Australia), 11 December 2010, 3.

<sup>163</sup> Detective Senior Constable Kevin Gehringer quoted in Flynn and Fitz-Gibbon, above n 16, 37.

As expanded on below, David Hamer has described three steps necessary to establish the conclusion that an accused person has told a lie: 1) there must be a statement, 2) the statement must be false, and 3) the falseness must have been deliberate.<sup>164</sup> Without an unambiguous statement, the alleged lie about the computer battery would fail on the first step.

### G *The Observations of Dr Stanley Stutz*

The only eyewitness to the interaction between the divers believed to be Gabe and Tina was Dr Stanley Stutz. Stutz was a student in an advanced open water class. He was diving with an instructor, Robert Webster, and six other students from the vessel *Jazz II* at the same time as Gabe and Tina were in the water.<sup>165</sup> Stutz was on the descent line previously used by the Watsons and Singleton, at about a five metre depth, when he saw two divers near him.<sup>166</sup> He thought they were part of a larger group of four to five divers who were not part of Stutz's class.<sup>167</sup> Stutz told police one of the two divers seemed to be in distress. He identified the apparently distressed diver as Tina.<sup>168</sup> Stutz told police she was on her back looking up at Stutz. He described her expression as showing 'fear and distress'.<sup>169</sup> A second diver (presumed to be Gabe) came to her and put his arms around her. They then broke apart, and Tina sank out of sight.<sup>170</sup> Gabe went rapidly to the surface.<sup>171</sup> Stutz then saw a third diver (presumed to be Singleton) ascending with Tina: he described Singleton holding Tina in a 'bear hug'.<sup>172</sup>

Stutz's description of a 'bear hug' was widely utilised in the media as a description of the interactions of the divers presumed to be Tina and Gabe.<sup>173</sup> In his 2003 statement, Stutz only uses the term to refer to Singleton. Stutz described Gabe putting his arms around Tina as 'cradling'.<sup>174</sup> This error is repeated in the police descriptions of the re-enactment, where they act out what they call a 'bear hug'.<sup>175</sup>

Coroner Glasgow told Flynn and Fitz-Gibbon:

<sup>164</sup> Hamer, above n 102, 382.

<sup>165</sup> Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson* (Coroners Court, 124/03, Coroner Glasgow, 27 November 2007) 756 (Robert Webster).

<sup>166</sup> Statement of Stanley Stutz, 22 October 2003, available on Michael McFadyen's Scuba Diving Web Site, <<http://www.michaelmcfadyenscuba.info/watson/Stutz%20statement%2022%20Oct%202003.pdf>> [12].

<sup>167</sup> Statement of Stanley Stutz, 16 January 2006, available on *ibid* 3. The identity of these divers does not appear to have been established.

<sup>168</sup> Statement of Stanley Stutz, 1 April 2007, available on *ibid*.

<sup>169</sup> *Ibid* 3.

<sup>170</sup> *Ibid* 4.

<sup>171</sup> *Ibid* 6.

<sup>172</sup> Statement of Stanley Stutz, 22 October 2003, above n 167 [18]. About 30 seconds to a minute passed between Stutz losing sight of Tina and his seeing her brought up by Singleton: Statement of Stanley Stutz, 1 April 2007, above n 169, 4.

<sup>173</sup> Flynn and Fitz-Gibbon, above n 16, 32.

<sup>174</sup> Statement of Stanley Stutz, 22 October 2003, above n 167 [13]; Statement of Stanley Stutz, 16 January 2006, above n 168, 5, 7, 17, 22.

<sup>175</sup> Running Sheet for Operation Charlie-Oswald, 20-22 September 2006, above n 16, items 15 and 20. See also Statement of Scott Cornish, 30 October 2007, available on Michael McFadyen's Scuba Diving Web Site, <[www.michaelmcfadyenscuba.info/watson/Cornish%20Scott%20statement.pdf](http://www.michaelmcfadyenscuba.info/watson/Cornish%20Scott%20statement.pdf)> [12], [21].

I don't think we would have got anywhere without Stutz really. It's his evidence and ... he was very good.<sup>176</sup>

Detective Gehringer also told Flynn and Fitz-Gibbon that Stutz's evidence was a key factor that convinced the investigative officers of guilt,<sup>177</sup> because it contradicted Gabe's version of events.<sup>178</sup>

Stutz's evidence contradicted Gabe as Stutz said he did not observe either diver's mask or regulator dislodged.<sup>179</sup> (However, on Stutz's description of the position of the divers believed to be Tina and Gabe, he would have been looking at the back of Gabe's head.)<sup>180</sup> He also described the two divers as being in physical contact before separating.

However, elements of Stutz's evidence are problematic for the police theory that Gabe intentionally killed Tina. Stutz describes Gabe and Tina as being close to the diver access point line when they separated, easily visible to divers on the line.<sup>181</sup> This is consistent with Singleton's evidence that he passed very close to the line when he ascended with Tina.<sup>182</sup> Gabe and Tina's presence at the line is inconsistent with an attempt to avoid witnesses.

In addition, the police theory was that Tina was dead or unconscious when Gabe left her.<sup>183</sup> Stutz, an emergency room physician, clearly states that Tina was moving after Gabe separated from her.<sup>184</sup> In his statement to police given 16 January 2006, Stutz said:

After they split ... and went in their different directions – she was still moving – but sort of ... was moving less and less.<sup>185</sup>

Stutz then demonstrated to the interviewing officer how Tina moved as she descended.<sup>186</sup> On 1 April 2007, Stutz gave a further statement to police, where he said:

The arms of diver 1 [Tina] were outstretched to her sides and her legs were moving flapping slowly up and down ... When the two divers separated [Tina's] limb and body movements did not change. There did not seem to be any organised structure in her body movements. ... While I had [Tina] under observation after their separation she did not start swimming nor was there any change in her body movements. From my perspective [Tina] was becoming progressively weaker as she was descending.<sup>187</sup>

<sup>176</sup> Flynn and Fitz-Gibbon, above n 16, 164.

<sup>177</sup> Ibid 32.

<sup>178</sup> Ibid 33.

<sup>179</sup> Statement of Stanley Stutz, 16 January 2006, above n 168, 9.

<sup>180</sup> Stutz describes Tina as horizontal in the water facing up towards Stutz, and the other diver on top of her facing her: *ibid* 10.

<sup>181</sup> Stutz says Gabe and Tina were about 20 feet (6.1 metres) away from Stutz while he was on the line: Statement of Stanley Stutz, 22 October 2003, above n 167 [12]; Statement of Stanley Stutz, 16 January 2006, *ibid* 10-11.

<sup>182</sup> Singleton describes passing 5-6 feet from Robert Webster when Webster was on the line: Statement of Wade Singleton, 22 October 2003, above n 2, [33]. See also statement of Statement of Robert Webster, 11 May 2005, available on Michael McFadyen's Scuba Diving Web Site, <<http://www.michaelmcfadyenscuba.info/watson/Webster%20statements.pdf>> [6]-[7].

<sup>183</sup> 'Unfathomable: Part Two' above n 96 and accompanying text (Detective Sargent Gary Campbell).

<sup>184</sup> Statement of Stanley Stutz, 16 January 2006, above n 168, 7-8, 19.

<sup>185</sup> *Ibid* 7.

<sup>186</sup> *Ibid* 8.

<sup>187</sup> Statement of Stanley Stutz, 1 April 2007, above n 169, 3-4.

Stutz also described the expression on Tina's face: 'I saw fear and distress on her face. The look on her face was awful and I had the belief that she knew that she was in danger. Her eyes were wide open.'<sup>188</sup> Stutz's evidence leaves open the possibility that Tina was conscious when Gabe separated from her and ascended, which is inconsistent with the theory he was attempting to murder her.

#### H *The Opinion Evidence of Kenneth Snyder and Douglas Milsap*

Opinion evidence was given to the police by Kenneth Snyder and Douglas Milsap, two divers who were passengers on the Spoilsport with Gabe and Tina. Both Snyder and Milsap were PADI divemasters.<sup>189</sup> Snyder and Milsap provided opinion evidence to the Coroner's Inquest<sup>190</sup> and they testified as experts in scuba diving at the Alabama murder trial.<sup>191</sup>

Snyder and Milsap provided multiple statements to the police,<sup>192</sup> and Snyder also contacted Tina's family to discuss his views on Gabe's story.<sup>193</sup> Alabama police officer Lieutenant Brad Flynn, who assisted Queensland police on the Watson case, told Flynn (no relation) and Fitz-Gibbon:

These guys knew the sport inside and out, and for them [to say] that's bullshit, in the middle of that tornado of emotion that [was] going around that boat. I remember thinking ... these guys are onto something.<sup>194</sup>

Whether the prosecution should have had Snyder and Milsap qualified to provide expert evidence on diving rescue in a criminal trial is questionable. Firstly, they would have to be experts in the area in which they offered their opinion.<sup>195</sup> Although they were both experienced divers, they appear to have relied on completion of the rescue course and, in Snyder's case, personal experience with 8-10 panicked divers.<sup>196</sup> In addition, the objectivity and impartiality of an expert witness may impact on the probative value of that

<sup>188</sup> Ibid 3.

<sup>189</sup> A PADI divemaster can lead certified divers and assist instructors, but cannot teach dive courses: PADI, 'PADI Divemaster Course – More Info' <[www.padi.com/elearning-scuba-registration/html/divemasteren.htm](http://www.padi.com/elearning-scuba-registration/html/divemasteren.htm)>.

<sup>190</sup> Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson* (Coroners Court, 124/03, Coroner Glasgow, 1 January 2008) 48-50 (Kenneth Snyder); and Transcript of Proceedings, *In the Matter of an Inquest Into the Cause and Circumstances Surrounding the Death of Christine Mae Watson* (Coroners Court, 124/03, Coroner Glasgow, 1 January 2008) 79-81 (Douglas Milsap).

<sup>191</sup> Flynn and Fitz-Gibbon, above n 16, 155-163.

<sup>192</sup> Statements of Douglas Milsap, 22 October 2003, 20 June 2006, and 21 April 2007, available on Michael McFadyen's Scuba Diving Web Site, <[www.michaelmcfadyenscuba.info/watson/Milsap%20Doug%20statements.pdf](http://www.michaelmcfadyenscuba.info/watson/Milsap%20Doug%20statements.pdf)>. Kenneth Snyder provided two statements to police dated 22 October 2003. In a statement taken by police officer Tracey Hartley, Snyder describes the fatality as occurring that day (the "Hartley Statement"). He provided another statement taken by police officer Scott Knowles in which he refers to time having passed since Tina's death (the "Knowles Statement"). Snyder provided at least three statements to police: the Hartley Statement, the Knowles Statement, and a statement dated 20 June 2006, available on Michael McFadyen's Scuba Diving Web Site, <[www.michaelmcfadyenscuba.info/watson/Snyder%20Ken%20statements.pdf](http://www.michaelmcfadyenscuba.info/watson/Snyder%20Ken%20statements.pdf)>.

<sup>193</sup> Flynn and Fitz-Gibbon, above n 16, 161.

<sup>194</sup> Ibid 160.

<sup>195</sup> Ian R Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Lawbook, 3<sup>rd</sup> ed, 2005) 21-28.

<sup>196</sup> Kenneth Snyder, 'Knowles Statement', above n 191, 4.

witness's evidence.<sup>197</sup> The emotional circumstances on the boat following Tina's death could be seen as a negative factor here.

There are also issues with the content of the opinion, particularly the information they provided about panic in scuba divers. In relation to Tina sinking, Snyder says: 'That is not indicative of a panicked diver. A panicked diver will crawl over the top of others to get to the surface.' Later in the same statement he says:

My experiences are that [panicked divers] simply want to get to the surface. They will strip everything off just to get to the surface and that will include their regulators. It is enforced in training as a rescue diver and as a diver in general that if someone is in a panic and you need to get them to the surface quickly it is appropriate that the person is grabbed, the weight belt from that person is dropped and then you guide them to the surface. Once the weight belt is released, a diver will normally always ascend as they are now very positively buoyant.<sup>198</sup>

Similarly, Milsap suggests that a panicking diver's only thought will be to get to the surface and that it is appropriate in this situation to initiate a buoyant ascent by inflating the BCD.<sup>199</sup>

The suggestion that a diver experiencing panic will inevitably ascend is contradicted by PADI rescue training, which describes two forms of panic.<sup>200</sup> Active panic is characterised by the diver struggling or bolting for the surface,<sup>201</sup> while in passive panic the diver may freeze and be unaware of their surroundings.<sup>202</sup> A 2001 study of divers found that 85 per cent of respondents who had experienced panic underwater reported resolving the situation without making a rapid or uncontrolled ascent.<sup>203</sup>

In addition, although PADI rescue training recommends assisting a panicking diver to the surface if necessary, in neither form of panic is the default response to initiate a buoyant ascent.<sup>204</sup> In the case of an actively panicking diver bolting for the surface, PADI training suggests the rescuer be prepared to slow the ascent to prevent a lung expansion injury.<sup>205</sup> PADI also cautions rescue divers that passive panic may turn to active panic without warning.<sup>206</sup>

#### IV FACTUAL INNOCENCE? THE IMPLAUSIBILITY OF THE MURDER THEORY

In the inquiry into the wrongful conviction of Farah Jama, Justice Vincent criticised prosecutors for failing to consider if their theory of the crime was inherently plausible.<sup>207</sup>

<sup>197</sup> Freckelton and Selby, above n 194, 25.

<sup>198</sup> Kenneth Snyder, 'Knowles Statement', above n 191, 4.

<sup>199</sup> Statement of Douglas Milsap, 21 April 2007, above n 191, 3.

<sup>200</sup> *PADI Rescue Diver Manual*, above n 57, 133-134.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.* 133.

<sup>203</sup> David F Colvard and Lynn Y Colvard, 'A Study of Panic in Recreational Scuba Divers' (2003) 1 *Undersea Journal* 40. See also WP Morgan, 'Anxiety and Panic in Recreational Scuba Divers' (1995) 20 *International Journal of Sports Medicine* 398.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.* 134.

<sup>206</sup> *Ibid.* 133.

<sup>207</sup> Victoria, FHR Vincent, *Report of Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama* (2010) 33-35.

An examination of the plausibility of the police theory in the Watson case shows a number of problems.

On the police theory, Gabe must have initiated the murder within minutes of entering the water on the first dive of a seven day trip. The site was relatively exposed and Singleton and his group were in close proximity. Later dives could have offered better concealment, particularly one of the night dives offered on the trip.<sup>208</sup> The police theory does not explain why Gabe would have committed murder on a charter boat trip at all, rather than diving alone with Tina at a quarry or beach where there would be no witnesses.

A further question is whether the mechanics of the police theory of the murder are plausible. In the middle of the water column, Gabe would have nothing to hold onto to leverage his strength. This raises the question of how he could have prevented Tina from surfacing. Regarding active panic, the PADI Rescue Diver Manual notes the difficulty in controlling another diver underwater, saying ‘*you probably can’t stop a panicked diver from ascending, but you don’t need to*’.<sup>209</sup> If either Gabe or Tina was very heavily weighted, as Edmonds suggests Tina was,<sup>210</sup> then this might prevent ascent. However, unless the weight was exactly balanced against the force of Tina swimming up, they would have sunk during the struggle. By contrast, Gabe’s computer shows no depth changes in the third and fourth minutes of the dive, the time when the alleged murder must have occurred.<sup>211</sup>

Additionally, Gabe would have risked his own life in committing the murder. Dan Orr and Eric Douglas note the dangers of attempting to prevent an out-of-air rapid ascent by another diver, describing it as ‘extremely dangerous’ to the diver attempting to slow the ascent.<sup>212</sup> On the theory of murder, once Gabe had turned Tina’s tank off he could not have surfaced without risking being caught. Nor could he release Tina without her escaping to the surface. His situation would therefore be more personally dangerous than a rescuer dealing with a panicked or out-of-air diver, since he could not surface if his gear were damaged nor abandon the attempt if his life were threatened.

Dr Carl Edmonds, a specialist in hyperbaric (diving) medicine, has also disputed the police theory and provided a clear alternative explanation. Dr Edmonds is the one of the authors of *Diving and Subaquatic Medicine*, 4<sup>th</sup> ed,<sup>213</sup> a medical reference work on diving medicine and he has published extensively on issues relating to scuba diving.<sup>214</sup> Edmonds would have been an expert witness in the Alabama trial if a defence had been called. He has written two articles on the Watson case in diving journals, which were published subsequent to the events which have been the focus of this article.<sup>215</sup>

Edmonds provides two reasons on the evidence for disputing the police theory that Gabe murdered Tina by turning off her air underwater. The first is Tina’s air consumption. Tina’s tank was filled to at least 200 bar (2900 pounds per square inch) pressure

<sup>208</sup> Tina had discussed night diving with Singleton, and had arranged an orientation dive for the first one: Statement of Wade Singleton, 22 October 2003, above n 1 [12].

<sup>209</sup> *PADI Rescue Diver Manual*, above n 57, 134 (emphasis added). The manual notes that the rescuer in this situation need only slow the ascending panicked diver, which could be done by hanging on and flaring the body to create drag: *ibid*.

<sup>210</sup> Edmonds, Case Report, above n 138, 227 and accompanying text.

<sup>211</sup> Gabe’s computer showed that he reached 40 feet in the third minute of the dive (2:00 to 2:59). There were no depth changes greater than 10 feet until he reached 50 feet in the sixth minute (5:00 to 5:59): Gabe Watson’s Computer Download – Second Dive (Table)’, above n 8.

<sup>212</sup> Dan Orr and Eric Douglas, *Scuba Diving Safety* (Human Kinetics, 2007) 81.

<sup>213</sup> Carl Edmonds et al, *Diving and Subaquatic Medicine* (Arnold, 4<sup>th</sup> ed, 2002).

<sup>214</sup> Carl Edmonds et al, *Diving Medicine for Scuba Divers* (2012) <[www.divingmedicine.info/CV2012.pdf](http://www.divingmedicine.info/CV2012.pdf)>.

<sup>215</sup> Edmonds, Case Report, above n 138 and Carl Edmonds, ‘The Honeymoon Death Chronicle’ (2012) *DAN Newsletter* <[www.danasiapacific.org/main/honeymoon\\_chronicle.php](http://www.danasiapacific.org/main/honeymoon_chronicle.php)>.

immediately before she left the boat for the fatal dive.<sup>216</sup> After the dive, her tank pressure was 2200 pounds per square inch.<sup>217</sup> Assuming that Tina was breathing for 5.5 minutes, Edmonds describes her air consumption rate as exceptional. He concludes that her air consumption rate would be physiologically impossible if the air was turned off for two of those five minutes.<sup>218</sup>

In addition, Edmonds indicates that the time needed for a person to lose consciousness due to deprivation of air underwater is greater than at the surface due to the increased oxygen pressure at depth.<sup>219</sup> Assuming Gabe and Tina left the descent line at a depth of 12 metres, Edmonds suggests that there was not enough time for Tina to lose consciousness and for Gabe to turn her air back on prior to him ascending.<sup>220</sup>

Finally, Edmonds describes the evidence in the Watson case as being consistent with a diving accident. He suggests that Tina may have suffered panic and possible exhaustion from fighting current as she and Gabe returned to the line. She hyperventilated and over-breathed her regulator, aspirated salt water into her lungs, lost consciousness due to hypoxia (lack of oxygen), and drowned.<sup>221</sup> He also offers the opinion that the possibility of a cardiac problem could not be excluded, as Tina had a history of heart surgery.<sup>222</sup> This suggests that a clear alternative to the theory of murder was possible, and indeed, likely: that Tina Watson's death on the Yongala was merely a tragic accident and Gabe Watson was factually innocent of murder.

## V CONCLUSION

The phenomenon of a miscarriage of justice following trial has been increasingly recognised in recent decades, but the Watson case demonstrates how plea bargaining, statements made by state agents, and subsequent media speculation can create two separate forms of injustice: conviction and sentencing based on a plea bargain not well grounded in law or fact; and extra-territorial injustice, when investigative errors are perpetuated in public forums outside of the court process. Although the Alabama proceedings are beyond the scope of this article, the injustice suffered by Gabe Watson was perpetuated when he was unsuccessfully tried for murder in his home jurisdiction

<sup>216</sup> Statement of David Lemsing, 22 October 2003, above n 126, [39], [74]-[76].

<sup>217</sup> Statement of Senior Constable DME Netting, 10 September 2004, available on Michael McFadyen's Scuba Diving Web Site', <[www.michaelmcfadyenscuba.info/watson/Dive%20gear%20tests.pdf](http://www.michaelmcfadyenscuba.info/watson/Dive%20gear%20tests.pdf)> [3.5]. See also Statement of Wade Singleton, October 22, 2003, above n 1 [49].

<sup>218</sup> Edmonds, Case Report, above n 138, 227.

<sup>219</sup> Edmonds, Honeymoon Death Chronicle, above n 216.

<sup>220</sup> *Ibid.*

<sup>221</sup> Edmonds, Case Report, above n 137, 230. As Edmonds said in the Honeymoon Death Chronicle: 'Salt water aspiration contributes to 37% of the diving fatalities, and leads to hypoxia as the blood is not adequately oxygenated (due to the sea water and oedema in the lungs). This progresses to a confusional state, unconsciousness and near-drowning, then death from drowning. Struggling may be present during this procedure, but often it is either ineffectual or absent. This is very different to asphyxia from obstruction of an air supply, in which accumulation of carbon dioxide induces severe and purposeful struggling to re-establish the air supply.' Edmonds, The Honeymoon Death Chronicle, above n 216, fn 7.

<sup>222</sup> The Coroner had excluded the heart surgery as a factor in Tina's death based on the evidence of Dr Griffiths and of Dr Epstein, Tina's cardiologist. Dr Edmonds questions the Coroner's conclusion, noting that Griffiths had in fact said that the possibility of a cardiac arrhythmia could not be excluded, even if Tina had a normal heart: Edmonds, Case Report, above n 138, 226-7.

based on the Queensland police investigation, arguably depriving him of many of the benefits of the Queensland plea agreement.

Both in the courts and via statements to the media, allegations of criminal conduct made by agents of the state were ultimately based on impressions and speculation. The narrative of the case which emerged was uncoupled from provable fact; even the laws of physics became mutable through errors and uncorrected statements.

How can these two forms of miscarriage of justice be corrected? It is insufficient to say that Gabe or his counsel should have corrected errors, and fought the state across multiple forums including within the media. Instead, if the state and its agents are to abandon adjudication for plea bargains, they have a responsibility to ensure that the factual and legal foundation for that plea is unquestionable. Further, they have a responsibility to avoid contributing to a trial by media. By removing cases from the adjudicative court process by plea agreement, it is critical that prosecutors and other agents including the police accept a higher duty to ensure only factually correct information is provided, reflecting the duty of fairness which exists within the court process. This duty suggests firstly that any public statements must be based on verifiable fact or confirmed by qualified experts. It also suggests secondly that the state must establish appropriate safeguards to prevent errors if possible, and if not, to correct any errors that are made public. The duty of fairness must be seen as an ongoing responsibility of the state. This duty is not meant to silence public officials, but rather to acknowledge the responsibility they take on when they choose to act outside the safeguards of the trial process.