

REVIEW OF
NEW ZEALAND PAROLE BOARD
DECISION GIVEN ON 28 JUNE 2006 TO RELEASE
GRAEME WILLIAM BURTON
ON PAROLE

Judge R J Johnson
Chief District Court Judge
New Zealand

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Introduction and Questions for Review

- [1] Mr. Graeme Burton was released from imprisonment on 10 July 2006 in accordance with a decision of the New Zealand Parole Board sitting at Wellington Prison on the 28th June 2006, subject to certain standard conditions of release and special conditions. It is alleged that in late 2006 he breached his parole conditions and committed several crimes of violence, to which it is understood he has now pleaded guilty, including injury of four cyclists in a bush reserve and the homicide of another. It is said that within a short time he was located by Police and after an armed confrontation was shot, enabling his detention. As a result of injuries received he suffered an amputation in respect of one leg.
- [2] This review was commissioned by the New Zealand Parole Board to consider the information available to the Board in order to address the following two questions:
1. On the information available to the Parole Board, was the decision a reasonable one?
 2. Is there anything to be learned by the Board in the exercise of its function, from this tragedy?
- [3] To say that release decision-making is a challenge is an understatement. This is particularly true in situations where prisoners have been in custody for extended periods. Difficulties arise when trying to determine the offenders' risk for re-offending in the institution. Considerable advances have been made in violent offending risk prediction in the past 15 years. However, there is still a dearth of valid information to guide us in determining the extent to which stable behaviour that occurs in prison, even over extended periods, ensures the significant reduction/elimination of violence in the future.
- [4] The decision-making tasks by the New Zealand Parole Board also must be considered in context. In the 2005/2006 year, the Board held more than 8,700 hearings pertaining to 5,200 individual offenders. The Board declines the majority of applications for parole that it hears. In 2005/2006, 72.5% of the applications for parole were declined. The degree of media and public attention the tragic aftermath of Mr. Burton's release has generated is a reflection of the relative infrequency of the Board's decisions ending so badly.

- [5] We approach this review with a considerable degree of caution since it is always easier to identify potential shortcomings when one has the benefit of hindsight. Regardless, though, the review is important. In our view, the value of this review will be to glean, to the extent possible, information from the release decision-making in Mr. Burton's case that may be useful in future situations pertaining to other offenders.
- [6] What follows, then, is a careful review of the New Zealand Parole Board's decision to release Mr. Burton on parole. The brief for the review is a narrow one. The information to be considered is that which was available to the New Zealand Parole Board in consideration of Mr. Burton's case, in light of the relevant law. As such, this review is based solely upon the information upon which the Board had access.¹ With such scrutiny, and the benefit of hindsight, matters have been identified that can be improved upon in the Board's consideration of cases in the future. Whether and to what extent any alterations to the approaches taken would have led to a significantly different longer-term outcome is questionable at best. Indeed, most often with serious offenders, we err on the side of the false positive – that is, restricting behaviour when, in fact, the risk of re-offending is manageable. Certainly, in this case, it cannot be said that caution was thrown to the wind. Quite to the contrary, with a high degree of care from the correctional staff, professionals, and the New Zealand Parole Board Mr. Burton's situation was carefully considered and the decision to release him was eventually made.

Statutory and legal principles guiding the Board's decision-making

- [7] Several sections of the Parole Act 2002 are relevant to the process of decision-making required of the New Zealand Parole Board.
- [8] By Section 7 the Board is enjoined

“when making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community”.

¹ An unsolicited submission was received from Mr. Graeme Burton for this review; however, since the information contained in that submission pertained to matters following his release from custody, the information was not relevant to the review.

- [9] Other principles contained within that section are that offenders must be detained no longer than is consistent with the safety of the community, and that they must not be subject to release conditions or detention conditions that are more onerous or last longer than is consistent with the safety of the community. The Board's decisions must be made on the basis of all the relevant information that is available to the Board at the time.
- [10] By Section 15 the kinds of special condition which may be imposed must be designed to
- a) reduce the risk of reoffending by the offender;
 - b) facilitate or promote the rehabilitation and the integration of the offender;
 - c) provide for the reasonable concerns of victims of the offender.
- Without limiting the kind of condition, they are specified to include-
- i) conditions relating to place of residence and work;
 - ii) conditions relating to participation in programmes to reduce the risk of further offending through rehabilitation and reintegration;
 - iii) conditions of non-association;
 - iv) conditions relating to medication.
- [11] By Section 21 the Board is required to conduct a parole hearing at least once in every twelve months after the offender's last parole hearing unless a postponement order is made. In such a case, Section 27 requires that if the Board makes a postponement order parole hearings for offenders serving indeterminate sentences (such as life for Burton) must be within three years of the offender's most recent parole hearing.
- [12] By Section 28 the Board is empowered to release an offender on parole after a hearing, only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to-
- a) the support and supervision available to the offender following release, and
 - b) the public interest in the reintegration of the offender into society as a law abiding citizen.
- [13] Further guidance on the meaning of "undue risk" appears in Section 7 (Guiding Principles) (3) which states

“When any person is required under this part to assess whether an offender poses an undue risk, the person must consider both a) the likelihood of further offending; and b) the nature and seriousness of any likely subsequent offending.”

- [14] The Parole Board is not entitled to impose its own view of general deterrence attaching to particular types of offences. The Court of Appeal in *Reid & Ors v New Zealand Parole Board* (CA247-249/05, 29 August 2006) held
- “[38]... We declare that, although considerations of general deterrence are relevant when setting the nominal sentence and minimum periods of imprisonment and in determining whether or not to grant leave to apply for home detention, they are not relevant when the Parole Board is considering applications for release on parole or home detention. Factors relating to the particular individual that may affect the safety of the community, as provided for in ss7, 28, and 35 of the Parole Act 2002 are, however, relevant when the Parole Board is considering such applications.”
- [15] The Court may be seen as contemplating that personal deterrence will be a relevant consideration in the sense that it affects the safety of the community.
- [16] Although the Parole Board must base its decisions on all the relevant information that is available to it at the time (Section 7(2)(c)) and may direct a release on parole only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community (Section 28(2)), what the Board is entitled to do when confronted with unsubstantiated allegations requires an authoritative legal ruling.
- [17] The Parole Board is prima facie captured by Section 27 New Zealand Bill of Rights Act 1990 which guarantees that any Tribunal will apply natural justice principles in making a decision that will affect any person, and Section 7(b) Parole Act 2002 requires that prisoners must be informed of any information the Board receives upon which it makes a decision. But the Parole Board is not a Court and because of the paramount concern for the safety of the public provided in the Act the New Zealand Parole Board must take into account all relevant information before it. The weight of judicial authority in foreign jurisdictions with parole legislation containing similar wording to the New Zealand Parole Act appears to be that the Board must ensure the information is reliable and persuasive.
- [18] In this regard reference was made in particular to the decision of the Canadian Supreme Court in *Mooring v Canada* (National Parole Board) [1996] 1 SCR 75 in

respect of legislation with similarities in relevant important respects to the New Zealand Parole Act 2002, in particular the requirement to take into account “all reasonable information that is relevant to a case”.

[19] Sopinka J said, at paragraph 36 on page 16 of his judgment

“What is the content of the Board’s “duty to act fairly”? The content of the duty of fairness varies according to the structure and the function of the board or tribunal in question. In the parole context, the Parole Board must ensure that the information upon which it acts is reliable and persuasive... Whenever information or “evidence” is presented to the Board, the Board must make a determination concerning the source of that information, and decide whether or not it would be fair to allow the information to affect the Board’s decision.”

[20] Turning to the paramount consideration of public safety, Sopinka J states at paragraph 37 on page 16 of his judgment

“s. 101(a) of the Corrections and Conditional Release Act requires “that the protection of society be the paramount consideration in the determination of any case”. This will accordingly be a guiding principle where the Board is required to rule on the admissibility of a particular piece of information. The Board’s expertise and experience concerning the protection of society will aid the Board in arriving at a decision. Should the Board fail to abide by the principles of fairness in making those decisions, an appeal lies ... and the Board’s decision is also subject to judicial review.”

[21] Burton was eligible for parole.

Burton’s Parole Board decision-making history

[22] On 16 June 2003 at Auckland Prison Burton appeared before the Board which adjourned his case for one month for further consideration because the Board wished him to attend the Violence Prevention Unit course at Rimutaka. The adjournment was to enable the prison officer to check the position and report to the Board whether it was possible for him to be re-enlisted in that programme.

[23] On 16 July 2003 he accordingly appeared before the Board which declined to release him on parole because of the nature of his offending and because he was to start the Violence Prevention Unit programme at Rimutaka.

[24] On 24 August 2004 the next hearing was adjourned at his lawyer’s request to 27 October 2004.

[25] On 28 October 2004 the Board declined his application for parole and signalled that an accommodation report in detail was necessary for his next hearing in twelve months time and emphasising

“...with as much strength as this Board is able to deliver, that the authorities should investigate day leaves, home leaves, escorted leaves and church paroles. This, in view of the Board, will give us the confidence knowing that there has been contact with the community and the applicant can now show his ability to cope with the community. Indeed what the Board is saying is that there should be a measured integration into the community.”

[26] On 14 September 2005 a further hearing was held. The Board declined his application for parole. The Board emphasised the need for temporary releases as previously recommended, but which had not been acted upon. As an essential “pathway to release” the Board indicated that it expected to hear that his conduct had remained impeccable as it had over the previous two years while in prison and that he had achieved successful temporary releases in the community so confidence could be expressed in any final release decision.

[27] On 20 March 2006 a further application for parole was heard. In its decision the Board said, among other things-

“Mr Burton was last seen on 14 September 2005. The Board was very positive in its approach to Mr Burton. It recommended that he have escorted outings and indeed there have been three such outings. It noted Mr Burton’s good behaviour and his lack of IDU status. For our part, we record that Mr Burton has completed an M-Pro programme in 2003 and the Violence Prevention Unit in 2004.

What is of great concern to the Board, particularly in view of its responsibility under Section 28(2) of the Act, is the lack of any updated psychological assessment for the last two years.”

[28] The Board went on to fix a date for release on 10 July 2006 and specify special conditions which would apply subject to the receipt of an updated psychological assessment addressing Burton’s risk of offending.

[29] The final hearing was held on 28 June 2006. The Board acknowledged the decision of 20 March 2006-

“when preliminary arrangements were made for his release into the community after serving approximately fourteen years imprisonment for the murder of Paul Neville Anderson. This decision should be read in conjunction with decisions of the Board dated 20 March 2006 and 14 September 2005. As will be seen the Board has come to the view over the past nine months that Mr Burton’s potential risk to the safety of the community is not considered to be undue taking into account the efforts made to address his offending and his proposed release plans.”

[30] Having heard from the sister of the victim the prior day, and considered the recommendations for release on parole with special conditions, but acknowledging that the opportunities for gradual reintegration into the community by a process of home leaves had not happened and that an updated psychological assessment for the last two years had now been provided, the Board said -

“There is a reference in the assessment to an unsubstantiated allegation for which no report has been received, no action has been taken. Furthermore, the incident was not mentioned in the pre-release report from the prison. In those circumstances it would be wrong for any Board to take such matters into account when assessing risk. As the psychologist stated:

“The apparent changes in dynamic risk factors and consequent moderation of Mr Burton’s assessment risk remain relevant to the decision-making process”.

The psychologist further stated:

“Mr Burton’s documented improvement in conduct and release plan supports a case for a carefully managed release under close supervision”.

Accordingly the Board stands by its earlier decision, and Mr Burton will be released on Monday, 10 July 2006. He will be on parole for life. His special conditions are as follows and will remain in existence for two years:

1. Reside at Flat 4, 2 Huron Place, Berhampore, Wellington or at an address approved by the Probation Officer.
2. For the first month at least, Mr Burton’s mother will reside at the flat as part of his integration process. Any breach of this condition could result in his recall to the prison.
3. Do not leave the Wellington region without prior written approval of the probation officer.

4. Undertake employment or employment related training as directed by the Probation officer but he will not engage in the tattoo business without the prior written approval of the probation officer.
5. Undertake a psychological assessment and any treatment recommended as a result of that assessment as directed by the Probation Officer.
6. Attend a maintenance group run by Intervention services in respect of the already completed criminogenic programme as directed by the Probation Officer.
7. Attend for any other counselling or programme aimed at reducing his risk of reoffending in the community as directed by the probation Officer.
8. Do not associate with any person nominated in writing by the probation officer.
9. Do not make contact with the victim's family, either directly or indirectly, unless with the prior written approval of the Probation Officer."

[31] The Board directed that the copy of the latest psychological assessment be given to Mr Burton's Probation Officer. The Probation Officer's attention was "particularly drawn to recommendation No. 2". This recommendation in the psychological assessment report was for those involved in supervising and supporting Mr Burton. It required that he be monitored for warning signs of relapse which would include the use of substances, association with those involved in criminal activity or substance abuse, withdrawal from support persons or supervision, persistently negative mood or attitude, compulsive behaviour, financial problems or accommodation instability.

Information available to the Board

Previous convictions:

[32] The computer record summarising Burton's criminal and traffic conviction history was available to the Board. In summary it reveals-

1. The life imprisonment sentence imposed in December 1992 for murder. Offences prior to that date comprised 91 convictions (drug [2], property [15], breach of bail [1], wilful damage [3], failure to answer to bail [3], breach of

periodic detention [1], preparing to commit a crime [1], resisting police [2], dishonesty [63]).

2. Two convictions for assault on prison officers in September 1994;
3. A conviction for assault with intent to injure from events in October 1996.
4. Six convictions for escaping from prison, burglary, unlawfully taking a motor vehicle and possession of firearms relating to his escape from Auckland West Prison in 1998.

Date of Birth

[33] 10 January 1971, age 35 years.

Sentence History

[34] Sentence commencement date 3 December 1992.

Parole eligibility date 14 May 2002.

No current status as an identified drug user.

A history of three security alerts.

[35] Security classification	Approval date
Maximum	1/8/98
High Medium	21/12/99
Maximum	23/2/00
High Medium	20/6/01
Low Medium	30/8/02
High Medium	16/1/03
Low Medium	26/06/03

[36] He had been held in Rimutaka, Wanganui and Auckland prisons between 2001 and 2003. He was 1.95 metres in height, weighing 111kgs. His personal contact was his mother living in New South Wales. His current sentences were for murder, for which he received life imprisonment; three burglaries, and escaping from custody for which he received three years in 1998; and several one year sentences for assault and car conversion. He escaped on 15 June 1998 and was recaptured on 26 June 1998.

- [37] Our enquiry of the Department of Corrections as to what the “alerts” referred to in paragraph [34] above related elicited the advice that alerts are a note on the Integrated Offender Management System (the Department’s computer software) to bring certain relevant issues to the attention of staff to ensure that staff are aware of the need for any exceptional management requirements. The three alerts related to “a health concern which arose on 24 January 2007” and two notifications received from New Zealand Police on 14 March 2003 regarding risks Mr Burton posed in terms of drug use and escape.
- [38] Taken at face value one of them appears to refer to a health problem arising after Burton’s release on parole, and so one of the “alerts” extant at the time of the Parole Board hearing remains unexplained. There is nothing on the material supplied to the Parole Board which disclosed the detail of any of the three “alerts”.
- [39] Our enquiry of the Corrections Department for definition of the security classifications of prisoners resulted in production of the rules for the Department’s National System for the Security Classification of Sentenced Prisoners, and the rules for the National System for Temporary Releases.
- [40] The Security Classifications explained the risk areas assessed by prison staff to justify the assignment of a particular classification and any restrictions these may bring about in relation to employment, programme participation, temporary removals (escorted outings) and other activities. They are a prison management tool.

Classification	Description of Risk	Level of Risk
Maximum	Escape physical harm to public physical harm to staff involvement in illegal activity during incarceration disruptive/destructive behaviour	high high high high high
High medium	Escape physical harm to public physical harm to staff, prisoners and visitors involvement in illegal activity during incarceration disruptive/destructive behaviour	high moderate to high moderate to high moderate moderate

Low medium	Escape physical harm to public physical harm to staff, prisoners and visitors involvement in illegal activity during incarceration disruptive/destructive behaviour	low low to moderate low to moderate moderate low to moderate
Minimum	Escape physical harm to public physical harm to staff, prisoners and visitors involvement in illegal activity during incarceration disruptive/destructive behaviour	minimal minimal minimal moderate minimal

[41] Except for some reasons irrelevant to this enquiry, temporary releases are defined by Department of Corrections as requiring a Minimum security classification.

[42] There is no evidence of the Burton Parole Board having been advised of any of these definitions. There is no evidence that after the 2004, 2005 and 2006 requests by the Board that Burton be allowed temporary releases, that they were advised that this did not comply with Corrections' release policy and would not happen.

History of proven misconducts

[43]

Date	Type of misconduct	Days	Type of punishment
03.07/1992	Assaulting any other inmate	7	Cell confinement
06.07/1992	Wilfully damaging property not their own	3	Cell confinement
22.12/1992	Disobeying a lawful order	10	Loss of privileges
22.12/1992	Disobeying a lawful order	10	Loss of privileges
15.02/1994	Disobeying a lawful order	3	Loss of privileges
11.01/1995	Assaulting any other inmate	4	Cell confinement
		14	Loss of privileges
01.03/1995	Having any article without authority	0	No penalty given
08.07/1995	Having any article without authority	10	Loss of privileges
03.04/1996	Having any article without authority	5	Cell confinement
03.03/1999	Wilfully damaging property not their own	7	Loss of privileges

29.10/2001	Offending against good order and discipline	7	Cell confinement
		14	Loss of privileges
24.04/2002	Using/consuming drugs/alcohol	3	Cell confinement
		3	Loss of remission
		5	Loss of privileges
14.05/2002	Refusing to comply with requirement to submit to a procedure (drugs/alcohol)	3	Cell confinement
		3	Loss of remission
		5	Loss of privileges

Current Misconducts

[44] No misconducts since May 2002.

Previous IDU (identified drug user) status

[45]

Level	Date from	Date to
1	24.04/2002	04.04/2003
1	14.05/2002	04.04/2003

Programmes undertaken

[46] Alternatives to Violence	April 1994
Lifestyle changes	April 1994
Personal Growth Course	1994
Violent attitude and behaviour	August 1997
Substance abuse	June 2001
Straight Thinking	July 2201
M-PRO Programme (mixed criminogenic)	May 2003
Violence Prevention Unit	2004
Basic Small Business Management	
Fitness Foundation Diploma	
6 th Form Economics	

Activities of Prison Service Reintegration Team

- [47] A reintegration assessment on the Parole Board file dated 17 March 2005 reports that Burton was part of the “multi-agency prisoner reintegration strategy”. An operational project group (OPG) made up of Housing New Zealand, Police, Wellington City Housing, Operation Jericho, NZ PARS, Community Probation Service and the Prison Service were reported to meet monthly to discuss a number of cases, including Burton’s, which had been presented to the Operational Project Group several times over the previous seven months. That report asserts that generally all members of the OPG agreed that good supports were needed to be put in place for Burton, and agreed that a number of day releases would be helpful and would be pursued further through “appropriate channels”.
- [48] The reintegration assessment addresses needs including housing/accommodation, employment/training/education, financial/income, health, cultural needs, spiritual needs, victims related needs, peer/family offending, family/whanau relationships, substance misuse, rehabilitative needs not addressed during sentence, community needs, offending history.
- [49] The information relating to preparations for prisoner release were presented to the Parole Board in the normal way via pre-release reports prepared by the Prison Service.

Pre-release reports

- [50] Reports were prepared for the Parole Board hearings as follows.

June 2002

Addendum report June 2003

June 2003

Addendum report September 2003

Addendum report September 2005

Addendum report February/March 2006

Addendum report June 2006

- [51] The reports uniformly disclose positive progress, positive motivation for reform and positive conduct within the prison over the period subsequent to the misconduct

resulting in IDU status in May 2002 and since the undertaking of the Violence Prevention Unit programme.

- [52] In addition to all the matters referred to elsewhere in this review the report for the March meeting of the Parole Board indicated that during the first escorted outing on 14 December 2005 there was no cause for concern and all interactions with business and the public were conducted in a polite and courteous way. Burton was said to have maintained his good behaviour since his Board appearance in September 2005 and staff at his prison unit interviewed on 16 December 2005 were quoted as saying: "Burton is polite and co-operative when dealing with staff. He goes along well with other prisoners and staff. There is no cause for concern".
- [53] His sentence plan review of 5 December 2005 was reported as stating: "His co-operation with staff and their instructions has been very good, and has been applying all he has learned in his programmes within Unit life. He can adequately describe a life free of crime and recognises the benefit of remaining crime free both within jail and upon release". In that report the Parole Board was told that he had maintained his non-IDU status and had not been the subject of any incident or misconduct reports. He had maintained a security classification of low medium.
- [54] In the pre-release addendum report of June 2006 it was confirmed to the Parole Board that Burton remained currently on low medium security classification, had maintained non-IDU status and was categorised as intervention. He had no incident or misconduct reports on the file since his last Board appearance. Prison unit staff had commented that Burton "displays good behaviour and attitude to staff. He is compliant to all instructions. He interacts well with other prisoners and causes no concern in the unit. He appears positive about his parole".
- [55] His sentence plan review was said to confirm that his motivation was still good. He wanted to make positive changes in his lifestyle as he had been in prison for a long time. He found the VPU course and other courses he had attended helpful. He affirmed his intention to be incident and IDU free. References were made to his fitness regime and his friendly attitude towards staff and other prisoners. At interview he was said by the report to be polite and compliant, appearing motivated and positive about his board and initial release.

- [56] With regard to rehabilitation programmes upon his release the report, among other things stated:

“It is imperative that Mr Burton attend a follow up Maintenance Programme to enhance and reinforce the skills and knowledge he gained from the criminogenic programmes.

He will need to be assessed for alcohol and drug counselling and psychological counselling and if suitable he would need to attend.

Mr Burton will require a high level of supervision due to his life sentence and violent nature of his offence.”

- [57] After outlining various programmes that were available to attend under a special conditions regime of parole, the report said:

“Mr Burton will be referred to Psychological Services upon his release to be assessed. The duration of treatment is assessed on a case by case basis.

Given Mr Burton’s risk assessment, he will be managed with “zero tolerance”. A close relationship is maintained between the Police and CPS for the management of high risk offenders.”

- [58] The report also dealt with his accommodation, employment, relationships, and community support, victim issues and health care matters in a positive way.

Psychological and Psychiatric Reports

- [59] The Parole Act (2002) specifies that the New Zealand Parole Board’s decisions must be made on the basis of all relevant information available to the Board at the time the decision is made. Section 28 of the Parole Act specifies that the Board is empowered to release an offender on parole only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community... (Section 28). While the Board had before it considerable information regarding Mr. Burton and his history of incarceration, the psychological and psychiatric reports available to the Board, some of which assessed Mr. Burton’s level of risk for ongoing offending and violence, were central to the question raised in Section 28 of the act regarding whether Mr. Burton posed an undue risk to the community. In recognition of the importance the Board placed on the psychological assessments of Mr. Burton’s level of risk, at the parole hearing held on 20 March 2006, in its decision the Board said:

'What is of great concern to the Board, particularly in view of its responsibility under Section 28 (2) of the act, the lack of any updated psychological assessment for the last two years.'

- [60] At the time of the Board's final hearing on 20 June 2006, the Board had before it four psychological assessments pertaining to Mr. Burton as well as two psychiatric assessments. The psychological assessments were prepared by psychologists employed by the Department of Corrections for the Parole Board, and the psychiatric reports were prepared by a psychiatrist retained by Mr. Burton's counsel representing him before the Board. The reports will be briefly highlighted below.

Psychological service report to the Parole Board (02 May 2002)

- [61] The psychologist assessed Mr. Burton on 16 April and again on 23 April 2002. The psychologist summarised Mr. Burton's presentation, his pattern of previous offending, his family background and offence precipitants. She used the background information and psychological testing to identify treatment considerations for Mr. Burton and related matters. Mr. Burton's potential to reoffend was described as follows:

'Static factors that place Mr. Burton at high risk for re-offending are the seriousness of his offence, unstable family upbringing, his previous escape from prison and young age at time of first conviction. However, Mr. Burton was able to demonstrate newly learnt skills that if applied will reduce his risk of re-offending. In addition, if he successfully completes the violence prevention unit program at Rimutaka Prison his risk of re-offending may be further reduced.'

- [62] The psychologist concluded the report by making recommendations pertaining to Mr. Burton's need to attend the violence prevention unit, to obtain substance abuse counselling, and noted that 'day leaves and home leaves will be a necessary part of Mr. Burton's successful reintegration.'

- [63] In addition to the psychological report itself, a one page 'psychological report summary' was also prepared. The report summary provided a brief overview of the information covered in the report. With respect to the question of Mr. Burton's level of risk the summary reported

'static factors place Mr. Burton at high risk of re-offending, however, Mr. Burton was able to demonstrate newly learnt skills that if applied will reduce his risk of re-offending. Mr. Burton is motivated to further address the issues related to his offending.'

The recommendations from the report were reiterated.

Psychological assessment report to New Zealand Parole Board (19 May 2004)

- [64] The psychologist relied on a range of sources of information including Mr. Burton's history including his escape history, pre-sentence report, judge's sentencing comments, prior conviction history and his 'offence chain interview'. She also relied upon information pertaining to Mr. Burton's treatment in the violence prevention unit where he had been from August 2003 to the time the report was prepared.
- [65] The psychologist also administered a psychological test to explore Mr. Burton's personality and psychopathology, experiences and expressions of anger, experiences with aggression, level of interpersonal reactivity, and his views about violence. The psychologist also reviewed two previous psychological reports.
- [66] With respect to Mr. Burton's potential to reoffend, the psychologist wrote:
- 'on the basis of convergent evidence from actuarial and clinical risk predictors, Mr. Burton is assessed as being at high risk for re-offending in a violent manner. Mr. Burton's score on the RoC*RoI, which is the measure of static risk predictors based on an offenders' criminal history information, indicated that he is at risk of re-offending. Static risk factors that elevate Mr. Burton's risk include; his previous history of offending, time spent in jail prior to his index offence, his young age at his first offence, criminal versatility, past experience of head injury, impulsivity and the seriousness of his index offence.
- Dynamic factors that elevate Mr. Burton's risk for violent recidivism include his pro-violence beliefs, his distorted thinking relating to his offending and his view of the world; specifically his beliefs of entitlement and suspicious and mistrustful outlook. Other dynamic factors that increase his risk include his limited ability to manage his emotions appropriately, criminal associates, substance use, and a lack of empathy and remorse. To date Mr. Burton has increased his insight into these factors, and while developing some strategies to manage his mood he is not yet using these reliably. He is also able to identify his thinking errors, and appears to be beginning to challenge them. Further intervention relating to these factors is needed.'
- [67] The psychologist also provided an outline of what would be considered 'high risk situations' for Mr. Burton's risk of violence, as well as warning signs that might exist when Mr. Burton's level of risk for violence is increasing.
- [68] The psychologist provided a comment on the release plan that was being formulated for Mr. Burton. Finally, she provided recommendations that pertain to Mr. Burton's

need to complete the violence prevention unit and the need to continue developing the reintegration plan. She suggested 'that the Parole Board consider the possibility of approving escorted outings for Mr. Burton to assist with his reintegration planning', and noted that Mr. Burton would likely benefit from further counselling relating to substance abuse as part of his reintegration plan.

[69] As with the previous report, a 'psychological service report summary' was provided to the Parole Board. The summary was approximately half a page and provided a brief mention of Mr. Burton's potential risk for offending, noting that 'while Mr. Burton has generally applied himself to the violence prevention program, the factors that contributed to his offending continued to place him at high risk for re-offending violently'.

Psychological service report to New Zealand Parole Board (17 August 2004)

[70] This psychological report is essentially an update of the previous report prepared by the same psychologist on 19 May 2004. By the time this report had been prepared, Mr. Burton had completed the violence prevention program and the report provided an update on his progress therein. Generally speaking Mr. Burton appeared to have made good progress in the violence prevention program. It was noted that while he stated at the outset of the program that he was 'attending for the Parole Board, this gradually changed with him identifying a number of intrinsic reasons for attending.' The prisoners are assessed on psychological measures before and after treatment and in Mr. Burton's case the scores on the psychological assessment measures reduced appropriately following treatment. While this is positive, the psychologist wrote 'a note of caution is warranted when interpreting the results of Mr. Burton's psychometric tests. These tests are all self report measures and they are therefore vulnerable to respondents attempting to portray themselves in a positive light.'

[71] On this occasion the psychologist reported that Mr. Burton was 'at *very* high risk for re-offending in a violent manner' (emphasis added). She reiterated that Mr. Burton's score on the RoC*RoI indicated he is at high risk of re-offending and once again identified static risk factors that elevated his level of risk.

[72] The additional information obtained in this report that seemed to have increased the psychologist's view of Mr. Burton's level of risk from high to very high was the

completion of the Psychopathy Checklist: Screening Version (PCL-SV). With respect to this measure the psychologist wrote:

Mr. Burton, however, was assessed as having a very high score on the Psychopathy Checklist Screening Version, a measure that has been shown to have high predictability in regard to both serious violent or sexual offending and speed of re-offending leading to re-imprisonment. Further, his very high score on the interpersonal section of the PCL:SV highlights an enduring pattern of grandiosity, and lack of empathy, remorse, and indicates he is likely to reoffend within a relatively short period of release into the community. Mr. Burton declined to participate in the interview for this measure.

- [73] The psychologist once again reviewed the dynamic factors that elevate Mr. Burton's risk for violence which mirrored those noted in her previous report. The psychologist did note however that 'Mr. Burton appeared, during group, to increase his ability to manage his emotions. He appeared to acknowledge the contribution of associates to his offending, and their influence on him.'
- [74] The psychologist once again highlighted the high risk situations for Mr. Burton as well as warning signs that might emerge if his level of risk for violence is increased. The recommendations that the psychologist made varied somewhat from those in the earlier report since at this time Mr. Burton has completed the violence prevention unit. The recommendations were that Mr. Burton would benefit from further counselling related to substance use, that Mr. Burton should not associate with criminals if released, and that he should continue with psychological counselling through the Department of Corrections upon his release 'to consolidate treatment gains made in the violence prevention unit and to help him to adjust to community life without placing himself in high risk situations.'
- [75] The psychological service report summary prepared following this report reflected on the content of the report: Mr. Burton's progress in the violence prevention program and his potential risk for re-offending as follows:

'While Mr. Burton has generally applied himself to the violence prevention program, the factors that contributed to his offending continue to place him at very high risk for reoffending violently'.

The summary reiterated the recommendations made in the report.

Psychological service report to the New Zealand Parole Board (26 April 2006)

[76] This comprehensive report was prepared on 26 April 2006 in response to the Parole Board's request made on 20 March 2006 for an updated psychological assessment for Mr. Burton. The psychologist assessed Mr. Burton on 30 March 2006 and 11 April 2006 for a total of four hours. The psychologist reviewed a range of information pertaining to Mr. Burton including, consultations with prison management, consultation with Mr. Burton's mother and designated support person, consultation with unit staff, the reports prepared for the New Zealand Parole Board, previous psychological reports, psychiatric report prepared for the Parole Board, prior decisions of the Parole Board, Mr. Burton's criminal history, Mr. Burton's last two incident reports, and sentencing notes made by the judge when Mr. Burton was sentenced following his escape in 1998. The psychologist also administered a scale to measure anger and distortions regarding beliefs about offending as well as a measure to assess the extent to which an individual may be inclined to respond to questions in a socially desirable manner.

[77] In reviewing Mr. Burton's background and offence precipitants, the psychologist reported on the presence of a 'public prison service memorandum dated 24 April 2006.' With respect to the memorandum, the psychologist wrote that it:

'Reports two instances in February and March 2006 when prisoners in unit four (where Mr. Burton was located) were believed to have been assaulted. One had a suspected broken arm and the other was found 'in a badly beaten state'. A third prisoner approached staff in February 2006 to request relocation from unit four due to alleging he was being repeatedly assaulted by the same person whom he would not name. The memorandum reported that 'intelligence information had been received on all three occasions that prisoner Graeme Burton was the perpetrator'. On 3 April 2006 intelligence information was received that Mr. Burton and another prisoner were soliciting other prisoners to do 'hits' on two staff members. This was thought to be in retaliation for the removal from the unit of a friend and associate of Mr. Burton. This latter allegation resulted in Mr. Burton being moved to another unit in the interests of good order and security of the prison as well as the safety of both staff and prisoners. The memorandum highlighted that the intelligence information has not been substantiated.

It does not appear that these allegations are able to be tested due to informants refusing to give evidence or recanting statements. It is noted that these reports contrast with documented observations of unit staff available on file. In December 2005 unit staff were quoted in a pre-release report as indicating he got along with staff and other prisoners and that there were no concerns. He was said in March 2006 to be a polite, compliant prisoner. There were other reports of staff describing similarly positive appraisals of his behaviour and attitude and no written negative comments were found on his

file during 2005 or 2006. However, the allegations are consistent with those made earlier in his sentence. A community probation service pre-sentence report dated 16 July 1998 noted that 'prison reports show that he was implicated in a number of assaults on other inmates – largely unsubstantiated due to the unwillingness of inmates to complain – and as a result he was transferred back to Auckland prison.'

[78] The psychologist assessed Mr. Burton's potential to reoffend. He noted that the scores on the RoC*RoI risk measure indicated Mr. Burton's score fell 'in the high range in regard to the likelihood of re-offending.' The psychologist noted that the Psychopathy Checklist Screening Version from 2004 was very high. The psychologist noted however that

'with the addition of information from the current interview and review of documentation during the period following the original administration, Mr. Burton's score was found to have decreased, but it was still in the high range. The decrease in his score was primarily due to Mr. Burton demonstrating an improved and apparently stable ability to manage impulsive behaviour and control his moods. The PCL:SV is based on lifetime traits and is not intended or suitable as a measure of shorter-term change'

[79] The psychologist also considered Mr. Burton's risk of violent recidivism in light of static (unchangeable) and dynamic (changeable) risk factors associated with violence. The psychologist employed the Violence Risk Scale to structure the assessment. He noted that

'static factors identified as present in Mr. Burton's current age, age at first violent conviction, use of violence throughout his life span, prior escape, and an unstable family upbringing. Mr. Burton has historically displayed a broad range of dynamic risk factors including violent lifestyle, criminal attitudes, poor work ethic, criminal peers, interpersonal aggression, emotional control, violence during institutionalisation, weapon use, substance use, impulsivity, and cognitive distortions.'

The psychologist reflected that

'the documented and confirmed evidence (prison reports and file notes) supports the view that Mr. Burton has made progress in addressing some of these dynamic risk factors. In particular, there is no confirmed evidence of misconduct, interpersonal aggression, or violence for nearly three years, no confirmed evidence of substance abuse for four years, apparent improvements in mood regulation, no observation of impulsive behaviour, and the demonstration of an ability to identify and restructure distorted cognitions supportive of violence.

It should be noted that it is very difficult to reliably measure change on these dynamic factors while the person is imprisoned. This is primarily due to the

structured and restricted nature of the prison environment (which is difficult to compare to the situation present in community) and the reliance on the offender's self report.

Based on the confirmed information available, Mr. Burton has demonstrated that he has significantly improved his ability to manage his risk in the prison setting. His release plan has some strengths in the short-term support of his mother and longer-term support of several other pro-social peers. However, if Mr. Burton carries out his plan to open a tattoo business, this is viewed as elevating his risk of relapse into criminal association, substance abuse and violence.'

[80] The psychologist specifically commented on his assessment of Mr. Burton's level of risk for re-offending. In doing so the psychologist wrote that

'Mr. Burton was assessed as being at *moderate-high* risk of further violent offending in the medium term following release. His immediate risk will be increased by any resumption of substance abuse, association with criminal peers, major life stressors or set backs, withdrawal from social support, lack of cooperation with supervision, and persistent negative mood states.'

[81] The psychologist noted that in arriving at his conclusion regarding Mr. Burton's risk he did not take into account the unsubstantiated and untested allegations that were made in the public prison service memorandum he commented upon earlier in the report. The psychologist noted however, that

'if the New Zealand Parole Board found the allegations to be convincing, this would substantially elevate Mr. Burton's assessed risk of re-offending and cast doubt on the veracity of his self-report on apparent benefit for treatment. However, if the Board considers that the allegations are not substantive, the apparent changes in dynamic risk factors and consequent moderation of Mr. Burton's assessed risk would remain relevant to decision-making regarding release.'

[82] The psychologist then commented on the release plan that had been in place for Mr. Burton. The psychologist reiterated his concern that Mr. Burton had plans to open a tattoo/graphic arts studio given that the psychologist believed it would bring Mr. Burton into contact with offenders. Finally, the psychologist wrote that

'Mr. Burton has behaved well on escorted outings to date but has not had the opportunity to progress to temporary releases. It is understood that these will not be possible in the short term while investigations into recent allegations are in progress. The lack of temporary releases does compromise Mr. Burton's reintegration through not allowing for a gradual process of becoming accustomed to the community.'

[83] The psychologist concluded by making two sets of recommendations. The first recommendations were suggested if the Parole Board decided to release Mr. Burton on the proposed date of July 2006. In that case the psychologist noted that proposed special conditions should include Mr. Burton not engaging in a tattoo business without written permission of the probation officer and that

‘those involved in supervising and supporting Mr. Burton should monitor him for warning signs of relapse, which will include any use of substances, association with those involved in criminal activity or substance abuse, withdrawal from support persons or supervision, persistently negative mood or attitude, impulsive behaviour, financial problems or accommodation instability.’

[84] Three recommendations were listed ‘if the New Zealand Parole Board chooses to defer Mr. Burton’s release date’. The recommendations were that

‘1. Mr. Burton should complete a series of temporary releases at progressively longer duration, 2. Mr. Burton should be briefly assessed by psychological services given that he is likely to find deferral of release difficult. He should be considered for individual treatment to support him in managing his behaviour without regression into violence or misconduct, and 3. That he could be considered for attendance at the ‘Montgomery House program, both to reinforce and extend treatment begun at the violence prevention unit and to fulfil a reintegration function.’

[85] The psychological service report summary following this report was approximately two thirds of a page in length and reiterated the general information provided in the report including the fact that allegations that were to date unsubstantiated had been made, that Mr. Burton successfully completed the violence prevention unit and demonstrated he had retained knowledge and was able to apply this to managing anger. The summary noted that Mr. Burton was assessed as being at moderate high-risk for violent re-offending in the medium term. The summary noted that the risk judgement was made excluding the recent allegations and that if the allegations were found to be substantive this would elevate both his immediate and long term risk. The set of recommendations, depending on whether the Board actually decided to release Mr. Burton, were also reiterated.

Private Forensic Psychiatric Assessment (22 October 2004)

[86] The psychiatrist prepared a report at the request of Mr. Burton’s lawyer. In preparing the report the psychiatrist discussed the case with the lawyer, reviewed Mr. Burton’s prison medical file and the psychological reports prepared for the Parole Board.

[87] The psychiatrist noted that the history he obtained was consistent with that presented in the psychological reports he reviewed. In his opinion the psychiatrist provided general information about Mr. Burton's mental state and functioning. He noted the presence of what Mr. Burton described as panic attacks and bouts of depression which he had experienced since childhood.

[88] With respect to his opinion regarding Mr. Burton's risk of re-offending, the psychiatrist wrote:

'with regard to his risk of re-offending I would concur with the psychological assessment that at the time of his incarceration this man carried with him a high risk of re-offending on the basis of his presentation at the time and his history. This is borne out by his description of his behaviour and attitude during the first half of this current incarceration. However, there appears to have been a subsequent maturation in his attitude and he has engaged in a substantial rehabilitative program to modify his risk of re-offending. It is therefore reasonable to conclude that his risk has been substantially modified from the time of incarceration.'

The psychiatrist further noted that

'because of the perceived high risk of re-offending he requires a well-managed and structured release into the community. I would support recommendations for ongoing drug and alcohol work as well as the provision of a support network and individual psychological counselling.'

Private Forensic psychiatric report (22 May 2006)

[89] The same psychiatrist who prepared the 2004 report updated his report on this occasion. The psychiatrist interviewed Mr. Burton again at Rimutaka Prison and reviewed a copy of the psychological report completed on 26 April 2006 for the Parole Board.

[90] The psychiatrist noted that Mr. Burton discussed with him that allegations had been made about

'significant misconduct of a violent nature in recent weeks and that these had at first come to light when he had been moved from the unit he had been in and further allegations had come to light when he had reviewed the most recent psychological report written about him. He indicated that it had been suggested that he had been intending to incite violence and had apparently placed an \$8,000 contract on one of the prison officers. He stated that despite these allegations he had been subject to neither an incident report nor

charges. He denied these charges. He stated that because the charges had been made he has been removed to one of the pods with considerable restriction on his freedoms, particularly he is now unable to take any kind of leaves from prison. He feels frustrated by what he sees as another set back which challenges his determination to behave in a positive and pro-social way.'

[91] The psychiatrist noted that while Mr. Burton had reported 'marked problem with anxiety particularly in the form of panic attacks' when he had previously seen him, Mr. Burton now noted that he had 'worked on his capacity to manage these and is no longer troubled by them.'

[92] The psychiatrist also reviewed with Mr. Burton his experience with the violence prevention unit which was seen as positive. In providing his opinion the psychiatrist noted that there had been limited change in Mr. Burton from the time he had seen him in the past except that the problems with anxiety had receded. He concluded:

'In my opinion, mindful of the limitations of my assessment and the allegations that have been made I continue to be impressed by Mr. Burton's presentation and the evidence that suggests that he has made a substantial change as I described in my previous report of October 2004. I would note that he is manifesting no evidence currently of psychiatric disorder and from his presentation and account seems to be coping with the delays as he perceives them in his release to the community well. However I would further suggest that from his own account and mindful of his past history it is possible that further delays if he experiences them as either arbitrary or overtly inimical to him may lead to a return to previous antisocial mindset. In other words (if the recent allegations are considered to be unfounded) it would seem that currently there is a window of opportunity to release Mr. Burton whilst he still manifests and continues to consolidate the benefits of the violence prevention unit and prior to these benefits being eroded by more prolonged incarceration. I would support the recommendations of the psychologist that he commences a program of incrementally increased leaves and that he be provided with the level of support and supervision recommended in that report if a decision is made to release him.'

Victim's submissions

[93] The sister of the victim of murder made a written submission to the Parole Board dated 28 June 2006 which was passed to the offender and also saw the Parole Board in person on the day prior to the hearing. There are no notes from that meeting available to us. The victim expressed concerns about the offender's:

- lack of remorse
- reoffending

- belief system

[94] As to re-offending, she expressed concern that if he were released the same “pain will be released on a whole new set of people. This cannot happen again”. She listed risk factors:

- adopted and his adopted mother had died
- drugs
- alcohol
- influenced by others
- no remorse
- escaped from jail

[95] She had general comments about the causes of anger and had a message for Burton to choose peace every time there was a situation of conflict, and love. In a written submission to the Board prior to the March 2006 hearing the mother of the victim of 1992 thanked the Board for a copy of the report of his hearing in September 2005, noting that the report suggested that Burton had some insight into his offending but the pain of the death of her son continued for the family in various ways. She hoped that if Burton were to be released into society he would continue to make the effort to control his anger, to think of other people and to make a contribution to the welfare of others. She said he was fortunate to have a second chance at life which her son would not have, and hoped that if he were released he would use his life wisely.

Other submissions

[96] The Board had received over two years, several letters of support for Burton from two or three members of the community connected either with his family or friends or programmes.

The Parole Board hearings

[97] Transcripts have been prepared from the taped record of the hearings of the New Zealand Parole Board on 14 September 2005, 20 March 2006 and 28 June 2006. The membership of the Boards on each occasion was slightly different. On 14 September there were five members of the Board; 20 March, six members on the Board; 28 June – six members on the Board. The membership denotes that it was

what is known as an extended Board rather than the three person Board which customarily sits for more straightforward matters. Burton was represented by counsel on each occasion.

[98] At the hearing of 14 September 2004, after listening to what everyone had to say and retiring to consider the matter, the Board indicated that it would produce its decision in writing subsequent to the hearing but that it had decided that Burton had done well and everything that he could do to that time to show that he was no longer a risk to the community. He was advised that he still had some proving to do that he had recovered from the original offence and the “very nasty category of escape” that he was involved in and the Board indicated that it needed to show him how he could make progress toward release. The Board was disappointed that the recommendations about home leave and other temporary releases had not been taken up and indicated that they wanted that to happen. They would emphasise again to the authorities the need for him to have releases in the meantime to build on the trust that he had established over the last two years, but that there would be no final promise to him that he would be released next hearing but that that would be assessed in six months time. He was told that everything was in his favour at the present time, except that he had not been tested out of prison in some way and that the Board would re-recommend that those recommendations be followed through. He was told that the Board was trying to track a path for his release, though a decision about that would have to be made in the future.

[99] At the hearing on 20 March 2006 a Principal Corrections Officer advised the Board that in the previous six months since November 2005 when he had commenced dealings with Burton there had been no untoward conduct or misconduct. He had been present on Burton’s last escorted release from custody through town for a medical appointment relating to a shoulder injury and his interactions with the public were praiseworthy.

[100] The Board, after considering their position following the hearing, told Burton the details of the decision which would give him a date for release of Monday 10 July subject to a satisfactory psychological report, saying:

“And therefore, our intention is to see you in June at our Board meeting when we will have that report. In the three months that is going to happen between now and then we will be recommending a) that you be seen by the psychologist; b) that you have greater opportunity to have leaves into the

community with the people who are prepared to support you; and that you be prepared for release on 10 July. But you need to be sure, you need to understand, we are still waiting for a report from the psychologist as to your risk. If that can show, with what you have achieved, has reduced your risk, you will be on your way. You are no longer an undue risk if that shows what that says [sic] so we are going to see you in three months, but you have a date to work towards.”

[101] At the hearing of 28 June 2006 a prison officer indicated to the Board that Burton had been in the unit which he worked in for six weeks, having arrived from a previous unit. He told the Board that “... he has basically just carried out his day to day routine. He certainly has given me no trouble whatsoever. Any issues that I have had to deal with Graeme he has been straight up, very approachable, there have never been any issues and I certainly have no concerns about the man at all.”

[102] Burton denied knowing about the events contained in the accusations and expressed dismay at being kept in jail for something he did not do which would be calculated to make him angry and that though he had tried to stay positive it seemed that barriers to his release were always being raised. His lawyer submitted that though his conduct had been positive and strategies were in place for his release to the community, despondency at the prospect of not being released was creeping through.

Responses to Questions for review

[103] We now turn to a consideration of the Board's decision in light of the information before it in considering Mr. Burton's matter.

Review Question #1:

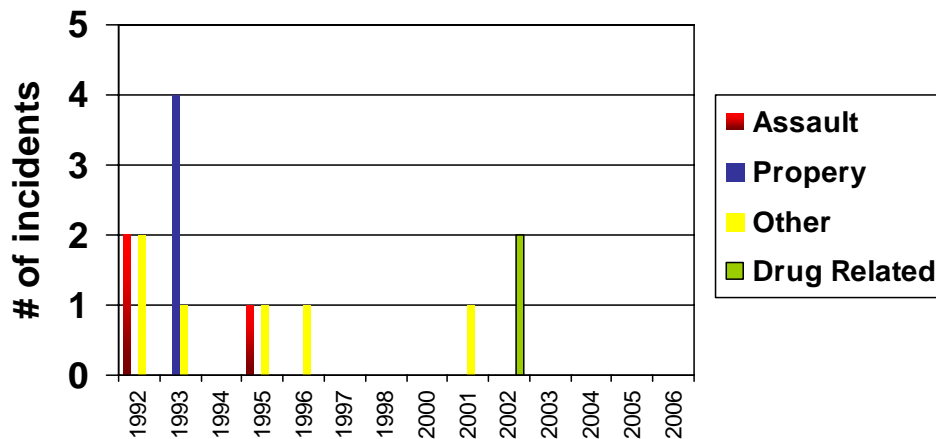
On the information available to the Parole Board, was the decision a reasonable one?

[104] As noted above in Paragraph 10, Section 28 of the Parole Act 2002 provides that the New Zealand Parole Board is empowered to release an offender on parole after a hearing, only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community. The Act provides in Section 7 that the Board must give “paramount consideration” to the “safety of the community” “when making decisions about...the release of an offender.”

- [105] Balanced against the obligation of the Board to give paramount consideration to the safety of the community, is the “the public interest in the reintegration of the offender into society as a law abiding citizen” (Section 28). Section 28 also provides that offenders must be detained no longer than is consistent with the safety of the community, and that they must not be subject to release conditions or detention conditions that are more onerous or last longer than is consistent with the safety of the community. The Board’s decisions must be made on the basis of all the relevant information that is available to the Board at the time.
- [106] Section 7 (Guiding Principles) (3) further provides that any person required to consider whether an offender presents an “undue risk” must consider “both a) the likelihood of further offending; and b) the nature and seriousness of any likely subsequent offending.”
- [107] In order to answer the question before us, whether on the information available to the Parole Board, the decision was a reasonable one, we must consider whether the Board erred in the process of balancing the potential risk that Mr. Burton posed to the community against the public interest in reintegrating him back into the community as a law abiding citizen.
- [108] Mr. Burton had been serving a sentence of life imprisonment imposed in December 1992 for murder. He was a young man (21 years old) at the time he was convicted of murder. Despite being young, Mr. Burton had accumulated a large number of convictions. The vast number of convictions related to property offences and fraud offences. There were only two convictions that were violence related – two counts of resisting police. The facts surrounding the offence of murder for which Mr. Burton was serving a life sentence indicated that the offence was quite uncharacteristic of Mr. Burton's general behaviour. He had been using drugs, which was not unusual for him, but the degree of violence which resulted in the murder appeared to be out of character for Mr. Burton, at least up to that point in his life.
- [109] To the point when he had been released by the Parole Board, Mr. Burton had served some 13.5 years in prison. During that period of time, his behaviour was such that he committed 15 incidents of misconduct that were recorded in his prison records. Mr. Burton was also convicted of two counts of assault on prison officers in September 1994 and assault with intent to injure from events in October 1996. As the figure below shows, though, the frequency of the incidents reduced over time to the point

where there were no incidents recorded against Mr. Burton for some three years. It had been a decade since he had any incident of misconduct or conviction for any violence-related offence.

Incidents of Misconduct Recorded During Period of Incarceration



[110] As the incidents noted above show, Mr. Burton has had two drug-related incidents of misconduct. One was for using/consuming drugs/alcohol and the second one was for refusing to comply with requirement to submit to a procedure (drugs/alcohol). Again, however, he was not found to have used substances since 2002, some three years before he was released.

[111] Mr. Burton, along with some fellow prisoners, escaped from custody in 1998. Mr. Burton was apprehended by the police and returned to prison. He received six convictions for escaping from prison, burglary, unlawfully taking a motor vehicle and possession of firearms.

[112] For many years, Mr. Burton received positive reports about his behaviour and activities in prison. He completed a range of treatment programmes pertaining to violence, substance abuse, and cognitive skills. Of particular importance are those reports that pertain to the treatment for violence that Mr. Burton received in 2004. The reports were positive, indicating the belief that Mr. Burton was learning from the program and using the information to change his outlook and his behaviour.

- [113] Mr. Burton was the subject of a reintegration strategy and he had three escorted outings that went well. The pre-release reports before the Parole Board were uniformly positive and commented positively on Mr. Burton's behaviour and his community reintegration plan.
- [114] Psychological reports prepared in 2002 and 2004 identified Mr. Burton having static or historical risk factors that placed him at a "high" or "very high" risk of re-offending; however, all of the reports indicated that Mr. Burton had progressed well in treatment and that he was motivated to change. The psychiatric reports before the Board were generally positive, providing support for Mr. Burton's release.
- [115] The most recent psychological report prepared by a psychologist working for the Department of Corrections was completed in April 2006. The report was comprehensive and approached Mr. Burton's potential release in a thoughtful way. The report brought to the Board's attention the possibility that there were unproved allegations against Mr. Burton. Although still noting that the historical risk factors were indicative of a moderate-high degree of risk, and noting the lack of temporary release opportunities that were afforded to Mr. Burton, the psychologist provided support for his carefully planned release.
- [116] At the hearings on 20 March 2006 and 28 June 2006, prison officers directly informed the Parole Board that Mr. Burton had behaved well and that there had been no untoward conduct.
- [117] In the prison service pre-release addendum report of June 2006 the Board was advised that if released Burton would be managed with "zero tolerance" and that a close relationship was maintained between the Police and Community Probation Service for the management of high risk offenders.
- [118] In its dealings with Mr. Burton over several years, the New Zealand Parole Board gave due consideration to the potential risk that Mr. Burton posed to the community and carefully balanced that risk potential against the public interest in reintegrating him back into the community as a law abiding citizen. Having made the judgment that the unproveable allegations about Burton's conduct recounted by the psychologist should not be taken into account, on the information available before the Parole Board on 28 June 2006, the decision to grant Mr. Burton's application for Parole was reasonable.

[119] After scrutinising the information available before the Parole Board, and in considering the processes undertaken by the Board, we turn to the second question posed for the review which contemplates that we consider the matter with the advantage of hindsight.

Review Question #2:

Is there anything to be learned by the Board in the exercise of its function, from this tragedy?

[120] This review has identified five areas for the New Zealand Parole Board to consider in future decision-making: Communications between the Parole Board and the Department of Corrections; The psychological reports before the Board; Dealing with release expectations over time; How the Board deals with untested allegations of misconduct; and Overcoming any disjunction between the Board's expectations and the reality of supervision after release.

Communications between the Parole Board and the Department of Corrections

[121] The New Zealand Parole Board must remain at arms length from the Department of Corrections to ensure the independence of its decisions. Nonetheless, the Board requires information from Corrections, and Corrections needs to monitor the decision-making of the Board, to ensure that release decision-making and planning is done in a way that maximizes the protection of the community while affording opportunities for the safe integration of the prisoner into the community.

[122] In Mr. Burton's case, there was no evidence that the Board understood that because Mr. Burton's security classification level was "low medium," he was not eligible for the temporary releases the Board kept requesting to facilitate a gradual release plan.

[123] Despite the Board reiterating its request for temporary release opportunities for Mr. Burton, there is no evidence that anyone from the Department of Corrections informed the Board of the reasons Mr. Burton was not being allowed to take temporary release.

[124] There is further evidence of inadequate communication between the Parole Board and the Department of Corrections. The only information regarding the allegations of

misconduct about Mr. Burton while in prison came from a report prepared by the psychologist in April 2006. No such information was contained in the pre-release reports prepared by Corrections for the Parole Board and the prison officers present at the hearing did not indicate that any allegations of misconduct were known.

[125] Despite Mr. Burton being scheduled for a Parole hearing in March 2006, no psychological assessment had been made available to the Board since August 2004. It would have been most beneficial for Corrections to have provided a recent report to be considered by the Board at that hearing.

The Psychological Reports before the Board

[126] The psychological reports prepared by the Department of Corrections for the Parole Board provide a general overview of the prisoner and matters relevant to the Board, including a systematic consideration of the prisoner's potential for re-offending. The state of expertise in re-offence and violence risk assessment does not enable one to predict definitively whether the individual in question will or will not re-offend. Contemporary approaches to risk assessment do allow the clinician to identify, with a reasonable degree of certainty, the extent to which the individual shares characteristics with categories of offenders who have been found to be at various levels of risk (e.g., low, moderate, high, etc.).² As such, the reports should be helpful to the Board in its decision-making, though, of course the Board should consider all available information in making its decisions.

[127] In cases where properly constituted reports indicate that an offender is at a "moderate-high" or "high" level of risk for re-offending or violence, there should be long-standing evidence that the offender has demonstrated change in the factors that contributed to the individual's level of risk. The changes must be demonstrated over time, across situations, and across contexts. Without good evidence of actual changes in behaviour and attitudes, there can be little assurance that the offender's behaviour will be different upon release.

² See, e.g., Ogloff, J. R. P., & Davis, M. R. (2005). Assessing Risk for Violence in the Australian Context. In D. Chappell & P. Wilson (Eds) *Issues in Australian Crime and Criminal Justice* (pp. 301-338), Chatswood: Lexis Nexis Butterworths.

- [128] The Board should have available current psychological assessments to consider in its decision-making, particularly in cases such as Mr. Burton's where the offender has engaged in very serious past acts of violence. Such reports must comply with contemporary standards of practice in the risk assessment field. The psychological reports in Mr. Burton's case were generally sound. In particular, the one prepared in April 2006, was consistent with best-practice standards in the field.
- [129] To the extent that the psychological reports, along with other information provided by the Department of Corrections, are important for the Board's consideration, the Board acted somewhat prematurely by setting a release date to be considered subject to the receipt of a psychological report "if that can show, with what you have achieved, has reduced your risk." This is particularly the case since the previous psychological reports identified Mr. Burton as having been at "high risk" or "very high risk" for violence.
- [130] The psychological reports can be quite long and somewhat technical. As such, the psychologists who complete them prepare a summary of the report that appears at the end of the report. Although it would be prudent for the Board to consider the reports in full, particularly in cases such as Mr. Burton's, the summaries can be of practical assistance. The summaries of the reports in Mr. Burton's case, though, did not follow any particular format. They would be of greater utility if they were prepared according to a format that clearly addressed the matters of concern to the board, in particular

"When any person is required under this part to assess whether an offender poses an undue risk, the person must consider both a) the likelihood of further offending; and b) the nature and seriousness of any likely subsequent offending" Section 7 (Guiding Principles) (3).

The summaries should also provide consideration of "the support and supervision available to the offender following release" (Section 28).

- [131] Psychological or psychiatric assessments prepared by independent practitioners working outside of the Department of Corrections may be useful for providing an external perspective on an offender's functioning. Only those reports, though, that carefully consider all of the relevant information can be of value to the Board in its decision-making (e.g., review of prison files, adequate interviews with prisoner, the offender's history, offence history and pattern of offending, release plans, collateral source information, and a systematic evaluation of risk for re-offending and violence

using contemporary best-practice approaches). In Mr. Burton's case, the psychiatrist who completed private reports noted that his opinions were necessarily limited by a lack of information. In fact, the only information to which the psychiatrist had access was the prisoner's self-report, his medical file, and the recent psychological reports.

[132] It is understood that members of the Parole Board have received some training in the area of re-offending and violence risk assessment. Ongoing training would be beneficial given the technical and developing nature of the work in the field.

Dealing with Release Expectations over Time

[133] In Mr. Burton's case, there was a sense over time that the Board had an expectation that Mr. Burton should be released. This was particularly evidenced in the Board's hearing and decision of 20 March 2006 where the release date was set, subject to a psychological report showing a reduction of Mr. Burton's level of risk for violence. The possible reasons for such expectations are unclear but may be linked to a sense that, with the passage of time and the rehabilitative efforts that Mr. Burton was undertaking, he deserved to be released. The expectations surrounding release may also arise out of the frequency of Board hearing, where changes might be expected from year to year. Finally, a degree of frustration seems to arise when the Board is not able to obtain the information it requires (e.g., a current psychological report) or does not have its expectations met (e.g., plans for temporary absences).

[134] As noted above, the Board need not have set a release date following the hearing of 20 March 2006. In the case where the Board does not have the necessary information before it, it is important for the Board to solicit such information but it would be best to withhold decisions regarding release until after the information is received and considered by the Board. To do otherwise can contribute to expectations of release by the Board and the prisoner. Once they have arisen, these expectations are difficult to advise against.

[135] An example of how the Board's expectations for release may have affected its decision-making in Mr. Burton's case arises from the Board's consideration of the psychological report that was prepared in April 2006, after the Board had set a tentative date for Mr. Burton's release. In its Decision of 28 June 2006, the Board quoted the following excerpt from the psychologist's report:

“The apparent changes in dynamic risk factors and consequent moderation of Mr Burton’s assessment risk remain relevant to the decision-making process”.

However, the quotation was taken out of context. The psychologist wrote “However, if the Board considers that the allegations are not substantive, the apparent changes...” The statement was made after the psychologist stated that if the allegations of misconduct were substantiated, Mr. Burton’s level of risk would be affected. The board also quoted the psychologist as writing

“Mr. Burton’s documented improvement in conduct and release plan supports a case for a carefully managed release under close supervision”.

Again, the context of the quotation was not provided. The psychologist wrote

“The task of providing clear advice to the New Zealand Parole Board that might assist in determining Mr. Burton’s suitability for release is complicated by the current situation, where serious allegations have been reported but not substantiated. It should be noted that in the absence of these allegations, Mr. Burton’s documented improvement in conduct and release plan would....”

Even if the Board decided, as it did, not to put weight onto the unproven allegations against Mr. Burton, the Board should have considered the psychologist’s report more fully than it appears that it did. Indeed, the psychologist concluded that “Mr. Burton was assessed as being at moderate high risk of further violent offending in the medium term following release.” This did not appear in the Board’s decision.

How the Board Deals with Untested Allegations of Misconduct

[136] Parole is a privilege provided when the Board is convinced that the offender will not pose an undue risk to the community and that his integration into society can be facilitated by a grant of parole. While it ultimately would be improper to deny parole based on groundless allegations, it would have been prudent for the Board to have delayed its decision subject to obtaining clarification from the Department of Corrections about the allegations of misconduct that apparently were in existence.

[137] While the law to be applied in New Zealand in such a circumstance requires authoritative statement, we consider that the *Mooring v Canada* [para 18] rule that the duty to act fairly is tempered by a requirement for the Board to make a determination about the source of the information to enable it to measure its reliability and persuasiveness will apply. The Board may have done that, but it did not say so in its

decisions. We consider that such a process would prudently require that Corrections be asked to explain what was happening.

Overcoming any Disjunction between the Board's Expectations and the Reality of Supervision after Release

[138] The Board was told in the pre-release addendum report of June 2006 that Mr. Burton would be managed with "zero tolerance", and that a close relationship is maintained between the Police and Community Probation Service for the management of high risk offenders.

[139] The Board followed the advice of the Corrections psychologist with regard to monitoring after release. They required that the Probation Officer's attention be brought particularly to the psychologist's recommendation that Mr. Burton be monitored for warning signs of relapse which would include the use of substances, association with those involved in criminal activity or substance abuse, withdrawal from support persons or supervision, persistently negative mood or attitude, compulsive behaviour, financial problems or accommodation instability.

[140] We are not privy to what happened after release except the public information around the tragedy, but the case raises a question as to whether the Board's expectations were reasonably capable of being resourced by those responsible for supervision. This may need consideration elsewhere, but in like cases it seems desirable that there be a mechanism for confirmation that Corrections can adequately service the Parole Board's set conditions before release is effected.