HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, KIEFEL AND BELL JJ

JAYANT MUKUNDRAY PATEL APPELLANT/APPLICANT

AND

THE QUEEN RESPONDENT

Patel v The Queen
[2012] HCA 29
24 August 2012
B11/2012 & B25/2011

ORDER

In matter B11/2012:

Appeal dismissed.

In matter B25/2011:

1. *Special leave to appeal granted.*

2. *Appeal treated as instituted and heard instanter, and allowed.*

3. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 21 April 2011 and, in its place, order that:*

    (a) the appellant's appeal to that Court be allowed;

    (b) the appellant's convictions for the manslaughter of Mervyn John Morris, James Edward Phillips and Gerardus Wilhelmus Gosewinus Kemps and for unlawfully doing grievous bodily harm to Ian Rodney Vowles be quashed; and

    (c) a new trial be had.

On appeal from the Supreme Court of Queensland

Representation

L F Kelly SC with D M Turner and P F Mylne for the appellant/applicant (instructed by Raniga Lawyers)

W Sofronoff QC, Solicitor-General of the State of Queensland and P J Davis SC with D L Meredith and J R Jones for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Patel v The Queen

Criminal law – Manslaughter by criminal negligence – Appellant convicted of manslaughter and unlawfully doing grievous bodily harm – Section 288 of *Criminal Code* (Q) imposes duty on persons who undertake to administer surgical treatment to have reasonable skill and use reasonable care – Prosecution alleged appellant breached his duty by deciding to operate on certain patients – Whether "surgical treatment" in s 288 encompasses decision to operate.

Criminal law – Miscarriage of justice – Change in prosecution case at late point in trial – Prejudicial evidence admitted – Whether test of criminal negligence is objective – Whether evidence remained relevant on revised case – Significance of tactical decisions by defence counsel.

Criminal law – Appeal – Application of "proviso" – Irrelevant and prejudicial evidence admitted – Whether no substantial miscarriage of justice actually occurred – Consideration of *Wilde v The Queen* (1988) 164 CLR 365 and concept of fundamental error.

Words and phrases – "fundamental error", "miscarriage of justice", "moral culpability", "no substantial miscarriage of justice has actually occurred", "proviso", "surgical treatment".

Criminal Code (Q), ss 282, 288-289, 303, 320, 668E(1)-(1A).

1 FRENCH CJ, HAYNE, KIEFEL AND BELL JJ. On 29 June 2010 Jayant Mukundray Patel ("the appellant") was convicted by a jury of three counts of manslaughter[1] and one count of unlawfully doing grievous bodily harm[2], after a trial in the Supreme Court of Queensland which lasted 58 days. The appellant was at the relevant times employed as a surgeon at Bundaberg Base Hospital. The charges of manslaughter arose out of surgery conducted by the appellant upon Mervyn John Morris, James Edward Phillips and Gerardus Wilhelmus Gosewinus Kemps and that of grievous bodily harm related to surgery that the appellant conducted upon Ian Rodney Vowles.

2 Allegations concerning the appellant's competence as a surgeon had been a subject of discussion at inquiries into the public hospital system in Queensland[3] and the subject of much discussion in the media. It was against this background that the prosecution opened its case before the jury. The general tenor of the case was that the appellant was generally incompetent and grossly negligent in: recommending the surgical procedures; the manner in which he carried out each of them; and the post-operative treatment which he supervised. Particulars of the prosecution case concerning the charge arising out of the surgical procedure performed on Mr Morris, which were provided some days into the trial, confirmed that the case ranged over the whole of the appellant's conduct as a surgeon. Particulars of the prosecution case on the other charges were not provided immediately. The defence applied, unsuccessfully, to have the jury discharged without giving a verdict[4], in part because of the absence of those particulars.

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1 *Criminal Code* (Q), s 303. References to provisions of the *Criminal Code* in these reasons are to the provisions as they stood at the relevant times.

2 *Criminal Code*, s 320.

3 See Commissions of Inquiry Order (No 1) 2005 (Q), published in *Queensland Government Gazette*, E84, 26 April 2005 (inquiry not completed); Commissions of Inquiry Order (No 2) 2005 (Q), published in *Queensland Government Gazette*, E5, 6 September 2005 as amended by Commissions of Inquiry Amendment Order (No 1) 2005 (Q), published in *Queensland Government Gazette*, E22, 23 September 2005 (report published as Davies, *Queensland Public Hospitals Commission of Inquiry: Report*, (2005)); Forster, *Queensland Health Systems Review: Final Report*, (2005).

4 *Jury Act* 1995 (Q), s 60.

3 On day 43 of the trial the prosecution provided a set of revised particulars in each case, which had the effect of narrowing the case against the appellant. With the principal exception of the procedure concerning Mr Kemps, allegations that the appellant was criminally negligent in the conduct of surgery were no longer maintained, nor was it alleged that the deaths or grievous bodily harm were caused by negligent post-operative care. The prosecution case was now focused upon whether the surgical procedure in each case should have been undertaken. Following receipt of the revised particulars, the defence sought on day 44 of the trial, again unsuccessfully, to have the jury discharged on the basis that a great deal of prejudicial, and now largely irrelevant, evidence had been admitted.

4 The appellant's appeal against conviction was dismissed[5], the Court of Appeal of the Supreme Court of Queensland holding that, in all but one respect, the evidence remained relevant.

5 The appellant has been granted special leave to appeal on the ground that he has been convicted on a wrong basis. It was part of the prosecution case that the standard of care provided by the appellant in connection with the surgical procedures was so low as to breach the duty imposed by s 288 of the *Criminal Code* (Q) upon a person who undertakes to administer surgical treatment. It is the appellant's contention that s 288 applies to the conduct of surgery but not to the anterior decision to operate, which decision was the essence of the prosecution case following the filing of its revised particulars. Alternatively it is submitted that the section is ambiguous and ought not to be construed so as to extend its operation.

6 A further ground in respect of which the appellant seeks special leave to appeal has been referred to a Full Court of this Court. It is that there was a miscarriage of justice in the conduct of his trial. The appellant contends that the trial judge (Byrne SJA) wrongly permitted the trial to proceed on the basis of the original particulars, when they provided so many alternatives as to be incoherent and therefore to prejudice the defence. The appellant submits that the trial judge was wrong to refuse to discharge the jury on day 44 because evidence that was highly prejudicial and now largely irrelevant had been admitted and it was not possible to ameliorate its effects on the jury by directions. Alternatively, this Court can now determine that there has been a miscarriage of justice for those reasons.

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5 *R v Patel; ex parte A-G (Qld)* [2011] QCA 81.

7 The respondent seeks to uphold the decision of the Court of Appeal that almost all of the evidence in question remained relevant and submits that special leave should be refused because no objection was made to much of the evidence in question. By Notice of Contention the respondent contends that if there was a wrong decision on a question of law, by virtue of either the prosecution's reliance on s 288 or the wrongful admission of evidence, the proviso in s 668E(1A) of the *Criminal Code*[6] should be applied to maintain the convictions because there has been no substantial miscarriage of justice. It is submitted by the respondent that the evidence properly admitted proves to the requisite standard that the appellant was guilty of each of the charges.

8 For the reasons which follow, the appellant's argument respecting s 288 should be rejected. There should be a grant of special leave with respect to the ground that there was a miscarriage of justice. The reformulation of the prosecution case rendered irrelevant the evidence it had led to demonstrate that the appellant had done things in the operating theatre and in the post-operative care of the patients that were careless to the point of being criminally negligent. The prosecution case as eventually put to the jury was that no competent surgeon would have recommended to the patients the procedures which the appellant undertook and that to do so was so large a departure from the norm as to be criminally negligent.

9 A feature of the prosecution case was that the appellant should have appreciated that he lacked skill as a surgeon. As will be explained in these reasons, it was irrelevant whether, as the prosecution alleged, the appellant ought to have known of his shortcomings as a surgeon. The prosecution case as ultimately formulated turned on what the appellant was shown to have known about each patient's state of health: in particular, what he knew about the patient having the disease to which the surgery was directed and what he knew about the patient's state of health. What he knew, or ought to have known, about his own skill was not to the point.

10 Consideration of the appellant's allegation of miscarriage of justice and the respondent's response to it will require that consideration be given to the course of the trial and the conduct of the prosecution and defence cases.

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6 Set out at [120] below.

Section 288

11 Under the *Criminal Code*, a person who causes the death of another is deemed to have killed that other person (s 293). A person who unlawfully kills another in circumstances which do not constitute murder is guilty of manslaughter (s 303). A person who kills another does so unlawfully unless the killing is authorised, justified or excused by law (s 291). In the present case, for convictions on the counts of manslaughter to be returned it was necessary for the prosecution to prove that the appellant caused the death of the three patients, thereby killing them (s 293). For a conviction on the count of grievous bodily harm, it was necessary to prove that the appellant had done grievous bodily harm to another and that the doing of it was unlawful (s 320).

12 Section 282 is an exculpatory provision which may apply in the case of a surgical procedure. At the relevant time, it provided:

> "A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case."

13 Section 288 appears in Ch 27 of the *Criminal Code*, which is entitled "DUTIES RELATING TO THE PRESERVATION OF HUMAN LIFE". The section provides:

> "It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such 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 observe or perform that duty."

14 Section 288 is not expressed in terms of criminal responsibility[7], but in terms of duty and causation. In *R v Stott and Van Embden*[8], McPherson JA observed that the provisions of Ch 27 were probably originally designed to cater

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7 Which is defined by s 1 to mean liability to punishment as for an offence.

8 [2002] 2 Qd R 313 at 319 [16].

for questions of causation arising out of cases of "'pure' omission or failure to act." Generally speaking, the law does not render a person liable for the consequences of such an omission where there is no obligation to act[9]. However, provisions of the Chapter came to be recognised as operating in relation to criminally negligent acts which might found a conviction for manslaughter.

15 The decision in *Callaghan v The Queen*[10] explains how a provision like s 288 operates. That decision was concerned with a provision[11] equivalent to s 289 of the *Criminal Code*[12], which also appears in Ch 27. Section 289 imposes a duty on persons in charge of dangerous things to use reasonable care and take reasonable precautions to avoid danger to life, safety and health. It operates in a way similar to s 288.

16 In *Callaghan v The Queen*[13] it was observed that a defence which was of similar effect to s 23(1) of the *Criminal Code*[14] was not available under the

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9 *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 at 421 [29]; [2011] HCA 43.

10 (1952) 87 CLR 115; [1952] HCA 55.

11 *Criminal Code* 1913-1945 (WA), s 266.

12 "It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, 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."

13 (1952) 87 CLR 115 at 119.

14 Section 23(1) of the *Criminal Code* provides:

> "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that occurs by accident."

equivalent of s 289, because the defence was expressed to be subject to provisions relating to negligent acts and omissions and the equivalent of s 289 was such a provision. Therefore, an event causing death which occurs independently of a person's will, or by accident, provides no excuse for the purposes of s 289. For that reason, and because s 289 holds a person omitting to perform the duty imposed to have caused any consequences which result to the life or health of another, breach of the duty of care becomes a constituent of the offence of manslaughter. The same may be said of the offence of grievous bodily harm.

17 The duty under s 288 is "to have reasonable skill and to use reasonable care", but the degree of negligence necessary to constitute a breach of duty is not that of the civil law of negligence. *Callaghan v The Queen* holds[15] that, because the provision appeared in a Code dealing with major crimes involving grave moral guilt, the standard to which a provision such as s 289 must be taken to refer is that set by the common law in cases where negligence amounts to manslaughter. The same standard applies to s 288.

18 Criminal responsibility therefore attaches only if there has been "criminal" or "gross" negligence. In *Bateman*[16], Hewart LCJ said that whatever epithet be used, the standard of conduct must go beyond that relevant to a matter of compensation; it must be such as to show such disregard for the life and safety of others as to amount to a crime and to be conduct deserving punishment. In *Nydam v The Queen*[17], the requisite standard was said to involve "such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."

19 The respondent submits that the prosecution case need not have depended upon a breach of the duty imposed by s 288 for a conviction of manslaughter or grievous bodily harm to be returned and that there is authority[18] for the view that, as an alternative to a case alleging criminal negligence, the prosecution could have simply alleged that the appellant directly or indirectly caused the deaths,

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15 (1952) 87 CLR 115 at 121, 124.

16 (1925) 19 Cr App R 8 at 11-12.

17 [1977] VR 430 at 445.

18 Referring to *Griffiths v The Queen* (1994) 69 ALJR 77 at 79; 125 ALR 545 at 547; [1994] HCA 55.

relying upon ss 293 and 303 (or s 320 for grievous bodily harm). If that alternative path to a conviction had been taken, s 23(1) would have applied, as would s 282. Thus, in addition to proof of causation, the prosecution would have had to show that the deaths or grievous bodily harm were a foreseeable consequence of the surgical acts[19] and that s 282 did not operate to exculpate the appellant. The respondent appears to be prepared to concede, consistent with the aforementioned interpretation of s 288, that the standard it would have to address to negative a defence under s 282 is the criminal standard of negligence[20].

20 The prosecution case was conducted by reference to s 288. As will be seen from the discussion concerning the conduct of the trial, it sought at a late point in the trial to run an alternative case, avoiding s 288, but the trial judge did not permit the prosecution to change its course. On that application the appellant argued to the contrary of its present position and submitted that s 288 did apply to the prosecution case.

21 The respondent's present contention is that, regardless of which path to conviction was taken, the questions which the prosecution had to address at the trial were essentially the same and therefore no miscarriage of justice has occurred if s 288 does not apply. That would not affect, and would leave for determination, the larger case that there was a miscarriage of justice by reason of the likely effects upon the jury of irrelevant and prejudicial evidence having been admitted. It is not necessary to determine the correctness of the respondent's contention. As will shortly be explained, s 288 applied to the prosecution case. Properly construed, s 288 does impose a duty with respect to the formation of a judgment that surgery be undertaken.

22 The appellant submits that s 288 deals with the actual performance of surgery or the provision of medical treatment, but that it does not, in terms, refer to a decision or recommendation to operate. The appellant's argument relies upon the text of s 288 and in particular the words "or to do any other lawful act" and "in doing such act". The physical sense of the word "act" does not, in the appellant's submission, accommodate any anterior decision to operate.

23 The appellant seeks further support from the terms of s 282, which he submits, by contrast, do extend to such a decision. The appellant's submission in this respect is that the words in s 282 "having regard to the patient's state at the

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19 Referring to, inter alia, *Kaporonovski v The Queen* (1973) 133 CLR 209; [1973] HCA 35.

20 As to which see *Callaghan v The Queen* (1952) 87 CLR 115 at 119-121.

time and to all circumstances of the case" encompass a decision to operate. Whether or not that is so, s 288 should first be considered in its own terms.

24 It may be accepted that the word "act" in the phrase "doing such act" refers back to "surgical or medical treatment … or … any other lawful act". The act to which it refers is not, however, restricted to the act of surgery. It refers to surgical treatment, which may readily be understood to encompass all that is provided in the course of such treatment, from the giving of an opinion relating to surgery to the aftermath of surgery. It would be a strange result if the section was taken as intending to impose a duty with respect to the conduct of surgery and its aftermath, but not to require the exercise of skill and care in the judgment which led to it.

25 Further support for a construction which gives full meaning to the term "surgical … treatment" and imposes a wider duty is provided by recognising the point at which the duty is imposed by the section. It arises when the person "undertakes" to administer surgical or medical treatment, which undertaking is given prior to the conduct of surgery and may commonly involve the formation of a judgment about whether surgery should be recommended.

26 Surgical treatment refers to all that is involved, from a recommendation that surgery should be performed, to its performance and the post-operative care which is necessary to be given or supervised by the person who conducted the surgery. The duty imposed by s 288 may be breached by a discrete act of gross negligence in carrying out the surgical procedure or if gross negligence attends the making of judgments about a patient's condition and the risks to the patient of the surgical procedure.

27 It is of course obvious that there can be no criminal responsibility for a death or grievous bodily harm without the physical act of surgery. However, recognition of the causative significance of the act of surgery does not prevent the duty from arising at an earlier point. Section 288 is apt to refer to the matters necessary to be considered before surgery is performed. There can be no criminal responsibility for manslaughter or grievous bodily harm merely by the formation of an opinion or the giving of a recommendation. But once the surgery is performed, the person performing it may be guilty of those offences if his or her assessment of the need for it, or of the risks to the patient which would attend it, is criminally negligent and death or grievous bodily harm results.

Background

28 Mr Morris was aged 75 years at the time the appellant undertook the removal of his sigmoid colon (a sigmoid colectomy) and the attachment of a

colostomy bag. The appellant determined that the bleeding per rectum from which this patient suffered was caused by diverticulosis. Mr Morris died on 14 June 2003 from the effects of the sequelae of the operation.

29 Mr Phillips was aged only 46 years, but was in poor health at the time of his surgery. He was in the final stages of renal failure, an earlier kidney transplant having failed. He required haemodialysis to survive. He had previously suffered a heart attack. Prior to surgery he had been found to have dangerously high levels of potassium in his system, the most likely cause of which was inadequate dialysis because of poor vascular access. Tests conducted on Mr Phillips showed that he suffered cancer of the oesophagus which was invasive and terminal. The appellant removed Mr Phillips' oesophagus (by way of an oesophagectomy) on 19 May 2003. Mr Phillips died two days later after an acute cardiac event brought about by high potassium levels.

30 Mr Kemps was 77 years of age when he underwent an oesophagectomy following a diagnosis of cancer in the oesophagus. He suffered from heart disease and impaired kidney function, amongst other conditions. He had recently suffered post-operative complications following another surgical procedure which necessitated his transfer from the hospital in Bundaberg to an intensive care unit in Brisbane. Mr Kemps died on 21 December 2004, the day following the oesophagectomy. The cause of death was uncontrolled bleeding from an unidentified source.

31 Mr Vowles, the subject of the charge of grievous bodily harm, had part of his large bowel removed in 1999 and again in 2003, when cancers were detected in his colon. The appellant recommended removal of the large bowel (by a proctocolectomy with ileostomy), and undertook this operation on 4 October 2004. The appellant did so on the basis of his interpretation of test results as showing pre-malignant changes which were signs of cancer and taking into account Mr Vowles' history and the likelihood of familial colon cancer. In fact Mr Vowles did not have cancer of the colon.

The conduct of the trial

32 The prosecution case as opened with respect to Mr Morris' surgical procedure provides the clearest example of the width of the case. It was said that the jury would be invited to conclude from the evidence "that Mr Morris died from either of or a combination of the surgery performed by the accused and the post surgical care supervised by the accused." The appellant was described as the "wrong doctor" to perform the operation. The "wrong preparation" was done, in that insufficient care was taken to correctly diagnose his condition. Bundaberg Base Hospital was the "wrong hospital" in which to carry out surgery of this

kind. Mr Morris should have been treated more conservatively and he received the wrong post-operative care.

33 At the conclusion of the first day of the trial Byrne SJA discussed the possible provision of particulars by the prosecution. The topic had been raised by his Honour at a directions hearing two days before the commencement of the trial. The concern expressed by his Honour at the conclusion of the first day of the trial was that the case as opened thus far contained many complaints about the appellant's conduct – before, during and after surgery – and that it was as yet unclear whether each of them in isolation or in combination might be said by the prosecution to be causally related to the deaths of the three patients. Clearly causation loomed as a potentially difficult issue because of the way in which the prosecution case was to be presented.

34 The trial proceeded for some days without particulars having been supplied. On the fifth day of the trial his Honour observed that, whilst the particulars might have an important role in the trial, the defence did not appear to be pressing for them. The defence responded by saying that it had requested particulars on the first day of the trial and was expecting them to be provided.

Original particulars – Mr Morris

35 On day 6 of the trial the prosecution provided particulars with respect to its case on the charges concerning Mr Morris' surgery. The original particulars ran to some 29 paragraphs but included much duplication. The detail in some of the particulars and general allegations, including those framed simply in the terms of s 282, may be put to one side. The essential allegations of negligence concerning the appellant's decision to operate were that the surgery should not have been undertaken and that further tests would have indicated this; and that the operation presented a high risk to the patient, not only because of the nature of the operation but also because of his poor state of health and the multiple conditions from which he suffered (described as "co-morbidities"). These allegations remained largely unchanged throughout the trial.

36 The original particulars also contained allegations of negligence in the performance of the surgical procedure and in the provision of post-operative care. Details of the former were that the surgery was performed or supervised in such a way as to give rise to (i) wound dehiscence (a breaking open of the surgical wound) which required surgical correction and (ii) the creation of an inadequate stoma (the colostomy opening in the abdominal wall), which was said to be a cause of post-operative partial bowel obstruction. The bowel obstruction alone or in combination with the incorrect placement of a nasogastric tube was said to have the consequence, post-operatively, that the patient vomited and aspirated the

vomitus. Further, negligence in post-operative care was said to be shown by the inadequate attention that was paid by the appellant to the patient's nutrition, amongst other things. Mr Morris' death was said to have been caused by any of these matters alone or in combination.

An application to discharge the jury is made

37 On day 9 of the trial his Honour the trial judge observed that the defence task was difficult, given the multiplicity of allegations and the variety of alternative cases seemingly put by the prosecution. Although his Honour thought that the essence of the prosecution case was "that it was criminally negligent to conduct the operation at all", he was beginning to doubt that the case would be so confined by the time the matter went to the jury.

38 The following day the defence made an application to have the jury discharged. The application was made on two grounds, one of which related to the particulars which were outstanding with respect to all but the Morris charges[21]. The application was refused. His Honour observed that the defence had not sought particulars until very late and considered that the defence would have to abide by the consequences of what his Honour took to be a considered, tactical decision.

39 The trial proceeded with particulars of the prosecution case on each of the other three charges being supplied prior to the evidence with respect to each charge being led. The process undertaken at trial was to call all medical and other evidence relating to one charge before moving to the next. Those witnesses giving evidence with respect to more than one charge were recalled as necessary. The trial proceeded with the trial judge expressing concerns about what appeared to be "roving investigations" into the appellant's conduct.

The Phillips, Kemps and Vowles particulars

40 The original particulars of the case concerning Mr Phillips' surgery alleged that the procedure should not have been performed given his state of health and medical history, and that there were other, less dangerous options available. It was alleged that the appellant should have consulted with the patient's treating doctors and in particular his renal physician. Relevant to the decision to perform the surgery was said to be the fact that Bundaberg Base Hospital had inadequate intensive care resources to care for the patient post-

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21 The other ground related to the evidence of an expert witness and is not presently relevant.

operatively. It was also alleged that the appellant performed the surgical procedure negligently in that he caused the patient to bleed internally at the end of the operation or shortly thereafter.

41 The original particulars relating to Mr Kemps' surgery alleged that the appellant failed to control internal bleeding which occurred during the surgical procedure and delayed undertaking a second procedure in order to find the source of the bleeding. When he did undertake the second procedure, he failed to find the source of the bleeding and stop the bleeding.

42 The other allegations in the original particulars concerning Mr Kemps related to the appellant's decision to operate. It was alleged that the procedure should not have been undertaken given the risks to the patient's health and the availability of other options. It was also alleged that the lack of resources of the intensive care unit at Bundaberg Base Hospital should have been taken into account by the appellant.

43 The original particulars relating to Mr Vowles alleged that the surgical procedure was unnecessary because test results at that time did not indicate that the surgical procedure should be undertaken and there were further investigations that should have been performed. It was also alleged that the appellant performed the procedure without reasonable care and skill because the operation resulted in the patient having an inadequate stoma that later required rectification.

44 Particulars were also given of the treatment of one James Ashton Grave, although the appellant was not charged over the surgical procedure undertaken with respect to him (an oesophagectomy). Mr Grave survived the procedure, but had a difficult post-operative period, necessitating his transfer to a hospital in Brisbane which had a tertiary intensive care unit. It was alleged that it was dangerous to perform the operation on a patient with Mr Grave's medical history and that the procedure should not have been performed without further tests with respect to the conditions from which he suffered. The matters otherwise raised by the particulars were that the appellant should have known that Bundaberg Base Hospital lacked the capacity to care post-operatively for patients recovering from this type of operation and that the earlier death of Mr Phillips following an oesophagectomy showed that the appellant lacked the skill to perform such a procedure.

The evidence

45 The above short summary of the particulars provided by the prosecution does not convey fully the nature and extent of the evidence given in the prosecution case. It involved a large number of witnesses, as may be evident

from the length of the trial. As observations made by the trial judge from time to time in the course of the trial confirm, the evidence given ranged beyond the acts identified in the particulars and extended to criticisms of the appellant's professional and personal conduct. The evidence was not restricted to the treatment of, and surgery conducted upon, the four patients and Mr Grave. Evidence was led about his working relationship with nursing and other staff and included references to his expressions of anger when his orders were disobeyed. His interpersonal skills at the hospital were described as "dysfunctional" and as affecting the welfare of his patients. Evidence was led that he instructed that another patient be removed from a ventilator so that he could conduct surgery upon Mr Kemps before going on holidays ("the ventilator incident"). Evidence was led about conversations the appellant had with relatives of Messrs Phillips, Kemps and Grave, when he failed to advise them of the true position relating to the patients' post-operative status. Much of this evidence reflected adversely upon the appellant as a person. It suggested that he was egotistical, uncaring, and dishonest in his dealings with the patients' families, and felt guilty about his performance as a surgeon. In summary, the prosecution case might be described as a wide-ranging attack upon the appellant both professionally and personally.

46 It is true that much of the focus of the prosecution was upon the judgment formed by the appellant as to the need for surgery in each case. Considerable time was taken with the questioning of experts called on that issue; but so too was considerable time taken in connection with the conduct by the appellant of the surgery itself, in the cases of Mr Morris, Mr Phillips and Mr Kemps. And, in the case of Mr Kemps, much of the evidence about the extent of the uncontrolled bleeding and attempts to stop it was very graphic. A considerable amount of evidence was given about problems which were experienced post-operatively, not only in the case of these three gentlemen, but also in the case of Mr Grave. The jury was provided with the records of the patients electronically and was taken through the stages of each patient's demise with detail being provided of the nature and extent of their suffering.

47 In all, approximately 36 doctors (or retired doctors) who had had some connection with the treatment of the patients were called. In addition, it appears that some five independent expert witnesses were called to review the decisions taken, the surgery performed and the problems encountered with post-operative care and to explain the duties of a surgeon in each respect. Opinions, which differed, were given about the adequacy of the facilities at the intensive care unit of Bundaberg Base Hospital to deal with the post-operative care of patients with complex, pre-existing conditions and those who had surgery as major as an oesophagectomy. Some 25 nurses were called.

The revised particulars

48 On day 40 the prosecution sought to put forward a case which did not depend upon s 288. It appears from his Honour the trial judge's ruling that the reason for the change of direction in the prosecution case was that the expert evidence, which had then concluded, suggested that at least three of the four operations conducted by the appellant were performed with reasonable care and skill. During his later summing up, his Honour would say that all the procedures had been "performed competently enough". The prosecution was concerned that s 288 might not extend to the anterior decision to operate or the recommendation to operate. His Honour ruled that the prosecution should confine itself to the case it had opened, which depended upon a failure to observe the duty imposed by s 288. His Honour was of the view that s 288 extended to a case where it was grossly negligent to undertake the surgery.

49 It appears from the discussion following the ruling that the prosecution nevertheless intended to rely upon aspects of the appellant's lack of surgical competence as relevant to the decision to operate. Not for the first time his Honour remarked that the approach taken was akin to throwing "every little piece of mud in the hope that some will stick", taking up a metaphor which had been used by defence counsel. The matter was left at that point on the basis that the prosecution would provide further particulars of the case it now intended to put to the jury.

50 Revised particulars of each of the four cases were provided on day 43. His Honour the trial judge referred to the revised particulars as the first comprehensible particulars provided and described the revised particulars pertaining to Mr Morris as a "vast improvement".

51 The particulars of the appellant's breach of duty in deciding to undertake the procedure on Mr Morris were retained but were now more specific. It was alleged that the appellant did not undertake proper testing, had not determined the cause of the bleeding with which the patient had presented and had not excluded the possibility that it was caused by radiation proctitis, of which there was evidence in the patient's medical history. The symptom of bleeding was said to be insufficient to justify the operation and the patient's age and the conditions from which he suffered made it dangerous. It was alleged that the appellant knew or ought to have known of his limitations as a result of the treatment of Mr Phillips, which predated Mr Morris' surgery.

52 It is unclear whether the limitations of which it was said the appellant should have been aware concerned his ability to perform surgery, or his judgment about whether surgery was warranted, or both. The latter is consistent with the

tenor of the revised particulars. With that qualification, the revised particulars contained no allegations of negligence in the performance of the surgery. The previous particulars concerning negligent post-operative care were not repeated.

53 The revised particulars with respect to Mr Phillips' surgical procedure alleged that the surgery should not have been undertaken because it was too dangerous to perform given this patient's multiple pre-existing conditions, and was not appropriate for the condition from which he then suffered. It was said that the surgical treatment was wrongly undertaken because the cancer was of a nature which did not justify the procedure and the appellant failed to investigate whether the cancer had metastasised (which would have made the operation pointless). Other treatment options were alleged to have been available. Further, it was alleged that the operation was performed at a hospital which would have difficulty dealing with post-operative complications. These matters relate to the appellant's judgment in deciding to perform the surgery. The original allegation concerning the conduct of the surgery itself, namely, that the appellant caused the patient to bleed, was maintained.

54 The revised particulars with respect to Mr Kemps alleged that the surgery should not have been performed because the cancer was too advanced; there was evidence of metastatic spread, making the surgery pointless; the patient was too old and unwell to survive the operation or the recovery period; and there were other treatment options available. It was alleged that the appellant should have known of his limits at this point because of the outcomes of the operations upon Messrs Phillips, Morris, Grave and Vowles; and of the limits of the intensive care unit at Bundaberg Base Hospital because of problems encountered post-operatively with respect to Messrs Phillips and Grave, and because of conversations he had had with other staff.

55 Allegations concerning the appellant's surgical competence were maintained in these particulars. It was alleged that the appellant failed to stop the uncontrolled bleeding during the first procedure, delayed undertaking a second procedure to locate and stop it and, having undertaken the second procedure, failed to stop the bleeding.

56 The revised particulars relating to Mr Vowles continued the allegations that the surgery was unnecessary. It was now alleged that the polyp found by the appellant was non-malignant. It was alleged that the appellant should have known of his limitations as a result of the treatment of Messrs Phillips, Morris and Grave. However, there was no mention of the previous allegation that the stoma had been incorrectly positioned. That is to say, there was now no suggestion that the appellant had been negligent in the conduct of the surgery itself.

The Oregon Order

57 It is necessary to mention a document which was referred to in some of the original and revised particulars. It was referred to in the proceedings as "the Oregon Order".

58 The appellant had trained as a surgeon in the United States of America and in 1989 had obtained a licence to practise medicine in Oregon. By the terms of an order made on 7 September 2000 by the Board of Medical Examiners of that State, an organisation responsible for regulating health care providers, the appellant acknowledged that he had engaged in conduct that was described as "gross or repeated acts of negligence in the practice of medicine" and that this conduct amounted to unprofessional conduct.

59 The background to the Oregon Order was a peer review conducted in 1998 by the appellant's then employer of 79 charts of his patients. The appellant's then employer restricted his surgical practice to exclude surgeries involving the pancreas, resections of the liver and the construction of ileoanal pouches. The Oregon Board of Medical Examiners conducted its own investigations, including obtaining a list of detrimentally affected patients from the appellant's employer, and questioned the appellant. The Oregon Order was the result of these investigations. The Oregon Order recorded a settlement of the matter whereby the appellant agreed not to undertake the abovementioned surgery and to obtain a second opinion pre-operatively "on complicated surgical cases" from approved surgeons. "Complicated surgical cases" were defined to include surgeries on high risk patients with severe co-morbidities including heart or renal failure, oesophageal and gastric surgeries, and surgeries on post-operative patients with more than two days' stay in an intensive care unit.

60 The Oregon Order was the subject of a pre-trial ruling of admissibility[22] over the objection of the defence. It had been referred to in the original particulars concerning Mr Morris' and Mr Vowles' surgical procedures, but only in connection with an allegation that the appellant lacked good faith in conducting the operations, for the purposes of s 282. The Oregon Order was referred to in the revised particulars. So far as concerned Mr Morris' procedure, it was relied upon to show that the appellant was required to obtain a second opinion before operating upon a patient with severe co-morbidities. So far as concerned Mr Kemps and Mr Vowles, it was relied upon to show that a second

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22 *In the matter of Patel* unreported, Supreme Court of Queensland, 20 March 2010 per Byrne SJA.

opinion was required with respect to the types of surgical procedures conducted upon them.

The defence applies again to discharge the jury

61 Upon receipt of the revised particulars, the defence raised the matter of what it described as a large quantity of evidence which had been given in preceding weeks but which did not now appear to be relevant. The following day, day 44 of the trial, the defence applied to have the jury discharged without rendering a verdict on the basis that the appellant could not secure a fair trial. The trial at this point was described by defence counsel as a "movable feast". The defence provided a schedule of evidence said to be irrelevant in light of the narrower case now pursued by the prosecution, although it was said that it may not be exhaustive. Much more evidence is now said to have been both prejudicial and irrelevant. Amongst the evidence which the defence did identify on its application as having become irrelevant was evidence which reflected upon the appellant's competence as a surgeon, evidence concerning the ventilator incident and evidence of the conversations which the appellant had with members of three of the patients' families, when he reassured them about the patients' conditions when they were in fact deteriorating.

62 His Honour the trial judge was understandably concerned about discharging a jury at so late a stage in a long trial and when the matter was about to go to the jury. His Honour acknowledged that whilst some evidence, such as that of mistakes made in other cases, might have probative value in connection with the appellant's knowledge about his abilities and could thus be connected to his decisions to embark upon surgery, other evidence of surgical misadventures had the potential for prejudice which far outweighed its probative value. There was a risk that the jury might misuse the evidence. His Honour observed that some jurors might feel overwhelmed by the sheer magnitude of the criticisms made of the appellant. His Honour, however, observed that save for some pre-trial applications, the evidence had not been objected to. His Honour reiterated his view that the defence appeared to have allowed the matter to proceed to trial on an unparticularised basis, as a result of a tactical decision. But his Honour's refusal to discharge the jury appears to have been based principally upon a view that directions to the jury might overcome much of the prejudice. His Honour invited the defence to identify evidence that should be subject to directions. However, the defence subsequently informed his Honour that it did not wish to make submissions on the point beyond those it had made on its application for the discharge of the jury.

Summing up about the nature of the prosecution case

63 At an early point in summing up, his Honour directed the jury as to the use that could be made of the Oregon Order. His Honour pointed out that the Oregon Order did not affect the appellant's entitlement to practise as a surgeon in Queensland and that it did not prohibit the procedures involved in the charges. His Honour further noted that even in Oregon they might have been performed, albeit following a second opinion. An additional question might be what opinion the appellant might have obtained from surgeons in Australia. His Honour directed the jury that the only uses that could be made of the Oregon Order were: (i) in considering the weight to be given to the patient's choice to undergo a procedure; and (ii) that its requirements might be thought to suggest that the appellant had reason to reflect, before recommending major surgery to patients, on any deficiencies there may have been in his knowledge and aptitude. His Honour directed the jury that it would be wrong to suppose that, because the appellant had admitted to having been grossly negligent in surgery in Oregon, it was likely that he had committed the offences charged.

64 It is at this point that his Honour directed the jury as to the essential nature of the prosecution case concerning the surgery performed by the appellant. His Honour said, "It is critical to appreciate that this trial is not about botched surgery. Instead, it is about surgery performed competently enough." His Honour continued, "It is not how the Accused performed surgery that matters in these four cases." His Honour explained that what mattered was the appellant's judgment in deciding to commend the surgery and then, having obtained a patient's consent, performing the surgery, and that the prosecution contended that the operations were unnecessary or inappropriate. The respondent did not take issue with the correctness of this aspect of his Honour's summing up either in the Court of Appeal or in this Court.

Miscarriage of justice?

The contentions

65 The appellant submits that he was always entitled to particulars of the acts relied upon in proof of the offences[23]. So much may be accepted. The defence might have applied for them at any time in the numerous pre-trial hearings which

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23 Referring to, inter alia, *Johnson v Miller* (1937) 59 CLR 467 at 489; [1937] HCA 77. See also *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 557 [26]; [2010] HCA 1.

took place. However, doing so may have served to focus the prosecution on the essential strengths of its case. It may readily be inferred, as his Honour the trial judge did, that a tactical decision was made by the defence not to demand particulars until his Honour raised questions about their need shortly prior to the commencement of the trial. The appellant is bound by the decision made in this regard[24].

66 The particulars that were originally supplied, especially those relating to Mr Morris' surgical procedure, were complex. The many alternative bases relied upon for findings of guilt would necessitate individual assessments of causation which might not be consistent with each other. The appellant submits that his Honour ought not to have permitted the trial to proceed on the basis of particulars which were legally incoherent. But his Honour's complaints about the incoherence of the particulars appear not to have motivated the defence to attack them. The appellant cannot now be heard to say that unfairness resulted to him on this account. In any event, it is the effect of the particulars, not their quality, which is now in issue.

67 If there was a miscarriage of justice, it was because the prosecution case changed at a very late point in the trial with the result that much of the evidence that had been admitted on the wide-ranging prosecution case no longer remained relevant to the more confined case that went to the jury. This is the matter which requires further consideration. The question is not, however, whether the trial judge was wrong in refusing to discharge the jury on this basis. As Sachs LJ observed in *R v Weaver*[25], there is no rule that, where inadmissible or prejudicial evidence is admitted through inadvertence, a jury must be discharged. This statement was referred to with approval by Gibbs ACJ[26] in *Maric v The Queen*. His Honour said that when an accused has been convicted, the appeal is not against the failure to discharge the jury, but against the conviction[27]. His Honour's observation remains relevant to a case such as this, even if the test as to what constitutes a miscarriage of justice sufficient to warrant the quashing of a

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24 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [9]; 225 ALR 161 at 164; [2006] HCA 9.

25 [1968] 1 QB 353 at 360.

26 *Maric v The Queen* (1978) 52 ALJR 631 at 634; 20 ALR 513 at 519-520.

27 *Maric v The Queen* (1978) 52 ALJR 631 at 634; 20 ALR 513 at 520.

conviction referred to in *Maric* is affected by what was later said by this Court in *Weiss v The Queen*[28].

Relevant evidence?

68 Questions as to the relevance of evidence cannot properly be understood except by reference to the matters which it was necessary for the prosecution to prove or which it might reasonably be necessary to meet in anticipation of a defence[29].

69 It is useful to start with what the prosecution case did not involve following the revised particulars. The prosecution case did not involve allegations of surgery performed so incompetently as to amount to criminal negligence. The effect of the evidence at the point the revised particulars were provided, as his Honour the trial judge later observed, was that the surgical procedures had been performed competently.

70 The revised particulars relating to Mr Phillips, which contain the allegation that the appellant caused some bleeding at the conclusion of the operation, do not detract from this assessment. It appears to have been an allegation that went nowhere. The particulars relating to Mr Kemps did consistently allege negligence in the conduct of surgery: in the appellant concluding the first procedure without locating the source of the internal bleeding and stopping it and, subsequently, in delaying the patient's return to surgery and then again failing to locate and stop the bleeding. However, these particulars require some further clarification, in light of the expert evidence.

71 As the trial judge observed in summing up in relation to Mr Kemps' procedure, "again, the focus is not on proficiency in carrying out a surgical procedure." Although the oesophagectomy caused the fatal bleeding, the source of the bleeding was never located and expert opinion did not resolve that question. It was said by one expert that a surgeon should be able to find a source of bleeding, but that expert did not suggest that the appellant was wrong to conclude the first procedure given the extent to which the bleeding had reduced. Nor did the evidence suggest that he was criminally negligent because he was unable to stop the bleeding in the second procedure. The prosecution case was that the appellant should not have delayed in undertaking the second procedure

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28 (2005) 224 CLR 300; [2005] HCA 81.

29 See *HML v The Queen* (2008) 235 CLR 334 at 351 [5]; [2008] HCA 16.

and that he should have suspended the surgery he had commenced on another patient and dealt with Mr Kemps' bleeding more promptly.

72 The Court of Appeal considered that the only revised particulars which contained no allegation of negligent acts in the conduct of a surgical procedure were those relating to Mr Vowles. Even so, it considered, some such allegation was to be found in the particular alleging that the appellant did not have reasonable skills and did not use reasonable care[30]. For the foregoing reasons, the Court of Appeal was incorrect in its conclusion concerning the particulars relating to Messrs Morris, Phillips and Kemps. So far as concerns those relating to Mr Vowles, the allegation was merely a general one, details of which were said to follow. No further particulars relating to surgery were provided.

73 The revised particulars in respect of each patient contained no allegation that the appellant was criminally negligent in the provision or supervision of post-operative care. The detailed allegations which had originally been made in the case concerning Mr Morris were not repeated.

74 The prosecution case according to the revised particulars was that none of the procedures was warranted: in the case of Mr Morris, because the bleeding had a cause which the surgery conducted would not address; in the case of Messrs Phillips and Kemps, because their health was too precarious for major surgery such as an oesophagectomy; and in the case of Mr Vowles, because he did not in fact have colon cancer. Thus, in general terms, the evidence necessary to be led by the prosecution concerned the appellant's judgment about the need for, and the risks associated with, the surgical procedures for the particular patient, the facts available to him about those matters, and whether the judgment he made fell so far below the standard of a competent surgeon as to warrant criminal punishment.

75 Additionally, the prosecution was required to prove that the undertaking of the surgical procedure in each case was a significant or a substantial cause of the death or grievous bodily harm[31] and that this was so despite the existence of other, more direct, causes. It was necessary for the prosecution to attempt to meet the defence of mistake of fact provided by s 24 of the *Criminal Code*. In the case of Mr Morris, it might be said that the appellant had an honest and

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30 *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 at [122].

31 *Royall v The Queen* (1991) 172 CLR 378 at 389, 398, 411-412, 423; [1991] HCA 27; *Osland v The Queen* (1998) 197 CLR 316 at 324 [15], 366 [147]; [1998] HCA 75.

reasonable, but mistaken, belief that the bleeding he presented with was from diverticula in the sigmoid colon. And in the case of Mr Vowles, it might be said that the appellant mistakenly believed that the growth was pre-cancerous, given the patient's history of bowel cancer.

Relevance of evidence of incompetence in surgery

76 In accordance with the original particulars concerning Mr Morris' surgery, evidence was led concerning the occurrence of the wound dehiscence and the incorrect positioning of the stoma. Evidence was also given concerning Mr Vowles' stoma as having been incorrectly positioned. In the case concerning Mr Morris, it was said by one expert that the incorrect positioning of the stoma was an error of surgery which could have been fixed when the surgery to correct the wound dehiscence was undertaken and that it was associated with the blockage of the colostomy. Evidence therefore connected the surgery performed by the appellant with the post-operative complications, although neither was the subject of the revised particulars.

77 The evidence concerning the surgery performed upon Mr Phillips went beyond the particulars and touched upon the appellant's competence as a surgeon in a number of respects. His inability to obtain a central venous line was said by an expert to indicate not only an unsatisfactory situation in which to proceed with surgery, but that he lacked technical competence with respect to a basic procedure. Evidence was given that the oesophagus had been torn in the process of the operation. This was said by one expert to be something that should not have occurred and to suggest that the surgery was handled roughly. Moreover, the removal of the cancerous oesophagus in two parts, rather than intact, was said to be unorthodox and to risk the "spilling" of cancer cells.

78 This body of evidence was tendered to support a case of general incompetence and that the surgery itself was performed in a manner which was grossly negligent with serious or fatal results. The evidence was not sufficient to support such a conclusion, yet it was clearly prejudicial to the appellant. How can this evidence be said, logically, to be relevant to the earlier formation of a judgment as to whether to operate?

79 The respondent submits that evidence of the appellant's general incompetence cannot be irrelevant to his negligence in deciding to undertake the surgical procedures. It is not readily apparent why this would be so. A view formed about the appellant's performance as a surgeon on other occasions does not permit a conclusion with respect to the offences alleged. The submission may, however, be better understood by reference to other submissions put, which

concerned the insight that the appellant should have had into his own competence, or lack thereof.

80 It is submitted by the respondent that evidence of the appellant's misleading the patients' families, and of his stating, unprompted, that the complications arising from surgery were not his fault, may be relevant to show that the appellant was conscious of his carelessness. This submission is consistent with the conclusion reached by the Court of Appeal that the way in which the appellant carried out the surgical procedures was relevant to show that he "knew or ought to have known" of his limitations[32]. This was a general allegation which had been made in the revised particulars concerning Mr Morris', Mr Kemps' and Mr Vowles' procedures.

81 Such an approach raises questions about just what the appellant should have perceived from the results of particular procedures and just what it is said his limitations were. It is not obvious what the appellant ought to have learned from what was reasonably competent surgery in those cases. Where there were errors, they had not themselves had a significant effect. More likely to be relevant to his judgment in deciding to operate was the fact that some patients with severe co-morbid conditions had suffered serious complications post-surgery.

82 Logically, what happened to a particular patient during or after surgery cannot have informed the appellant's decision to operate on that patient. The prosecution case did not have this temporal problem. It sought to fix the appellant with actual or imputed knowledge of earlier surgery and apply it to subsequent decisions with respect to other patients. This was the basis upon which the Court of Appeal viewed the evidence as relevant[33]. Indeed, this appears to have been one of the bases upon which the evidence relating to Mr Grave was initially tendered[34].

83 Notions of the appellant's supposed consciousness of his lack of skill, in surgery or in his judgment, permeate the respondent's submissions as to the relevance of much of the evidence in question. Yet there is a fundamental objection to the respondent's position. Even if the allegations that the appellant "knew or ought to have known" of his own shortcomings were relevant to the

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32 *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 at [124].

33 *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 at [124].

34 See *R v Patel* [2010] QSC 068 at [14], [22]-[23].

case as originally formulated (a question that need not be decided), they were not relevant to the reformulated case. As these reasons will show, the test of criminal negligence is objective. The central questions presented by the reformulated prosecution case were first, would a competent surgeon have decided to operate and second, was the decision to operate so great a departure from reasonable skill as to be criminally negligent. Showing that the appellant ought to have known he should not operate was irrelevant.

84 Evidence critical of his surgical technique (in these or in other cases) was wholly irrelevant. As will be shown, evidence critical of his post-operative care of these patients was also irrelevant except to the extent that it bore upon the immediate cause of death of the patient. Before discussing that matter, it is appropriate to mention the Oregon Order, in respect of which questions about the appellant's consciousness assume special importance.

Relevance of the Oregon Order

85 The prosecution did not address the jury about the use to which the Oregon Order could be put, but the respondent now says that its probative value was higher than that which the trial judge indicated in his directions to the jury. The respondent submits that the Oregon Order was relevant as an admission that the appellant had made surgical errors of the kinds there specified. An obvious difficulty with the submission is that the surgery here was said to have been performed competently enough. The Oregon Order cannot counter direct evidence to this effect. His Honour the trial judge correctly directed the jury that it could not use the appellant's admissions to determine that the appellant was guilty of the offences charged.

86 The Oregon Order was not sought to be relied upon as propensity evidence[35], as to the appellant forming grossly negligent opinions about whether to undertake surgery upon patients with severe co-morbidities. It is difficult to see how it could have been, not least because the Oregon Order did not specify the facts relating to any previous decisions of this kind. Nevertheless, the potential for the misuse of the contents of the Oregon Order by the jury and the level of prejudice that it might have engendered in the minds of members of the jury is self-evident. The trial judge sought to minimise its potential effects by limiting the use to which it might be put. His Honour directed the jury that the only uses that could be made of it were in considering the weight to be attached to a patient's choice to undergo a procedure and, more importantly, that it might

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35 *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7.

be thought to have caused the appellant to reflect upon his limitations. However, the evidence could not be relevant even for that latter purpose.

The test of criminal negligence is objective

87 Because of the value the law places upon human life, it punishes grossly or criminally negligent conduct which causes death or grievous bodily harm, and it does so regardless of the subjective intentions of the accused or the accused's appreciation of the risk involved in his or her conduct[36].

88 The test applied to conduct which is alleged to amount to gross or criminal negligence in the context of the crime of manslaughter, or grievous bodily harm, is an objective one[37]. So too is an objective test applied to manslaughter by unlawful and dangerous act[38] and driving a motor vehicle in a negligently culpable manner[39]. The test does not require that an accused have an appreciation of, or an indifference to, the risk created by the conduct in question. The only criterion necessary is an intention to do the act which inadvertently causes death[40] or grievous bodily harm.

89 The objective standard of conduct set by the law in a case such as the present is that of a reasonably competent surgeon. The question is whether the appellant's conduct, in judging that surgery was necessary or warranted, fell so far below that standard as to amount to gross or criminal negligence and thereby warrant criminal punishment.

90 There may be cases where the standard to be applied must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act[41]. But that is not to use a person's knowledge to determine

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36 *R v Lavender* (2005) 222 CLR 67 at 87-88 [60]; [2005] HCA 37.

37 *R v Lavender* (2005) 222 CLR 67 at 87-88 [60].

38 *Wilson v The Queen* (1992) 174 CLR 313 at 324, 341; [1992] HCA 31; *R v Lavender* (2005) 222 CLR 67 at 82-83 [40].

39 *King v The Queen* (2012) 86 ALJR 833 at 843 [31], 857 [92]; 288 ALR 565 at 576, 594; [2012] HCA 24.

40 *R v Lavender* (2005) 222 CLR 67 at 83 [40].

41 Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (2011) at 148 [6.1.2.1].

their guilt. A person's special knowledge may mean that the standard of conduct expected of them is higher. It is necessary to add that the appellant's imputed knowledge of his limitations cannot, logically, be applied to exculpate him for the reason that the objective standard to be applied is a minimum standard, applicable to all persons who profess to have the skills and competence of a surgeon by undertaking to perform surgery.

91 In *Bateman*[42], Hewart LCJ said that it was conceivable that a person may be held liable for undertaking a case "which he knew, or should have known, to be beyond his powers". His Lordship should not be taken to suggest as appropriate an enquiry into an accused's state of mind. What his Lordship said is not inconsistent with the application of an objective test. It is not necessary to show that an accused in fact knew that a case was beyond his or her powers. Criminal negligence in the context of manslaughter is to be distinguished from other forms of criminal liability which involve intention or recklessness.

92 The respondent did not suggest in argument that the appellant's consciousness was relevant because he appreciated the risks he was taking with respect to the lives and bodily states of the patients, but nevertheless chose to take them. The respondent's argument centred upon what the appellant should have understood about his deficiencies. Had the respondent raised questions of recklessness of the kind just mentioned, it would have been necessary to consider what was said by this Court in *Wilson v The Queen*[43], as to whether the application of a test of recklessness in the context of criminal negligence might create confusion with the concept of reckless indifference as it applies to murder. This serves to underline subjective intention as being relevant to murder, but not to manslaughter or grievous bodily harm.

93 In assessing the appellant's decision to operate by reference to that which would have been reached by a reasonably competent surgeon, it would be relevant to have regard to the facts and matters which would affect the formation of that judgment. Thus, evidence about the facts known about a patient's condition; whether a diagnosis was possible without further investigation; what the correct diagnosis was; whether a need for surgery was thereby indicated; whether there were less invasive procedures to be considered; the risks to the patient from the surgery; and the ability of the patient to withstand surgery are all

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42 (1925) 19 Cr App R 8 at 13.

43 (1992) 174 CLR 313 at 339-340 per Brennan, Deane and Dawson JJ; see also *R v G* [2004] 1 AC 1034.

matters which would be relevant. The prosecution case contained much evidence of this kind.

94 Evidence about what the appellant perceived about himself, and what insight he had, or should have gleaned, from other surgical experiences, is not relevant to an assessment as to whether he was negligent. He is not to be punished because he failed to learn lessons and obtain insights. He will be punished by the law only if the opinion he formed was, judged objectively by the standard of conduct that the law requires, so careless and so unskilled as to be grossly negligent and if the surgery which followed caused death or grievous bodily harm.

Relevance of the evidence relating to Mr Grave

95 A similar misapprehension about the relevance of the appellant's subjective understanding of his competence attends the respondent's submission concerning the evidence relating to Mr Grave. Such evidence was initially said to have been relevant because the appellant must have appreciated his lack of competence when he later undertook the same operation, an oesophagectomy, on Mr Kemps. This is not a correct application of the objective test.

96 In any event, this is not the approach which was ultimately taken by the respondent to the probative value of this evidence at trial. In argument before this Court it was contended that, in the end result, the evidence about the post-operative complications that Mr Grave suffered was relevant only to the issue of *where* an operation of the kind conducted should have been carried out, which is to say whether it required, for post-operative care, the facilities available at larger intensive care units at metropolitan hospitals. There were differences of view about whether the intensive care unit at Bundaberg Base Hospital was adequate. In any event, it is conceded by the respondent that there was no evidence that, if Mr Grave's surgical procedure had been undertaken in Brisbane, the outcome of the operation would have been different.

Moral culpability as a test

97 The appellant's alleged lack of competence is also said by the respondent to be relevant to whether the alleged breach of the duty imposed by s 288 was "morally grave". It will be recalled that in *Callaghan v The Queen*[44] it was explained that the degree of negligence required to prove that a person is guilty of manslaughter is gross or criminal, the offence being contained in a criminal

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44 (1952) 87 CLR 115 at 121, 124.

code dealing with crimes involving grave moral guilt. However, this is to explain the rationale for the degree of negligence required to amount to criminal negligence. It does not suggest that moral culpability is itself a test of a person's guilt.

98 It may be inferred that the moral aspect of the appellant's conduct to which the respondent refers, by way of this submission, is the appellant's supposed awareness of his limitations when he decided to undertake the surgery. This is at least consistent with the respondent's other submissions. So understood, the submission suffers from the same problem, explained above, as those submissions concerning the use of an accused's subjective intentions or understanding about the risks being taken.

99 It has been said that a conviction for manslaughter should reflect the principle that there should be a close correlation between moral culpability and legal responsibility[45]. That correlation, however, should be achieved by the degree of negligence required[46].

Relevance of post-operative care

100 There was a considerable body of evidence led by the prosecution concerning the problems in Mr Morris' post-operative care which were connected to his death. Detailed evidence was also given of the nature and the extent of the suffering of Mr Morris in the period leading to his death, including his mental anguish.

101 The immediate cause of Mr Morris' death was the aspiration of vomit into the lungs. It is not evident that the appellant was said to have been responsible for the mis-positioning of the nasogastric tube but there was evidence connecting the stoma to the post-operative blockage of the colostomy which, in turn, was linked with the aspiration. Malnutrition was said to have been a secondary cause of death. There was evidence that a surgeon is responsible for the maintenance of a patient's nourishment post-operatively and that the failure to address this patient's nutritional requirements suggested the level of care fell below that of a competent surgeon.

102 Evidence of post-operative difficulties was given with respect to the other three patients. The cause of Mr Phillips' death was directly attributable to the

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45 *Wilson v The Queen* (1992) 174 CLR 313 at 334.

46 *R v Lavender* (2005) 222 CLR 67 at 108 [128].

failure of dialysis treatment to reduce his potassium levels, which induced heart failure. Evidence was led of his "parlous" condition post-operatively, which deteriorated until his death. Evidence was led concerning the action the appellant should have taken, namely, returning Mr Kemps to theatre in order to identify and stop his bleeding. There were post-operative complications with respect to Mr Vowles' stoma and there was evidence that it needed repositioning by another surgeon. Evidence was given concerning the problems and discomfort associated with this complication.

103 What was a substantial body of evidence as to the post-operative condition of the four patients was tendered, most clearly in the case of Mr Morris, in order to show that the appellant was criminally responsible for what then occurred. It is now said that, when the prosecution case narrowed, it remained relevant to issues of causation.

104 It may be accepted that, in respect of the patients who died, the prosecution needed to explain to the jury the sequelae to the surgical procedures and the part they played as causes of death. The direct cause of death in each case was not the surgery and arose post-operatively: the aspiration of matter by Mr Morris; heart failure caused by Mr Phillips' high potassium levels; and uncontrolled bleeding from an unidentified source in the case of Mr Kemps. But the evidence which was called by the prosecution went beyond these purposes and made other, more general criticisms of the appellant's conduct. That evidence was not relevant, whether to proof of causation or at all. Apart from evidence about the appellant's part (if any) in placing and monitoring the feeding tube in Mr Morris and in not taking Mr Kemps back to theatre quickly enough, evidence critical of the appellant's post-operative care was not relevant to whether the decision to operate was a substantial cause of each patient's death.

Relevance of the ventilator incident

105 At least eight witnesses gave evidence with respect to the ventilator incident.

106 The evidence included testimony by the instrument nurse who assisted the appellant in Mr Kemps' surgery, who said that she had heard that Mr Kemps' operation might not be proceeding because there were insufficient beds in the intensive care unit. The appellant gave instructions that the patient who was then attached to the ventilator was to be removed from it and the bed made available. The appellant was said to have become angry when he realised those instructions had not been carried out. The reason the appellant's instructions were not followed was that procedures necessary for the removal of life support had not been undertaken. A clinical nurse had obtained further instructions from an

anaesthetist, Dr Joiner, that the patient was not to be removed from the ventilator until the proper procedures had been completed. When they were, the head of the anaesthetics department, Dr Carter, turned off the ventilator. Of particular significance in the context of this evidence was the statement alleged to have been made by the appellant to the clinical nurse, to explain the need to act promptly. He was alleged to have told the clinical nurse that he had to perform the operation that morning as he was due to go on leave in a day or two.

107 This evidence was clearly prejudicial to the appellant. It suggests that he was unprofessional in directing that action be taken without observing proper procedures. The conversation with the nurse is likely to have created a strong, adverse feeling towards him on the part of the jury, as a person who was callously indifferent to the plight of the patient taken off the ventilator and concerned only about his own interests. The prosecution in closing address sought to downplay the incident, and emphasised that no criticism was made of the appellant for having instructed that the ventilator be turned off. By this point, however, it may be thought that the damage had been done.

108 The Court of Appeal held that this evidence was irrelevant, even on the wider prosecution case articulated in the original particulars[47]. The respondent does not now contend to the contrary, but says that the evidence was innocuous in light of the evidence of Dr Carter, the limited reliance placed on it by the prosecution in closing address, and the trial judge's summing up. The Court of Appeal considered that evidence concerning the ventilator was a relatively small body of evidence led over the course of a long trial and was unlikely to have been prominent in the jury's deliberations with respect to either the charge arising out of Mr Kemps' surgery or the other charges[48]. We respectfully disagree. The evidence is likely to have made a strong impression upon the jury and to have reinforced adverse views about the appellant, professionally and personally, which the prosecution was encouraging the jury to form by the evidence that it led.

Relevance of evidence of conversations with relations

109 Malnutrition was regarded by an expert witness as a secondary cause of the death of Mr Morris and to have contributed to it to a significant extent. Evidence of non-expert witnesses reinforced this aspect of the case against the appellant. Mr Morris' daughter gave evidence of the concerns that his family had

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47 *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 at [136].

48 *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 at [137].

as to whether her father was receiving sufficient nutrients. She relayed these concerns to the appellant and received off-hand responses, accompanied by advice that the nasogastric tube was working. Clearly it was not.

110 There was evidence from a number of nurses to the effect that the appellant advised Mr Phillips' mother and sister that he was stable and improving, when he was not, and that he became upset when he learned that other medical or nursing staff had advised the family to the contrary. Similar evidence was led concerning conversations with Mr Kemps' wife, and with Mr Grave's wife and daughter.

111 It is difficult to imagine that evidence of this kind made no impression upon the jury, which was also told in detail of the suffering of the patients and the distress that their condition caused their families. Indeed, the trial judge remarked in the course of the trial that he had observed members of the jury taking notes whilst family members of the deceased patients were giving evidence.

A substantial miscarriage of justice?

112 There can be no doubt that the evidence referred to above was highly prejudicial to the appellant and that much of it was rendered irrelevant by the narrowing of the prosecution case. Where it was relevant to issues such as causation, some of it may nevertheless have been excluded in the exercise of the trial judge's discretion had the trial been conducted on the narrower basis from the outset. The appellant was denied an opportunity to have much prejudicial evidence excluded.

113 Despite the fact that the trial judge gave careful and succinct directions as to some of the most prejudicial evidence, such as evidence of errors in surgery, it cannot be concluded that the directions were sufficient to overcome the prejudicial effects of the evidence, individually and collectively, upon the jury. The misgivings his Honour recorded in his ruling on the application to discharge the jury were well-founded.

114 The respondent submits, nevertheless, that there was no miscarriage of justice, in the sense of a lack of fairness to the appellant, because the appellant did not object to much of the evidence and did not seek to make it the subject of any particular directions. Certainly there must be exceptional circumstances for the Court to grant special leave to appeal where an applicant did not object at trial to the tender of evidence which is subsequently found to have been

improperly admitted[49]. Although the law recognises the possibility that justice may demand exceptions, it is a cardinal principle of litigation, including criminal litigation, that parties are bound by the conduct of their counsel[50]. The correctness of their counsel's decision for the most part will not be relevant, for it is the fairness of the process which is in question. Where it can be seen that a failure to object was a rational, tactical decision, the Court is entitled to conclude that no unfairness attended the process[51].

115 The appellant's counsel did take objection to the admission of the Oregon Order, the evidence relating to Mr Grave and evidence of the ventilator incident[52]. Objections to this evidence were taken and ruled upon before the trial commenced. The evidence relating to Mr Grave and the evidence of the ventilator incident was also identified as prejudicial and irrelevant in the application made by the defence to discharge the jury on day 44, when it was apparent that the case to be presented to the jury was much narrower than that which had been particularised and presented to that point. At that time, the appellant also identified the evidence of the patients' families as amongst the prejudicial evidence which was no longer relevant.

116 It is true that the defence did not seek a reconsideration by the trial judge of rulings[53] which had been made by his Honour and by another judge pre-trial refusing the applications by the appellant to have certain prejudicial evidence excluded. Such an application was possible[54], but unlikely to succeed. Until the

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49 *HML v The Queen* (2008) 235 CLR 334 at 361 [36], 408 [207], 459 [360], 491 [481].

50 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [9]; 225 ALR 161 at 164.

51 *Suresh v The Queen* (1998) 72 ALJR 769 at 772 [13], 773-774 [22]-[23], 780 [55]-[56]; 153 ALR 145 at 149, 151, 160; [1998] HCA 23; *Ali v The Queen* (2005) 79 ALJR 662 at 664 [7], 677 [98]-[99]; 214 ALR 1 at 4, 21-22; [2005] HCA 8; *Tully v The Queen* (2006) 230 CLR 234 at 280 [149]; [2006] HCA 56; *Nudd v The Queen* (2006) 80 ALJR 614 at 618-619 [9]; 225 ALR 161 at 164-165.

52 See *R v Patel* [2010] QSC 068; *In the matter of Patel* unreported, Supreme Court of Queensland, 20 March 2010 per Byrne SJA.

53 *R v Patel* [2010] QSC 068; *In the matter of Patel* unreported, Supreme Court of Queensland, 20 March 2010 per Byrne SJA.

54 *Criminal Code*, s 590AA(3).

revised particulars were provided, nothing had occurred which would have justified such an application.

117 The difficulty that faced the defence was the width of the prosecution case as opened, which resembled a wide-ranging inquiry into the appellant's conduct, as was confirmed by the original particulars. Objection was taken to evidence which was clearly irrelevant. The rulings on this evidence appear to have been influenced by views about the width of the prosecution case. It may be that the appellant could have objected to some other evidence, such as the detailed evidence as to the demise of each of the three patients which was given by doctors, nurses and family members, or sought the exclusion of some of it on discretionary grounds. Objection perhaps should have been taken to the evidence tendered for the purpose of showing that the appellant was callous and deceitful. However, it cannot be said that such objections were assured of success, given the width of the prosecution case. In any event, it cannot be inferred that the appellant's counsel made a considered, tactical decision not to object. It is difficult to see what was to be gained by the appellant in allowing the evidence to be admitted.

118 A careful consideration by the prosecution of the expert evidence to be tendered to prove that the appellant was not competent in the conduct of the surgery and in the provision of post-operative care ought to have revealed that the evidence could not sustain a finding to that effect, let alone a finding of gross negligence to the requisite standard. The result was that very late in the trial the prosecution was forced to acknowledge that if, on the prosecution case, the appellant were criminally liable, he might only be so in respect of his judgments. Much of the prejudicial evidence which had been tendered was not relevant to this topic. Not only had the jury been exposed to this large body of evidence, it had been exposed to it repeatedly over a long period of time and in the context of a much wider prosecution case. There has been a miscarriage of justice.

119 Subject to consideration of the proviso to s 668E(1) of the *Criminal Code*, the miscarriage warrants an order for a new trial. This is not a step to be taken lightly in any case, let alone one where there has been a very lengthy trial. The need to consider such a course is brought about by the way in which the prosecution conducted its case: in tendering a body of evidence prejudicial to the appellant which could not be maintained as relevant once it had radically revised its case. Had the prosecution focused at the outset on the judgment the appellant formed about the need for or appropriateness of the surgical procedures, the trial would not have assumed the dimensions that it did and there would not have been the miscarriage of justice that occurred.

120 It remains to consider whether the proviso to s 668E(1) of the *Criminal Code* should be applied. Section 668E(1A) provides:

> "However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

It cannot be concluded that there has been no substantial miscarriage of justice unless the Court is persuaded that the evidence, properly admitted at trial, proved beyond reasonable doubt the accused's guilt of the offence on which the jury returned its verdict of guilty[55].

121 The evidence presents some difficulties in concluding, to the requisite standard, that the appellant was guilty of the offences charged. According to the evidence of one expert, Mr Morris' surgery caused his death only in the sense that without it he would not have suffered the complications from which he died. There was evidence that the appellant honestly believed that the bleeding with which Mr Morris presented was from diverticula and that multiple diverticula were seen as present by another doctor in attendance when the appellant conducted a colonoscopy on this patient. Even if the appellant was not reasonable in deciding to operate because of his failure to conduct further investigations, or because there were alternatives to surgery, a conclusion of guilt would require those facts to amount to gross negligence.

122 The case concerning Mr Phillips presents problems in establishing causation. He died of an acute cardiac arrest caused by potassium poisoning following the failure of dialysis treatment, for which the appellant was not responsible. Other doctors, including the anaesthetist who took part in the surgery, had also assessed the patient as suitable for the procedure. Further, a review of the decision to operate must take account of the type of cancer from which he suffered. As was pointed out by expert witnesses, cancer of the oesophagus has an extremely unpleasant and certain side effect, namely that at some point the sufferer will no longer be able to swallow. An oesophagectomy is often the only cure and sufferers will often undertake it for that reason.

123 Mr Kemps also suffered from cancer of the oesophagus. The bleeding from which he suffered during surgery was not caused by the appellant. Its source was not found and could not be determined at trial. Bleeding to death is

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55 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

an extremely rare complication in surgery of this kind. There was evidence that, while this patient could have been suitable for the surgery, he should have been sent to Brisbane. But to find that a failure to conduct such an operation in Brisbane was causative of death would require a conclusion that the outcome would have been different had he been transferred. It was not suggested that the appellant was wrong to cease the first operation when he did, the bleeding having apparently lessened, and it was not said that he was criminally responsible because he could not stop the bleeding when he operated again. On the prosecution case at trial, whether the appellant was grossly negligent in relation to the continued bleeding depended upon his judgment in delaying the undertaking of the second operation. Whether the appellant's delay was a significant cause of death depended upon whether there could be no reasonable doubt that, had the appellant intervened earlier, Mr Kemps would have survived.

124 A defence was raised concerning the appellant's diagnosis of Mr Vowles as suffering from bowel cancer. It was that the appellant honestly and reasonably believed, based on this patient's history in having had this form of cancer twice before, that he was most likely suffering from it. The growth was later found to be benign. It was said that there were less radical procedures which could have been undertaken. The question here would be whether the appellant's decision to undertake removal of the bowel was grossly negligent.

125 Before reaching a conclusion as to these questions, and as to the appellant's guilt of the offences charged in the manner that *Weiss v The Queen* requires, it is necessary to consider the appellant's submission that the miscarriage of justice which occurred at his trial is such as to render the proviso inapplicable.

126 In *Wilde v The Queen*[56], it was said that the proviso has no application where there has been such a departure from the essential requirements of the law that the irregularity goes to the root of the proceedings. If that has occurred, it can be said that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of this kind may be so fundamental that by their very nature they exclude the application of the proviso.

127 *Wilde v The Queen*[57] further explained that there is no rigid formula for determining what qualifies as such a fundamental error. In *AK v Western*

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56 (1988) 164 CLR 365 at 373; [1988] HCA 6.

57 (1988) 164 CLR 365 at 373.

Australia[58] and in *Cesan v The Queen*[59], a cautionary note was sounded. It was said that what was said in *Wilde v The Queen* "is not to be taken as if it were a judicially determined exception grafted upon the otherwise general words of the relevant statute". What was said in *Wilde v The Queen* simply acknowledged a particular class of circumstances in which errors at trial are to be seen as radical[60]. The application of the proviso is not to be determined by reference to the form of expression used in *Wilde v The Queen*; it is necessary to consider in a particular case the miscarriage of justice that has been identified[61].

128 In some cases where the proviso is to be considered it will be possible to place some weight upon the fact that the jury returned a verdict of guilty[62]. In *Cesan v The Queen* this was not possible, because the jurors had been distracted when the accused gave them explanations in evidence. The jury did not then perform its task[63] and the proviso was therefore held not to be engaged[64]. In the present case, no weight can be given to the verdicts of guilty for the reason that so much irrelevant or unnecessary and prejudicial evidence was before the jury. The miscarriage of justice was grounded in the nature, significance and extent of the evidence to which the jury had been exposed. It would be expecting too much of a jury to attend to its task of determining the appellant's guilt on the four charges on the basis only of the appellant's judgment about whether to operate, putting to one side all that it had seen and heard concerning his competencies in other areas and his deficiencies as a person.

129 It is possible to identify those pieces of evidence which are likely to have been most damaging. The Oregon Order is clearly significant, as is the evidence of errors in the surgery itself. The Oregon Order was likely to be misused by a jury and no direction could prevent that. It should not have been admitted for any purpose. Other evidence, such as that concerning the ventilator, was

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58 (2008) 232 CLR 438 at 455-456 [54]; [2008] HCA 8.

59 (2008) 236 CLR 358 at 394 [126]; [2008] HCA 52.

60 *AK v Western Australia* (2008) 232 CLR 438 at 456 [54].

61 *Cesan v The Queen* (2008) 236 CLR 358 at 394 [126].

62 *Cesan v The Queen* (2008) 236 CLR 358 at 395 [129].

63 *Cesan v The Queen* (2008) 236 CLR 358 at 395 [130].

64 *Cesan v The Queen* (2008) 236 CLR 358 at 396 [132].

damaging to the appellant personally. However, any consideration of the effect upon the jury's ability to undertake its now more confined task must take account of the evidence as a whole. The sheer extent of the prejudicial evidence in the context of a wide-ranging prosecution case is likely to have overwhelmed the jury. The jurors were not given directions that they must exclude much of it from their minds. In practical terms any such directions would have been useless.

130 In these circumstances it cannot be said, in the terms of s 668E(1A), that no substantial miscarriage of justice has actually occurred. The proviso does not apply.

Conclusion and orders

131 The appeal on the ground that the appellant was prosecuted under a wrong provision of the *Criminal Code*, s 288, should be dismissed. However, special leave to appeal should be granted with respect to the ground that there has been a miscarriage of justice, and the appeal on that ground should be allowed. The order of the Court of Appeal should be set aside and in lieu it should be ordered that the appeal to that Court be allowed, the appellant's convictions be quashed, and a new trial be had.

132 HEYDON J. Bundaberg is in Queensland. About 70,000 people live there. It is 385 kilometres from the largest city in the State, Brisbane. The appellant practised surgery at Bundaberg Base Hospital. After a trial by jury presided over by Byrne SJA, the appellant was convicted on three counts of manslaughter. They related to three patients: Mr Morris, Mr Phillips and Mr Kemps. He was also convicted of unlawfully causing grievous bodily harm to another patient, Mr Vowles. The appellant conducted a sigmoid colectomy and colostomy on Mr Morris. He performed oesophagectomies on Mr Phillips and Mr Kemps. He removed Mr Vowles's large bowel. At the trial, much attention was directed to uncharged acts of the appellant in treating another patient, Mr Grave, on whom the appellant performed an oesophagectomy.

133 The appeal raises one question. Was the appellant charged under the wrong section of the *Criminal Code* (Q) ("the Code")? The answer is "No". The appellant's application for special leave to appeal raises a second question. Did a miscarriage of justice arise from, inter alia, a change in the prosecution case on the forty-third day of the trial? The answer is "Yes". Special leave should be granted in relation to the second question, and the appeal should be allowed.

Section 288 of the Code

134 *The issue.* The ground of appeal on which special leave was granted was:

> "The Court of Appeal erred in law in finding that the convictions of the appellant … could be supported on the basis that the appellant had breached a duty under s 288 of the [Code]. This section did not apply to the offences of which the appellant was convicted."

135 Section 288 provided:

> "It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such 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 observe or perform that duty."

Section 300 of the Code provided: "Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case." Putting to one side the charge of unlawfully doing grievous bodily harm to Mr Vowles contrary to s 320, the appellant was charged with manslaughter. What is "unlawful" killing? Section 291 provided: "It is unlawful to kill any person unless such killing is authorised or justified or excused by law." What is "killing"? Section 293 defined "killing" by reference to causation: "Except as hereinafter set forth, any person who causes the death of

another, directly or indirectly, by any means whatever, is deemed to have killed that other person." It follows that if an accused person caused the death of another, the accused person would be guilty of manslaughter unless the killing were authorised, or justified, or excused by law. Section 288 created a duty. Breach of that duty meant that, subject to any exculpatory provision, a killing was not authorised, or justified, or excused by law. As the respondent submitted, the duty arose at the moment when a person undertook to administer surgical or medical treatment. The duty was to have reasonable skill and to use reasonable care in administering that surgical or medical treatment. What is "treatment"?

136 *"Treatment" in ordinary usage.* Treatment is "[m]anagement in the application of remedies; medical or surgical application or service."[65] It is "[t]he course of action adopted to deal with illness, and the control of the patient."[66] It is "management in the application of medicines, surgery, etc."[67] It is "medical care for an illness or injury."[68] The process involved in "management", a "course of action" or "medical care" is a process which includes typical steps like taking a history, assessing symptoms, conducting a physical examination and procuring tests. Then, often later, the process can involve diagnosing the relevant condition, and giving advice as to how to deal with it, as well as carrying out any surgical or medical procedures, or supplying any drugs or medicines, conforming to that advice. As the respondent submitted, the duty to have reasonable skill and to use reasonable care arises not when surgery begins, for example, but at an earlier moment when a person "undertakes" to administer surgical or medical treatment, which occurs before those typical steps are taken.

137 A medical practitioner who, after considering a patient's history and symptoms, advises that patient that it is desirable to undergo surgery is administering treatment to that patient. This is so whether or not the medical practitioner personally carries out the surgery. It is so whether or not the surgery takes place. Suppose a person pants heavily and habitually complains of chest pain after walking 50 metres. If someone said to that person: "You need medical treatment", it would accord with ordinary English usage for that person to reply: "I am getting it: I am seeing a cardiologist who is considering whether a course of blood pressure and cholesterol tablets will help me or whether I need an angioplasty to be performed by a cardiothoracic surgeon." The receipt of

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65 *The Oxford English Dictionary*, 2nd ed (1989), vol 18 at 464 (meaning 3).

66 Critchley (ed), *Butterworths Medical Dictionary*, 2nd ed (1978) at 1740.

67 Delbridge et al (eds), *Macquarie Dictionary*, Federation ed (2001), vol 2 at 1999 (meaning 3).

68 Soanes and Stevenson (eds), *Concise Oxford English Dictionary*, 11th ed (2004) at 1536 (meaning 2).

"treatment" can commence before any positive act by way of a surgical procedure takes place.

138 *The historical origins of s 288.* That construction is supported by the origins of s 288[69]. In 1877, James Fitzjames Stephen published the first edition of *A Digest of the Criminal Law (Crimes and Punishments).* Article 217 provided:

> "It is the legal duty of every person who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act of a dangerous character, and which requires special knowledge, skill, attention, or caution, to employ in doing it a common amount of such knowledge, skill, attention and caution."

In 1878, Stephen drafted a Criminal Code based on the *Digest.* It was introduced into Parliament but did not pass. A Royal Commission comprising Lord Blackburn, Mr Justice Barry, Lord Justice Lush and Stephen was appointed to report on the Draft Criminal Code of 1878. It reported in 1879. It recommended the enactment of a provision (cl 162) in the following terms[70]:

> "Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge skill care and caution in doing any such act, and is criminally responsible for omitting to discharge that duty if death is caused thereby."

A Draft Code as revised by the Commission was introduced into Parliament in 1880, but was not carried. Clause 158 of the Bill provided:

> "Every one who undertake (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge skill and care in doing any such act, and is criminally responsible for omitting without lawful excuse to discharge that duty if death is caused by such omission."

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69 The Court of Appeal quoted lengthy passages from the relevant ruling of the trial judge exploring the origins of s 288 as far back as Stephen. However, these passages did not deal with the common law to which Stephen referred. See *R v Patel; Ex parte Attorney-General (Qld)* [2011] QCA 81 at [46] and *R v Patel* (2010) 202 A Crim R 60 at 63-65 [32]-[47].

70 United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C 2345] at 98.

139 Sir Samuel Griffith modelled cl 295 of the Draft Code he prepared in 1897 on cl 158. Clause 295 provided[71]:

> "It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act: and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty."

140 What did Stephen mean by "treatment"? Light is cast on that question by a footnote to Art 217. Neither Art 217 nor the footnote changed in any of the editions of Stephen's *Digest* published in his lifetime. Nor, apart from renumbering the Article, was there any change after his death[72].

141 The footnote to Art 217 referred, inter alia, to "*R v St John Long*, 2nd Case"[73]. The accused was charged with manslaughter. The deceased occasionally experienced a choking sensation in her throat. She habitually treated this by applying a blister to her throat, thereafter dressing the wound with spermaceti ointment. The accused, however, treated her by applying a liquid to her chest which caused ulceration and eventually death. The Attorney-General, Sir Thomas Denman, in opening the case for the prosecution, said that the charge against the accused was "of applying himself to the treatment of a case of which he knew nothing, and of using a most dangerous liquid, with the effect of which, in the judgment of charity, he must be supposed to have been unacquainted."[74] After argument at the close of the prosecution case, Bayley B said that the case should go to the jury. He stated: "rashness will be sufficient to make it manslaughter." He gave the following example of that kind of manslaughter: "If I have the tooth-ache, and a person undertakes to cure it by administering laudanum, and says 'I have no notion how much will be sufficient,' but gives me a cup-full, which immediately kills me"[75]. Laudanum is a drug capable of beneficial use. Advice that a cupful of laudanum be taken to cure toothache is negligent advice as to the proper course to be pursued in order to alleviate the

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71 Griffith, *Draft of a Code of Criminal Law*, (1897) at 119.

72 See Sturge (ed), *Stephen's Digest of the Criminal Law (Indictable Offences)*, 9th ed (1950) at 247.

73 (1831) 4 C & P 423 [172 ER 767].

74 (1831) 4 C & P 423 at 424 [172 ER 767 at 767].

75 (1831) 4 C & P 423 at 438 [172 ER 767 at 773].

condition. It is also negligent administration of a medicine. This is the case even though if laudanum were properly administered it could have alleviated the condition.

142 Stephen's footnote also referred to "cases collected" in *Russell on Crime*[76]. Five of them will be considered.

143 In *R v Crook*[77], the deceased suffered from a cancer on his face. The accused informed the deceased that he could cure him. He applied corrosive sublimate to the cancer – a substance sometimes applied in small quantities to wounds, but dangerous if applied to a large skin surface. Watson B "directed the jury to find the prisoner guilty if they considered he took upon himself the responsibility of attending to a patient suffering under cancer, when he, the prisoner, was not qualified for the purpose."[78] As with *R v St John Long*, the decision to advise a particular method of treatment was a negligent act distinct from the negligent administration of a substance pursuant to that method. The negligent decision of the accused to attend to the deceased's cancer was thus regarded as sufficient to constitute manslaughter, even if the negligent way the patient was attended were put to one side.

144 In *R v Webb*[79], the accused, a publican, was an agent for the sale of Morison's Pills. Morison's Pills had some medical value, apparently as a purgative. The accused advised a victim of smallpox to take large quantities of Morison's Pills. The victim died. There was evidence that "medicine of the violent character of which the pills were composed, could not be administered to a person in the state in which the deceased was, without accelerating his death."[80] Lord Lyndhurst CB said[81]:

> "if a person not acquainted with the medical art, administers to a person labouring under a serious disease, and death ensues from such administering, it is manslaughter. So, if such person administer medicine, of the nature of which he is ignorant, and such medicine causes death."

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76 Prentice (ed), *Russell's A Treatise on Crimes and Misdemeanors*, 5th ed (1877), vol 1 at 672-673. Stephen referred to 572-573, but this was a slip.

77 (1859) 1 F & F 521 [175 ER 835].

78 (1859) 1 F & F 521 at 522-523 [175 ER 835 at 836].

79 (1834) 2 Lew 196 [168 ER 1127].

80 (1834) 2 Lew 196 at 209-210 [168 ER 1127 at 1131].

81 (1834) 2 Lew 196 at 211 [168 ER 1127 at 1131].

Hence to advise a person to adopt a particular medical course which causes that person's death can be manslaughter.

145 In *R v Markuss*[82], a herbalist advised the daughter of a woman suffering from back pain and a cold, and weakened by heart disease, to prepare and administer to her mother a mixture of brandy and colchicum seeds. The woman died two days later. Her death was caused by gastritis induced by an overdose of colchicum seeds and by exhaustion resulting from her heart disease. Willes J said to the jury that one type of gross negligence:

> "consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, of the properties of which he was ignorant, or how to administer a proper dose. A person who with ignorant rashness, and without skill in his profession, used such a dangerous medicine acted with gross negligence … If a man knew that he was using medicines beyond his knowledge, and was meddling with things above his reach, that was culpable rashness."[83]

146 In *R v Bull*[84], the accused medical practitioner was charged with manslaughter after advising a patient to take, and providing her with, prussic acid. It was not clear how much prussic acid the patient had ingested before her death. The accused maintained that he had given the patient four drops. This amount was understood to be appropriate treatment. Cockburn CJ said[85]:

> "If a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care; and if he does it with negligence he is guilty of manslaughter.
>
> But do the facts here show such culpable negligence on the part of the prisoner?
>
> If, indeed, the prisoner had given the deceased all that was missed from the bottle, it would be so, for the quantity would have been so large that it must have been the grossest negligence. But the cork was found broken and half out of the bottle, so that it is impossible to say how much of the poison might not have escaped; or again, the cork being half gone, the liquid might have dropped faster than the prisoner supposed, and, if so,

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82 (1864) 4 F & F 356 [176 ER 598].

83 (1864) 4 F & F 356 at 358-359 [176 ER 598 at 599].

84 (1860) 2 F & F 201 [175 ER 1024].

85 (1860) 2 F & F 201 at 202 [175 ER 1024 at 1024].

> it would not be such culpable negligence as would make him criminally responsible."

147 In *R v Chamberlain*[86], a woman had a tumour on her shoulder. The accused, a herbalist, advised her to rub arsenic-based ointment on it. The woman died of arsenic poisoning. There was evidence that arsenic-based ointment had been used up to the last 30 years in England. It continued to be used on the Continent as an "heroic" method of treating hopeless cases. Blackburn J directed the jury that:

> "if the prisoner administered the arsenic, without knowing, or taking the pains to find out, what its effect would be, or if, knowing this, he gave it to the patient to be used, without giving her adequate directions as to its use, there would, in either view of the case, be culpable negligence"[87].

148 The authorities to which Stephen referred support the view that at common law an accused could be guilty of manslaughter for rashly advising or carrying out the administration of substances and the use of procedures. It might be rash because the person who administered the substances, used the procedures or commended them to the patient was not a person competent to do so. It might be rash because the substance or procedure, while having some safe and useful applications, was dangerous in other applications, either in itself or because of the patient's condition.

149 Whether or not the modern law of manslaughter corresponds in every respect with the mid-19th century common law is immaterial. The question is what the common law then viewed as "treatment". The widest versions of the case alleged against the present appellant – that the patients should not have been operated on at all; that he should not have operated on them at Bundaberg Base Hospital; that he conducted the operations without having reasonable skill or using reasonable care; or that he supervised post-operative care without having reasonable skill or using reasonable care – all fall within the conception of "treatment" revealed in the common law authorities.

150 The appellant's argument on s 288 assumes that there is a clear and water-tight division between negligent advice to undergo a procedure (either at all, or at a particular person's hands) and negligent conduct of that procedure in all circumstances. In many factual contexts there is such a division. But in some there is not. In some there is an overlap between the category which the appellant submits is outside s 288 and the categories which the appellant accepts are within it. To say: "I advise you to take these pills", where in fact they are

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86 (1867) 10 Cox CC 486.

87 (1867) 10 Cox CC 486 at 488.

lethal, may reflect gross negligence in the advice and also in the preparation of the pills. It is artificial to separate them.

151 Section 288 can be traced back to Stephen's Art 217. In Art 217, Stephen was stating his perception of the common law. It may be inferred that the meaning of "treatment" in s 288 corresponds with the common law. It is true that the Code is to be interpreted according to its terms without resort to any presumption that its provisions reflect the common law[88]. But the above reasoning is not resorting to that presumption. Nor does the above reasoning adopt the forbidden course of finding out how the law stood before the Code, and then seeing if the Code will bear an interpretation which will leave the law unaltered[89]. Instead the above reasoning depends on the fact that the original source of s 288 was modelled on the common law. The Code replaced the common law. But in many places, one of which is s 288, it was modelled on a series of earlier Codes. The first of those Codes adopted the common law.

152 *The appellant's submissions.* The appellant advanced several submissions against the construction urged by the respondent and accepted above.

153 The appellant's first submission was that the words creating a duty to have reasonable skill and use reasonable care "in doing such act" in s 288 referred to an act of performing surgery or an act involving non-surgical medical conduct. The appellant described his construction of s 288 as "perfectly plain". But an "act" can be the giving of advice.

154 The appellant's second submission was that "when the Code intends to refer to a decision to operate it does so, as in s 282, and that no such intention is revealed in s 288." However, ss 282 and 288 perform different functions. Section 282 is in Ch 26 of the Code. Chapter 26 is headed: "Assaults and violence to the person generally – justification and excuse". Section 288 is in Ch 27. Chapter 27 is headed: "Duties relating to the preservation of human life". It is dangerous to draw much from formal differences in the language of the two sections. Further, the field of operation of s 282 is narrower than that of s 288. Section 282 refers to "a surgical operation". Section 288 concerns undertakings "to administer surgical or medical treatment … or to do any other lawful act which is or may be dangerous to human life or health". As the Court of Appeal said, the contrast is an insufficient ground for reading s 288 down.

155 The appellant's third submission was that the construction adopted by the trial judge and the Court of Appeal failed to give significance to the word "lawful" in the expression "or to do any other lawful act" in s 288. He submitted:

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88 *R v Barlow* (1997) 188 CLR 1 at 18; [1997] HCA 19.

89 *Brennan v The King* (1936) 55 CLR 253 at 263; [1936] HCA 24.

> "The section is premised upon the decision to operate, logically anterior to the performance of the surgery, being *lawful*. It does not make sense that the section could be attempting to cover criminally reprehensible decisions to operate as they, by definition, could not be lawful." (emphasis in original)

The answer is that the words "any other lawful act" refer to acts which are lawful provided that the actor has reasonable skill and uses reasonable care. The words exclude punches or the throwing of glass bottles, for example.

156 The appellant's fourth submission was that s 288 should be given the "most lenient construction" in the event of ambiguity. There is no relevant ambiguity.

157 In his fifth submission, the appellant criticised the process of construing s 288 widely in order to prevent impunity attaching to wanton decisions to operate. He submitted that "it is not a correct principle of interpreting the Code … to strain unreasonably the meaning of a plain provision to make it accommodate extreme, hypothetical examples of medical misconduct." If the trial judge or the Court of Appeal had adopted that type of reasoning, the submission would have been right to criticise it. But the trial judge and the Court of Appeal did not adopt that type of reasoning. The conclusion that s 288 catches decisions to operate can be supported without recourse to that type of reasoning.

158 Finally, the appellant submitted that to construe s 288 as applying to a decision to undertake unnecessary surgery meant that there was a duty to have reasonable skill and to use reasonable care "in doing" conduct which should not be done. This, the appellant submitted, was so odd as to point against that construction. The submission reads "treatment" too narrowly. "Treatment" is not limited to the physical manipulation of instruments involved in surgery. It includes earlier advice to undergo surgery. It includes post-operative care. It also includes advice not to undergo particular forms of surgery or to receive particular forms of post-operative care.

159 Hence the respondent's submission that s 288 extends to advice about whether surgery should be undertaken is correct.

Miscarriage of justice: the procedural history

160 In order to understand the arguments relating to miscarriage of justice, it is necessary first to examine the procedural history of the trial.

161 *Separate trials.* The indictment presented on 24 April 2009 put first things first. It charged the appellant with eight counts of dishonestly gaining or attempting to gain a financial benefit contrary to s 408C(1)(d) and (2)(d) of the

Code. The young Hayden Starke would have applauded this decision to place important questions of dollars and cents ahead of mere manslaughter matters[90]. An order was, however, made for a separate trial on the dishonesty charges. The balance of the indictment contained the charges on which the appellant was convicted and two further alternative charges of causing grievous bodily harm to a patient. Those two charges were dropped before the trial began.

162 *Inherent problems in the trial.* The circumstances of the trial created considerable difficulties for the jury.

163 One problem was that a great deal of the evidence called was technical and scientific in nature. It was therefore not always easy to understand. Further, the prosecution's testimonial modus operandi lay to a large extent in taking many of the witnesses through the medical records of each patient, line by line. Some of these witnesses had made the relevant entries. Some were familiar with the system by which the entries were made. Some were experts whose opinions were sought on the facts which the records supposedly revealed. The prosecution case thus involved much repetition. A lot of the evidence about what happened during and after the operations was potentially prejudicial. Some jurors may not have fully appreciated that surgery conducted by surgeons who have a high degree of skill and use a high degree of reasonable care is often startling, even grisly, to those who have not experienced it before. This is particularly so where the patient is already very unwell. The prosecution has a duty to call all relevant witnesses. But that duty is subject to the dictates of fairness towards the accused[91]. It was necessary – though by no means easy or straightforward – for the prosecution to discriminate between what was strictly relevant and what was arguably not strictly relevant. That consideration made it important that precise particulars be provided, and that evidentiary tenders conform to them. There was a risk that the techniques the prosecution employed would build up among the jurors two feelings. One was that the patients had experienced terrible suffering. The other was that for this suffering someone should pay. In short, the evidence was prejudicial in two senses – the jury was "likely to give the evidence more

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90 Cf the start of the prosecution's final address. It quoted words attributed to the appellant by a nurse: "Don't you think the community's lucky to have someone like me? I've brought a lot of money to the hospital. I've increased its activity. Are you aware of these things ...?" The address went on: "to focus on money after these disastrous outcomes is a misplaced priority".

91 *R v Apostilides* (1984) 154 CLR 563 at 575-576; [1984] HCA 38.

weight than it deserve[d]" and "the nature or content of the evidence [might have inflamed] the jury or divert[ed] the jurors from their task."[92]

164 A second problem was that the charges concerned four different patients. The evidence on each patient was treated as cross-admissible similar fact evidence. In addition, similar fact evidence of uncharged acts relating to another patient, Mr Grave, was tendered. In *Pfennig v The Queen*, McHugh J gave reasons for the general exclusion of similar fact evidence. Some of the reasons are material in this case[93]:

> "One reason is that it creates undue suspicion against the accused and undermines the presumption of innocence. Another is that tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct. Similarly, '[c]ommon assumptions about improbability of sequences are often wrong', and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association 'is unlikely to be innocent'. Another reason for excluding the evidence is that in many cases the facts of the other misconduct may cause a jury to be biased against the accused". (footnotes omitted)

165 Thirdly, the charges were serious. The appellant was sentenced to concurrent terms of seven years' imprisonment for each conviction of manslaughter and three years' imprisonment for grievous bodily harm. The charges therefore needed to be examined with particular care.

166 Then there were the problems flowing from adverse publicity. The prosecution approach to the trial resembled that of a commission of inquiry conducting a very broad survey. The appellant's conduct had already been the subject of two commissions of inquiry. There were proceedings to extradite him from the United States of America. It is difficult to imagine that there could be many speakers of English living in Australia, even parts of Australia outside Queensland, in the years before the trial who had not been exposed to the massively unfavourable publicity that the appellant received during these events. It was inflammatory, derisive and bitter. Its effect must have been more intense, and therefore more damaging, in Queensland than elsewhere. The trial judge warned the jury not to be influenced by it. Counsel referred to it during the trial without contradiction. In his address to the jury, defence counsel spoke of "a frenzied media storm" against the appellant over a five-year period. In

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92 *Festa v The Queen* (2001) 208 CLR 593 at 609-610 [51] per McHugh J; [2001] HCA 72.

93 *Pfennig v The Queen* (1995) 182 CLR 461 at 512-513; [1995] HCA 7.

Queensland, the appellant was seen as a hostis humani generis. The appellant's counsel informed this Court that if the appeal succeeded the appellant would be seeking a stay on that ground. It may be inferred from the pre-trial publicity that there was great pressure on the prosecution to put the case against the appellant on its widest possible basis.

> "There is an accumulative Cruelty in a number of Men, though none in particular are ill-natured.
>
> The angry Buzz of a Multitude is one of the bloodiest Noises in the World."[94]

The prosecution called witnesses who loathed the appellant. Some of the nurses appeared to come to the trial determined to tell all, and to tell it colourfully. The risk of prejudice was thus very great. Whether prejudicial evidence should be admitted became a peculiarly sensitive question.

167 *The need for particulars.* In *Johnson v Miller*, Dixon J said that an accused person "is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge."[95] A representative instance of how the indictment expressed each manslaughter charge is count 9: "between the first day of April, 2003 and the fifteenth day of June, 2003 at Bundaberg in the State of Queensland, [the appellant] unlawfully killed [Mr Morris]." Count 9 raised many queries. In what circumstances did the unlawful killing take place? Had Mr Morris died in a fight with the appellant? Or had Mr Morris been run over by the appellant? No doubt the jury soon understood that the prosecution concerned the much-publicised behaviour of the appellant towards his patients. But what was the particular act, matter or thing which was alleged as the foundation of the charge? Was it a decision that Mr Morris should be operated on *at all*? Was it the decision of the appellant that *he* should operate? Was it some careless act or failure to act *while performing the surgery*? Was it some careless act or failure to act while providing and advising on *post-operative care*? The 19th century cases to which Stephen referred[96] generally left a reader of the indictment in no doubt as to what the allegedly unlawful conduct was. The criminal procedure of those

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94 George Savile, Marquis of Halifax, *A Character of King Charles the Second*, (1750) at 89.

95 (1937) 59 CLR 467 at 489; [1937] HCA 77. See also *S v The Queen* (1989) 168 CLR 266 at 286-287; [1989] HCA 66 and *R v Carr* [2000] 2 Cr App R 149 at 156-157.

96 See above at [140]-[147].

days is often denigrated today, but in this respect at least it seems to have been much superior.

168 In *Johnson v Miller*, Evatt J said[97]:

> "It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularize the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged."

But the importance of particulars does not lie only in relation to questions of inadmissibility for irrelevance. Particulars can also be necessary to enable the defence to make particular forensic judgments. Some concern the cross-examination of prosecution witnesses. Others concern the marshalling and deployment of its own evidence[98]. Parts of the trial record, incidentally, suggest that the present case may, with respect, illustrate Evatt J's point that without particulars the prosecution can be as unsure of the case being run as is the court and the defendant.

169 In pleading civil cases there is a distinction between the "necessary" particulars of allegations like fraud, which ought to appear in the pleadings themselves, and other particulars, which need not appear in the pleadings but must be supplied if requested.

> "[It is] anomalous and wrong that a case against a defendant should be spelled out with less particularity when he stands in the dock accused of [homicide] than when he resists a claim for compensation."[99]

The nature and seriousness of the charges levelled at the appellant obligated the prosecution to provide some particulars either in the indictment itself or at least well before the trial.

170 *The particulars issue before the trial.* In the period before a pre-trial hearing on Saturday 20 March 2010, two days before the trial started, the

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97 (1937) 59 CLR 467 at 497-498.

98 *R v Carr* [2000] 2 Cr App R 149 at 157.

99 *R v Carr* [2000] 2 Cr App R 149 at 157 per Lord Bingham of Cornhill CJ (Scott Baker and Curtis JJ concurring).

prosecution had supplied no particulars of any of the charges. None had been ordered pursuant to s 573 of the Code[100]. None had been ordered pursuant to the inherent power of the Court[101]. On 20 March 2010, a hearing took place before the trial judge. Particulars were discussed. The trial judge expressed surprise at the lack of particulars. Defence counsel informed the trial judge that he had earlier submitted that particulars needed to be supplied – in the course of committal proceedings and in the course of pre-trial hearings about the admissibility of evidence before a judge other than the trial judge. The pre-trial hearings before that judge were conducted on 16 June 2009 and 9 March 2010. Prosecution counsel did not protest at or contradict what defence counsel said. Prosecution counsel said that the defence was content for him to open the case and provide particulars in the course of the opening.

171 *The opening.* On the first day of the trial, 22 March 2010, the appellant was arraigned. The jury was empanelled. Prosecution counsel opened the case[102]. The opening began by alleging that the appellant's decision to operate on the four patients breached s 288. Later, the opening alleged that Mr Morris's death had also been caused by the defective surgical method the appellant employed and by the unsatisfactory post-operative care the appellant provided.

172 *An early debate about particulars.* At the end of the first day, after releasing the jury, the trial judge turned to particulars. He said:

> "The other thing that occurs to me from the opening is that at some stage – I hope not too far away – the particulars that were discussed [on 20 March 2010] will need to be reduced into writing. The large number of complaints that have been foreshadowed about the surgery and postoperative care in respect of Mr Morris indicate to me that it will be necessary to identify with some care, especially in cases where the cause of death may be doubtful, precisely what acts or omissions are said to have brought about the death. I am particularly concerned about the prospect of a number of alternative scenarios being left to the jury at the end of the day about acts or omissions that may or may not be

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100 It provided: "The court may, in any case, if it thinks fit, direct particulars to be delivered to the accused person of any matter alleged in the indictment, and may adjourn the trial for the purpose of such delivery."

101 *Johnson v Miller* (1937) 59 CLR 467 at 497.

102 Counsel who led for the prosecution at the trial (apart from a brief appearance by the Solicitor-General of the State of Queensland) and in the Court of Appeal did not appear in this Court. Counsel who led for the appellant at the trial did not appear in the Court of Appeal or in this Court. Counsel who led for the appellant in the Court of Appeal did not appear in this Court.

> characterised as criminal negligence, and if any are, which, if any, of those is shown to have caused the death."

Prosecution counsel did not demur. Defence counsel said: "My concern is that's the first time I have heard them particularised." After prosecution counsel offered a further explanation as to how the various complaints made in the opening related to the causes of the deaths, the trial judge said: "I have a feeling that before the addresses begin, some refinement will be necessary. In any event, we shall see how things progress." Defence counsel then expressed concern that he would need the particulars "sooner rather than later with a view to cross-examining". The trial judge indicated that the prosecution had made at least 10 complaints about the appellant's treatment of Mr Morris in its opening. His Honour foreshadowed the possibility that the prosecution would present to the jury numerous alternative theories as to which particular factors, in isolation or in combination, caused Mr Morris's death. Prosecution counsel then said of the complaints: "The number of them is not a criticism of the Crown, it's a criticism of the [appellant]." The trial judge pointed out the need for the prosecution to isolate instances where it claimed that the appellant had exhibited a lack of care which allegedly caused death. Prosecution counsel then said: "the Crown is not inclined to leave itself in the position where the defence can say, 'Well, you pick one and we'll pick the other', and that's why – and it's really a consequence of the generally substandard treatment of this patient." The trial judge then replied: "It can't be left to the jury on the basis that there's a litany of things that went wrong and then leave it to the jury to pick and choose which of them might matter to a case of unlawful killing." Prosecution counsel answered: "Well, that's a consequence not of the Crown's choosing, but of what he did." The trial judge responded: "We shall see."

173 In this exchange and in other, similar, later exchanges, the trial judge perceptively foresaw the troubles which would later plague the trial.

174 *Further consideration of particulars.* On the second day, Tuesday 23 March 2010, the opening concluded. The prosecution began to call evidence. It called the evidence relating to Mr Morris before the evidence relating to each of the other patients.

175 On the fifth day of the trial, Friday 26 March 2010, defence counsel told the trial judge that prosecution counsel had supplied him with what he understood to be "draft particulars" of the case concerning Mr Morris. This had happened, according to prosecution counsel, some days earlier. The document was handed to the trial judge. The transcript then attributes to his Honour the expression: "Mmm". Prosecution counsel then said: "Your Honour, it troubles me with the – your Honour just expressed some concern, I thought." The trial judge agreed. But his Honour said that it was a matter for defence counsel to decide whether he wished to take issue with the particulars. However, after an intervention by prosecution counsel, the trial judge made a lengthy critique of the

particulars. His Honour especially criticised their failure to state any causal connection between the alleged omissions of the appellant and the death of Mr Morris. Prosecution counsel and the trial judge both attributed this deficiency to the fact that the particulars had been supplied independently of any specific request from the defence. Defence counsel agreed that he wanted particulars meeting the deficiency. It was left to counsel for both parties to see what progress could be made before the sixth day of the trial, Monday 29 March 2010.

176 Before the start of that day, particulars in relation to Mr Morris were supplied to defence counsel in a non-draft form. Defence counsel then asked for particulars in relation to Mr Phillips's death. The trial judge said that judging by the particulars, the trial "is about to become considerably more difficult." His Honour said that if the particulars for the other patients were going to be like those for Mr Morris, the trial would become "unmanageable".

177 On the seventh day of the trial, Tuesday 30 March 2010, the trial judge indicated that he was still concerned about whether any of the complaints made against the appellant could be causally connected to Mr Morris's death. His Honour queried whether there were over a dozen alternative cases pleaded.

178 At the start of the ninth day, Thursday 1 April 2010, defence counsel complained about a disparity between the evidence of an expert witness given at the trial in relation to a particular invasive procedure and that given by the same witness at the committal hearing. The trial judge remarked: "Why does any of it matter? By the sound of it, when finally the case is pared down it can be left to the jury in a digestible form, the essence of it is going to be that it was criminally negligent to conduct the operation at all." The trial judge foresaw that the case against the appellant would eventually turn on his decisions to operate, rather than on deficiencies in how he performed those operations or in the post-operative care he provided. A little later his Honour said: "I don't know if it is going to assume any significance at the end of the case. I am rather optimistic, as I say, that it will be reduced to a form that is manageable in a jury trial." Defence counsel then complained that, as the trial judge had earlier foreshadowed, "a lot of mud" was being thrown in the course of the evidence. The trial judge responded:

> "I grant you that it is hard for you in a case where, as you put it a little figuratively, every piece of mud that can be thrown is. And you may be right. My optimism that it will be pared back by the time it goes to the jury to a digestible case capable of rational assessment may prove to be unduly optimistic. You might still be confronted [with] a welter of additional or alternative allegations.
>
> ...

> And it looks as though the prosecution wishes to conduct the case on the basis that in respect of those acts or omissions which are said to have caused the death, whether they bear the character of such a substantial departure that they should be characterised as criminal negligence, can be informed by whether other mistakes were made, which at the moment seems to me to be an unlikely proposition, but [prosecution counsel] has said that's to be advanced."

179 *The first application to discharge the jury.* At the start of the tenth day of the trial, Tuesday 6 April 2010, defence counsel applied for a discharge of the jury. He applied on the ground that no particulars had been supplied, save for the convoluted particulars in relation to Mr Morris.

180 The trial judge challenged defence counsel: "How can you complain about that, you didn't ask for them?" The defence had in fact pressed for them before the trial. And even if they had not been asked for by means of specific requests for particulars, they were asked for on the first and fifth days. The following exchange then took place. It commenced with an affirmative but ambiguous answer to the trial judge's question.

> "[DEFENCE COUNSEL]: Well, we – that's true, but we didn't expect them to be as convoluted, if I may respectfully say so, as what they appear to be achieving in the case of Morris. We were told – or we heard on Friday, or Thursday, I should say that, indeed, in respect to Morris *it's probable that those particulars will themselves change*.
>
> HIS HONOUR: In the sense that they are likely to be narrowed. So that by the time the addresses begin, the prosecution will have a more confined and digestible case to put to the jury, reducing the number of alternatives tiffs." (emphasis added)

In the course of argument, it emerged that the discharge application was not based solely on the deficiencies in or the absence of particulars. It was also based on the tender by the prosecution of inadmissible evidence. The defence had had no notice of that evidence. But it had not objected to its admission. The application metamorphosed into an application for an adjournment. The purpose of that adjournment would have been to "put in place a tightly controlled Court managed schedule" in relation to final particulars. In argument, the trial judge opposed the complaint about particulars. His opposition flowed from the lateness with which the matter had been agitated. Counsel for the defence admitted to a possible lack of diligence. But he denied that there was any tactical motivation behind the failure to seek particulars early. The trial judge did express disquiet about the volume of complaints in the particulars, and their broad and indefinite expression. He again foresaw that by the time of its final address the prosecution might abandon some of the alternatives in its particulars.

The trial judge rejected the inadmissible evidence complaint on the ground that the evidence had not been objected to.

181 *The particulars relating to Mr Phillips.* On the tenth and eleventh days of the trial, the trial judge and defence counsel had pressed for final particulars in relation to Mr Phillips. On the twelfth day, Thursday 8 April 2010, the trial judge read those particulars. His Honour said: "Oh, dear." On the twentieth day, Thursday 22 April 2010, the trial judge declared that he was "completely befuddled" by the prosecution case. On the twenty-first day, the trial judge challenged the prosecution to produce authorities that supported the proposition that "you can bolster a case to characterise an act or omission as gross by reference to some other act or omission not shown to have any ... causal connection with the death." His Honour foreshadowed the possibility that "we may ... be confronting, 10 weeks down the track, an application to discharge without verdict because the jury will have heard so much that can't ultimately be left to them ... I remain very troubled by the idea that you can prove a case against this surgeon by finding every little criticism that can be mustered and saying, 'Things could have been done differently.'"

182 *The trial judge's further complaints about particulars.* On the twenty-second day of the trial, Tuesday 27 April 2010, the trial judge asked: "How much more complicated can the case be made?" On the twenty-sixth day, Tuesday 4 May 2010, the trial judge expressed concern about the large litany of complaints that the prosecution had made against the appellant. His Honour drew attention to the "myriad number of alternative cases that [had been] propounded". On the same day, the trial judge referred again to the prosecution's optimism that by the time the evidence had concluded, the range of alternative cases for the jury would have narrowed.

183 On the thirtieth day, Wednesday 12 May 2010, prosecution counsel tendered some evidence as part of the res gestae. Counsel was either remembering or forgetting Lord Blackburn's dictum: "If you wish to tender inadmissible evidence, say it is part of the *res gestae*"[103]. The trial judge said:

> "Enough of things that have nothing to do with what may have caused the death. It is not a third Commission of Inquiry. A man is standing trial on very serious charges on the footing that he is criminally responsible for these consequences. The idea that we should have roving investigations into every little thing he is said to have done imperfectly is most unattractive."

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103 According to *Cross on Evidence*, 5th English ed (1979) at 43 n 13.

184 On the thirty-fifth day of the trial, Wednesday 19 May 2010, the trial judge repeated his prediction that by the time the case went to the jury, there would be particulars that identified acts or omissions that were allegedly both negligent and causative of death. On the thirty-sixth day of the trial, Monday 24 May 2010, the trial judge said that he remained "concerned at the extent of the evidence adduced of acts or omissions which are the subject of criticism, but which are not shown to be connected with a surgical outcome." His Honour also stated: "We keep hearing a great deal of criticisms, and at the moment I remain, as I have been for many weeks, concerned that this may be putting a fair trial at risk." Prosecution counsel submitted:

> "If it is necessary for the prosecution to prove that what was done was, in broad terms, gross beyond the meaning of negligence, then the prosecution says it can do so by looking much more widely than just the narrow focus".

The trial judge replied:

> "I remain to be persuaded of the proposition that you can demonstrate that a particular act or omission bears the character of criminally culpable negligence by reference to other acts or omissions that are disconnected with a pertinent event".

Even at that stage, prosecution counsel maintained that the appellant had failed to have reasonable skill and to use reasonable care before and during the operation on Mr Grave, and that these uncharged acts were relevant to the charges in the indictment.

185 On the thirty-eighth day of the trial, Wednesday 26 May 2010, the particulars relating to Mr Vowles were handed up. The trial judge said:

> "What concerns me, still concerns me, is the state of the particulars, but I've borne in mind your optimism that by the time the case is left it will be considerably narrowed.
>
> ... I'm, frankly, struggling to see how we will move past the particulars to a digestible case. Anyhow, we shall see how these things develop."

186 The following day, the thirty-ninth day of the trial, the trial judge extensively criticised the particulars provided in relation to Mr Vowles. His Honour said that if they were a civil pleading, they would be struck out as not disclosing a reasonable cause of action. The oral evidence called by the prosecution came to an end.

187 *The emergence of the revised particulars.* On the forty-second day of the trial, Friday 4 June 2010, prosecution counsel informed the trial judge that the

defence wanted some refinement of the particulars. The trial judge said of the prosecution's proposed approach:

> "To me, it just sounds like throwing a welter of prejudicial material at the jury and saying, 'Even if logically the Crown can't show a connection between a decision to remove a colon that is not cancerous and whether or not he can insert a central venous line, nonetheless you can take that into account.' Can he read a CT scan? If it's got nothing whatsoever to do with the particular surgery, how could a jury logically say, 'Because he has difficulty reading a CT scan that has something to tell you about the degree of culpability involved in taking out a colon where there isn't a cancer'? I can't see it."

188 His Honour added: "It sounds as though the Crown is very anxious to over-egg the pudding and to throw – well, we have been over this before – every little piece of mud in the hope that some will stick."

189 On the forty-third day, Monday 7 June 2010, revised particulars were handed up. In the trial judge's view, they abandoned the prosecution's complaints about the appellant's incompetence in performing surgery and in providing post-operative care. On the forty-fourth day, Tuesday 8 June 2010, the trial judge remarked that he did "not find even looking at [the original particulars] an appealing exercise they are so bad." In contrast, the trial judge described the revised particulars as a "vast improvement", as "sensible", and as "considered". The trial judge asserted that the delivery of the revised particulars meant that the trial "is not just a mud-slinging exercise anymore." His Honour also asserted that for "the first time in the trial [defence counsel] has comprehensible particulars that make sense." Even though the appellant agreed with this praise, with respect, for reasons set out below[104], if the revised particulars are read in a certain way, these are questionable propositions. If they are read another way – as the trial judge appeared to in his summing up – they are sounder propositions. However, one thing is plain. If so experienced and capable a criminal lawyer as the trial judge found the original particulars incoherent and confusing, the jury must have been in a much worse position.

190 *The second application to discharge the jury.* On the forty-third day, Monday 7 June 2010, defence counsel agreed to attempt to identify the items of evidence which were not admissible in the light of the revised particulars. On the forty-fourth day, Tuesday 8 June 2010, he supplied a non-exhaustive schedule of transcript references to that evidence. And he again applied for a discharge of the jury. The primary ground of the application was that much of the evidence admitted at the trial was not admissible on the case the revised particulars

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104 See below at [196]-[202].

propounded. The trial judge accepted a submission by the prosecution that evidence of bad surgery performed by the appellant was relevant to whether he knew he was a bad surgeon. This, in turn, went to proving that he was morally culpable in advising that he should perform surgery. The trial judge accepted defence counsel's argument that the evidence could be unfairly prejudicial. But his Honour pointed out that the defence had not objected to most of it. Of course, at the time an objection could have been made, the particulars were different in very significant respects. His Honour concluded that if any evidence were admissible only in relation to one or more particular charges, or might be used only for a limited purpose, that could be dealt with by counsel identifying those items of evidence and by appropriate directions to the jury. In contrast, the trial judge had said the day before: "we'll now have a lot of material in, for example – a lot of it – about malnutrition and scout nurses who were inexperienced ... [t]hat has nothing to do with the case that's to go to the jury."

The appellant's complaints

191 The original particulars attacked the appellant in three ways. First, they attacked the appellant for incompetent decisions to operate on the patients. Secondly, they attacked him for performing the actual surgery incompetently. Thirdly, they attacked him for giving incompetent post-operative care. The appellant submitted that the revised particulars pursued the first line of attack only. The appellant's principal point was that the change to the particulars caused much of the evidence which was relevant or arguably relevant under the original particulars to become irrelevant.

192 The appellant grouped the evidence of which he complained into four categories. One was evidence of allegedly incompetent surgery. Another was evidence of incompetent post-operative care. The third category was evidence calculated to call the appellant's integrity and professionalism into question. The final category was graphic and emotional evidence about the patients' pain and suffering and the consequential distress of their families and friends. The trial judge said he had noticed many jurors taking notes of this fourth category of evidence. He went on to say that the evidence of family members was "[f]requently about matters that might have seemed to lawyers to have little or no relevance to the case but which might be thought to engage the emotions rather than reasoning faculties."

193 In broad terms, the appellant's submissions should be accepted. Before going to the detail of the appellant's submissions and why they should be accepted, however, it is desirable to analyse the revised particulars.

General problems with the revised particulars

194 *The revised particulars summarised.* In seeking to understand the particulars, it is necessary to bear in mind the order in which the relevant

operations occurred. On 19 May 2003, the appellant operated on Mr Phillips. On 21 May 2003, Mr Phillips died. On 23 May 2003, the appellant operated on Mr Morris. On 6 June 2003, the appellant operated on Mr Grave. On 14 June 2003, Mr Morris died. On 4 October 2004, the appellant operated on Mr Vowles. On 20 December 2004, the appellant operated on Mr Kemps. Later that day, the appellant operated on Mr Kemps for the second time. Mr Kemps died the next day.

195 The particulars in their final form relied on this chronology in the following way. In relation to Mr Morris, the revised particulars alleged that one reason why the surgical treatment (a sigmoid colectomy and colostomy) was wrongly undertaken was that the appellant knew or ought to have known of his limitations as a surgeon because of his treatment of Mr Phillips (an oesophagectomy). The original particulars in relation to Mr Grave were never revised. They alleged that the appellant was negligent in deciding to operate, in the actual conduct of the operation, and in providing post-operative care. They also alleged that "the facts concerning the treatment and death of [Mr] Phillips show that the [appellant] lacked reasonable skill and reasonable care to perform oesophagectomies and show that such operations should not be performed at the hospital and these facts should have been apparent to the [appellant]." Even though the operation on Mr Grave (oesophagectomy) took place two weeks after the operation on Mr Morris, the prosecution placed no reliance on any "facts concerning the treatment" of Mr Morris. The revised particulars in relation to Mr Vowles alleged that one reason why the surgical treatment (removal of large bowel and rectum, and ileostomy) was wrongly undertaken was that the appellant knew or ought to have known of his limitations as a surgeon because of his treatment of Messrs Phillips and Grave (each oesophagectomies) and Mr Morris (sigmoid colectomy and colostomy). And the revised particulars in relation to Mr Kemps alleged that one reason why the first surgical treatment (oesophagectomy) was wrongly undertaken was that the appellant knew or ought to have known of his limitations as a surgeon because of his treatment of Messrs Morris, Phillips, Grave and Vowles. They also alleged that the appellant knew or ought to have known of the limitations of the hospital as a facility because of the outcomes for Messrs Phillips and Grave. These allegations may be described as the "lessons of experience" particulars.

196 The four sets of revised particulars and the unrevised particulars about Mr Grave created two related problems.

197 *Time problems in relation to Mr Phillips and Mr Kemps.* One problem appears in the revised particulars pertaining to Mr Phillips. They alleged that one reason why the decision to advise surgical treatment was negligent was that the appellant "caused the patient to bleed internally at the end of the operation or shortly afterwards". What happens after a decision to recommend surgery cannot have influenced the making of that decision. A similar flaw appears in the revised particulars in relation to Mr Kemps. They alleged, after a paragraph

charging that the first surgical procedure on Mr Kemps should not have been performed, that during "the first surgical procedure the [appellant] caused uncontrolled bleeding which the [appellant] did not control during the first surgical procedure or at any time afterwards." They also alleged that one reason why the surgical treatment was wrongly undertaken was that "the [appellant] failed to stop the uncontrolled bleeding during the first surgical procedure and delayed before attempting to do so in the second surgical procedure and failed to stop the bleeding in the second surgical procedure". What happened during either the first surgery or the second surgery cannot have affected the appellant's decision to advise the first surgical procedure. And what happened during the second surgery cannot have affected the appellant's decision to undertake it. In these respects, the particulars were liable to be struck out.

198 *The "lessons of experience" particulars.* A second difficulty lies in the "lessons of experience" particulars. The revised particulars for Mr Phillips did not say what was negligent in the appellant's actual conduct of the procedures used on Mr Phillips. The revised particulars for Mr Morris did not say what was negligent in the appellant's actual conduct of the procedures in relation to Mr Morris. And the particulars for Mr Grave did not say what was negligent in the appellant's actual conduct of the procedures in relation to Mr Grave. Thus in the particulars about Mr Morris, it was alleged that the appellant "knew or ought to have known of his *limitations* as a result of the *treatment* of [Mr] Phillips" (emphasis added). But what aspects of that treatment? What limitations? In relation to Mr Grave, the prosecution alleged that the appellant lacked the skill to perform an oesophagectomy. The prosecution alleged also that the appellant lacked the skill to provide post-operative care to patients who had undergone oesophagectomies. Yet the prosecution did not allege that any particular act or omission of the appellant in treating Mr Grave was negligent. In relation to Mr Phillips, the only particular given of negligent treatment should have been struck out for reasons just given – namely, that what happens during or after an operation is irrelevant to whether that operation ought to have been performed[105].

199 One view is that the evidence about the appellant's limitations as a surgeon, the hospital's limitations as a facility and the treatment of other patients was inadmissible in each particular case because the particulars were uncertain and should be treated as nullities. Even if that evidence was admissible, tensions were likely to arise when the trial judge directed the jury that, with limited exceptions, the case was about incompetent decisions to operate, not incompetently conducted operations[106].

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105 See above at [197].

106 See below at [204]-[209].

200 The "lessons of experience" particulars rested on the appellant's knowledge of his "limitations" as a result of "treatment" of patients before the particular patient in question. In the original particulars, there were some details given of the respects in which the appellant's performance of particular operations was said to be criminally negligent. They appeared to rest on the maxim res ipsa loquitur. For example, it was said that the appellant performed Mr Morris's surgery without having reasonable skill or using reasonable care for two reasons. First, it gave rise to wound dehiscence which required surgical correction. Secondly, it created an inadequate stoma, which caused partial bowel obstruction. It was said that the appellant performed Mr Phillips's surgery without having reasonable skill or using reasonable care because Mr Phillips suffered internal bleeding. It was said that the appellant lacked reasonable skill to perform Mr Grave's oesophagectomy because, after it, Mr Grave required operations to deal with dehiscence, and to repair a leaking jejunostomy, as well as an exploratory laparotomy. It was said that the appellant lacked reasonable skill and did not use reasonable care in operating on Mr Kemps in three respects. He concluded the first operation, despite failing to control the patient's internal bleeding. He delayed performing the second operation. And he failed to identify the source of the bleeding during the second operation, he failed to stop it, and he failed to seek the assistance of an experienced surgeon to do so. It was said that the appellant performed Mr Vowles's surgery without having reasonable skill or using reasonable care because it resulted in an inadequate stoma. In two instances, particulars were also given about defects in post-operative care. These particulars of the appellant's operative skill and his provision of post-operative care did not appear in the revised particulars. The introduction of references to "limitations" and "treatment", and of the "lessons of experience" allegations, meant that in fact the revised particulars were less particularised than the original particulars, not more.

201 It is not clear whether the "lessons of experience" particulars alleged that the "treatment" was criminally negligent, or was merely in breach of the civil duty of care (if that were relevant), or was not negligent at all (though revealing "limitations"). Apart from the revised particulars for Mr Kemps, there was no substantive allegation of either criminal or civil negligence in performing surgery or providing post-operative care in any of the revised particulars. How, then, could surgery or post-operative care which did not fall below the levels of competence required by the criminal law (or perhaps the civil law) create in the appellant knowledge of his "limitations" as a surgeon? Of what materiality were these "limitations"? Why would surgery or post-operative care which was, ex hypothesi, reasonably skilful and careful, be such as to suggest to the appellant, or such as to suggest to a reasonable person in the appellant's position, that he had "limitations" as a surgeon?

202 The prosecution ignored these problems. It continued to maintain, right up to and including its final jury address, that all evidence admitted under the original particulars remained admissible under the revised particulars. This can

only have been true if the "lessons of experience" particulars are viewed as having this effect. The prosecution opened its final jury address by submitting that the appellant was "a bad surgeon". It submitted that "there were bad choices made about when and upon whom to operate, where to operate, how to operate, how to treat patients after the operation." Prosecution counsel made more detailed points to this effect throughout the address. The trial judge's summing up put the prosecution case to the jury as being a much narrower one. It expressed the case as turning almost entirely on the appellant's decisions to advise surgery[107]. At the end of the summing up, the trial judge asked prosecution counsel whether he had any application for a redirection. He answered in the negative. That state of affairs creates very serious problems for the respondent in this Court.

The trial judge's summing up

203 Initially, the trial judge appeared to view the revised particulars as permitting quite a wide prosecution case. On the forty-fourth day in delivering his judgment refusing to discharge the jury his Honour outlined the prosecution case as he saw it:

> "To prove that each of the decisions of the [appellant] to operate in respect of charged surgical procedures was not only negligent but criminally so, the prosecution contends that the [appellant's] moral culpability matters. This is correct. Then it is said that evidence tending to establish that culpability is admissible; again, in principle, that must be so. Next it is argued that the [appellant] is a bad surgeon and, more than that, knows that he is, and that evidence of what he has done in performing surgery that is not the subject of the charge in question is admissible to prove his moral culpability.
>
> Now, evidence of other errors, whether of poor judgment in deciding whether to perform surgery, or in a lack of technical surgical proficiency in performing surgical procedures, has potential to bear on whether the [appellant] knew facts which should have caused him not to operate on the patients whose surgery is the subject of the charges. In that way, evidence of mistakes in other cases, at least those known to the [appellant], in connection with the surgical management of other patients, has potential probative value in connection with such issues as whether embarking on surgery as major as an oesophagectomy was so reprehensible as to constitute criminal negligence."

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107 See below at [204]-[209].

204 But by the time of his summing up, his Honour characterised the case much more narrowly. He gave the following direction:

> "It is critical to appreciate that this trial is *not about botched surgery*.
>
> Instead, it is about *surgery performed competently enough*. There may have been an imperfection or two in some of the procedures. If so, the mistakes did not, it seems, adversely affect patients.
>
> It is not how the [appellant] *performed surgery that matters* in these four cases.
>
> What matters is his judgment in *deciding* to commend the surgery to a patient and, having obtained patient's consent, in taking the patient to theatre to perform it." (emphasis added)

205 This stated explicitly to the jury not only that the competence of the surgery was not in issue, but that it was in fact competently performed. And it stated implicitly that post-operative incompetence was not in issue. It stated implicitly that reasoning based on the "lessons of experience" which made or should have made the appellant aware of his own limitations as a surgeon was impermissible.

206 Indeed, the trial judge reinforced what he had just said by continuing:

> "The prosecution contends that the operations were unnecessary or inappropriate.
>
> Removal of Mr Morris's sigmoid colon is said to have been inappropriate, mainly because the bleeding problem that the surgery was to address was sourced in his rectum.
>
> The surgery on Mr Vowles is said to have been inappropriate because, contrary to what the [appellant] supposed, Mr Vowles did not then have colon cancer.
>
> With both Mr Phillips and Mr Kemps, the primary contention is that the patient's health was too precarious for an oesophagectomy."

The narrowness with which the trial judge so presented the prosecution case must be qualified in two respects. First, later parts of the summing up indicated that to a limited extent the "lessons of experience" remained relevant in relation to whether Bundaberg Base Hospital was an appropriate facility at which to conduct certain types of operations and to whether the appellant was an appropriate surgeon to conduct those operations. But these matters were said to go to the question of whether the appellant was right to recommend that he conduct those operations. They were not relevant to whether the surgery he actually conducted,

or the post-operative care he supervised, violated the criminal law. Secondly, the failure of the appellant to stop Mr Kemps's bleeding and to start the second operation earlier was relevant under the revised particulars in relation to him. Since he was the last of the five patients, however, there were no "lessons of experience" to be learned from the treatment of him.

207 Conformably with what the trial judge had said in the two passages quoted[108], in dealing with each patient, the trial judge concentrated on the appellant's decision to operate (apart from the failure to stop Mr Kemps's bleeding and to start the second operation on him earlier). The trial judge did refer to prosecution counsel's description of the appellant as a "bad surgeon". But he said nothing about either incompetently conducted surgery (save in relation to Mr Kemps) or incompetently provided post-operative care, even when summarising the prosecution's detailed submissions. For example, the trial judge summarised prosecution counsel's submissions about the copious evidence concerning Mr Morris's decline into death thus:

> "But for the surgery, the consequences that followed the operation, including the patient's death, would not have happened.
>
> The operation, therefore, caused the death."

208 It is true that the trial judge summarised prosecution counsel's submissions concerning Mr Grave as follows:

> "the Grave case demonstrated that an oesophagectomy was beyond the capacity of both the Bundaberg ICU and the [appellant's] judgment.
>
> [Prosecution counsel] also argued that the Grave case:
>
> Demonstrates that the [appellant] lacked the skills to perform an oesophagectomy.
>
> Shows that even when the oesophagectomy itself goes well, things can go wrong afterwards, which is a reason not to perform the procedure in Bundaberg."

The trial judge also summarised prosecution submissions that Mr Grave's post-operative experiences showed that his oesophagectomy should not have been performed at Bundaberg Base Hospital. Those submissions concerned the decision to operate, not the actual competence with which the operation was conducted and the post-operative care was provided. It is important to bear in mind that the appellant was not charged with any crime in relation to Mr Grave.

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108 See above at [204] and [206].

209 The trial judge summarised some of prosecution counsel's submissions about the alleged "lessons of experience". He summarised some submissions by prosecution counsel about the appellant's lack of surgical skill. But, as summarised, these submissions were not directed to obtaining a conviction for manslaughter by way of incompetent surgery. They were directed only to the question of whether the appellant's decision to recommend that he conduct an operation was criminal.

210 It is now necessary to compare the evidence admitted under the original particulars in relation to each patient with the scope of the issues as defined in the revised particulars and the summing up respectively.

The evidence relating to Mr Phillips

211 *What the revised particulars said.* The revised particulars in relation to Mr Phillips alleged that it was wrong to conduct an oesophagectomy on him. This was essentially because it was dangerous in view of his co-morbidities; because the operation was or may have been pointless; because there were other, less dangerous treatments available; and because the appellant knew or ought to have known that Bundaberg Base Hospital would have difficulty in dealing with the post-operative problems that could reasonably be anticipated[109]. The revised particulars contained no allegation of incompetence in relation to either the appellant's conduct of the operation or his provision of post-operative care.

212 The absence in the revised particulars of any such allegation rendered inadmissible a considerable amount of evidence regarding the appellant's conduct of Mr Phillips's surgery which had been admitted under the original particulars. That evidence was prejudicial to the appellant.

213 *Inadmissible evidence of incompetent surgery.* The evidence of incompetent surgery which became inadmissible after the revised particulars were issued was along the following lines. The appellant could not get central venous access, which was said to indicate surgical incompetence. The operation should not have continued until central venous access was established. The appellant inadvertently but incompetently tore the oesophagus. There was considerable blood loss during the operation. Contrary to some principles of cancer surgery, the piece of the oesophagus removed was divided into two pieces, creating a risk of cancer cells "spilling". Given that Mr Phillips died of potassium poisoning for which the appellant was not responsible, none of this evidence can have been relevant even to the cause of death. Nor was any of it relevant to the merits of the decision to operate. It concerned events after that decision had been made.

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109 This leaves aside a matter discussed above at [199]-[201].

214 *Inadmissible evidence arising out of Mr Phillips's post-operative condition.* Further, despite the absence of any allegation of incompetence in providing post-operative care, there was evidence prejudicial to the appellant in relation to Mr Phillips's post-operative progress. Indeed, this evidence was inadmissible even under the original particulars, save to the extent that it might have gone to causation. Mr Phillips did not regain consciousness after the operation. He lost blood after surgery and his blood pressure was unstable. After his death, he had very high potassium levels, probably contributed to by internal bleeding, to the point that his heart was being poisoned by potassium. The appellant was in charge of the patient after surgery. He was in a "parlous" condition because of the instability of his blood pressure and the abnormality of his coagulation. Mr Phillips received numerous blood transfusions. His pupils became unresponsive, revealing something drastically wrong, like a haemorrhage, inside the brain. There was evidence that the patient's circulation was marginal and that he was shutting down. A senior specialist challenged the accuracy of the appellant's post-operative notes. Contrary to those notes, the patient was haemodynamically unstable. There was evidence that the appellant gave orders about the post-operative care of Mr Phillips which conflicted with the advice of other doctors. There was evidence that he resisted and obstructed attempts to transfer Mr Phillips to Brisbane despite the limited capabilities of the Intensive Care Unit in Bundaberg Base Hospital. There was evidence that the appellant had conducted himself in a "dysfunctional" way. There was evidence that the appellant had misleadingly told Mr Phillips's mother and sister that his condition was improving. There was evidence that he became angry with nurses for telling the truth about Mr Phillips's condition to his family. In particular, there was evidence that when it was suggested to the appellant that Mr Phillips's next-of-kin be notified of his condition, he said that there was "no way" that they should be told of the patient's poor prognosis because "he's going to get up and walk out of here." The appellant then became angry when a doctor spoke to Mr Phillips's mother, who then approached the appellant. He screamed at a nurse, and threatened to leave his post at the hospital.

215 *Conclusion.* Once the revised particulars had been supplied, this evidence was only relevant as "lessons of experience". The evidence was alleged to have conveyed to the appellant what he knew or ought to have known of his "limitations" as a result of his "treatment" of Mr Phillips, being a matter allegedly relevant to the decisions to operate on Messrs Morris and Kemps. But, as already noted[110], there was no particularisation of those allegations. And even more of the evidence was inadmissible once the trial judge told the jury that the case was about decisions to operate only.

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110 See above at [200]-[201].

Evidence relating to Mr Morris

216 *What the revised particulars said.* The revised particulars alleged that the appellant was negligent because the sigmoid colectomy and colostomy performed on Mr Morris should not have been performed. This was largely because of the patient's age, the patient's co-morbidities, the failure to conduct a complete investigation of the patient's condition, and the "limitations" of which the appellant knew or ought to have known as a result of the treatment of Mr Phillips. In contrast to the original particulars, there was in the revised particulars no allegation of any substantive deficiency in the appellant's conduct of Mr Morris's surgery or in his provision of post-operative care.

217 *Inadmissible evidence of incompetent surgery.* Despite that radical change in the prosecution case, there remained before the jury evidence alleging that the appellant, through surgical error, had failed to create an adequate stoma for Mr Morris's bowel. There was evidence of an obstruction of the bowel not detected or attended to competently by the appellant. There was evidence that wound dehiscence took place after the operation. When a second operation took place to repair this, the appellant did not deal with the stoma or bowel blockage problems.

218 *Inadmissible evidence arising out of Mr Morris's post-operative condition.* There was evidence that a causal factor in Mr Morris's death was the appellant's alleged mispositioning of a nasogastric tube in Mr Morris's oesophagus instead of his stomach, which led to the aspiration of vomit and faecal matter into his lungs. This event has no relevance to the appellant's earlier decision to operate on Mr Morris. That decision was the only particularised event requiring examination for its significance as a possible cause of Mr Morris's death.

219 If the revised version of the particulars had been supplied before the evidence was called, much of the copious evidence about Mr Morris's condition over the 22 days between his operation and his death would have been inadmissible (subject to a causation argument advanced by the respondent). It was evidence from medical staff and from Mr Morris's daughter. It dealt with the malnourishment of Mr Morris; his pain, suffering and disorientation; his low blood pressure; his difficulty in breathing; his growing weakness; his development of oedema (excess fluid retention); his abdominal pain, which developed to the point that Mr Morris needed morphine; the increasing amount of fluid in his lungs; his lack of appetite; his loss of liver, kidney and bowel function; his gradual development of mental distress; his feelings of nausea; his distended abdomen; his urinary tract infection; and his pain when he tried to move.

220 *Conclusion.* The trial judge's account of the issues in his summing up made even more of the evidence which had been received irrelevant.

Evidence relating to Mr Grave

221 *The inadmissibility of evidence relating to Mr Grave.* In this Court the respondent strongly argued that all the evidence which the appellant now complains about was not objected to before it was received. To this the respondent acknowledged three exceptions, one of which concerned Mr Grave. The appellant objected to the whole of the evidence concerning Mr Grave. The objection was based on the proposition that Mr Grave's evidence was similar fact evidence which did not comply with the principle stated in *Pfennig v The Queen*[111]. The objection was wrongly overruled. But since the appeal in relation to the evidence concerning Mr Grave did not take the *Pfennig* point, there is no purpose in examining why the objection was soundly based.

222 What counsel for the appellant did submit was that no evidence relating to Mr Grave should have been admitted unless it was capable of demonstrating criminal negligence in the appellant's decisions to operate on the four patients whose operations were the subject of the charges. So far as the evidence concerning Mr Grave related to incompetent surgery and post-operative treatment, it was irrelevant after the particulars for the patients whose treatment was the subject of charges were revised.

223 The trial judge's summing up stated Professor Jamieson's opinion that Mr Grave's operation had been carried out in "a standard and acceptable fashion", and that Mr Grave's post-operative complications – for example, pneumonia – were "recognised occurrences following an oesophagectomy." His Honour also said: "The post-operative complications are said by the prosecution to reveal lessons the [appellant] should have learned: in particular, that Bundaberg was not the place for an oesophagectomy." On that basis, evidence not going to that issue should have been treated as inadmissible because it was irrelevant or excludable under s 130 of the *Evidence Act* 1977 (Q)[112].

224 *The inadmissibility of some of the evidence relating to Mr Grave.* Counsel for the appellant submitted that a considerable amount of Mr Grave's evidence was irrelevant or so prejudicial as to warrant exclusion. Contrary to that submission, and subject to the criticisms of the "lessons of experience" particulars made above[113], some of that evidence was at least arguably relevant under the revised particulars in relation to the patients whose oesophagectomies

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111 (1995) 182 CLR 461.

112 Section 130 provided: "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

113 See above at [198]-[202].

took place after that of Mr Grave. Its potential relevance lay in providing "lessons of experience" for the appellant concerning possible shortcomings of Bundaberg Base Hospital as a facility for performing oesophagectomies. That approach would permit some general evidence about what the post-operative complications were, together with evidence about how they would have been avoided or overcome at a large Brisbane hospital, and any discussions on that subject in the appellant's presence. But that approach would not permit evidence that the appellant inadvertently put a hole in Mr Grave's oesophagus during the operation (particularly since this was not said to be negligent). And it would not permit various items of evidence about what happened after the operation. One example is evidence from Ms Davon, who was Mr Grave's daughter, that the appellant told her and Mr Grave's wife that the operation had been straightforward, coupled with her graphic evidence about Mr Grave bleeding and needing subsequent surgery to stop the bleeding. Another example is evidence from Ms Davon that her father could not speak properly after the operation and never recovered his voice before he died. Another example is evidence from Mr Grave's widow that after the operations on her husband, the appellant said everything would be fine, when the opposite turned out to be the case. Another example is very detailed evidence about Mr Grave's post-operative complications. Another example is evidence presumably tendered as admissions by conduct, but tending to reveal the appellant as stubbornly unconcerned with Mr Grave's welfare, to the effect that the appellant resisted Mr Grave's transfer to Brisbane and threatened to resign if it occurred. On the forty-fourth day, after the supply of the revised particulars for the other four patients, the trial judge said that the evidence about transferring Mr Grave to Brisbane, which was voluminous, "now looks to have receded very largely into the background". That is a euphemistic way of saying that it had become irrelevant.

The evidence relating to Mr Vowles

225 *What the revised particulars said.* The revised particulars for Mr Vowles alleged negligence in the appellant's decision to operate to remove his bowel because it was pointless since the patient did not have bowel cancer, because the investigations conducted prior to surgery were incomplete, and because of the "lessons of experience". Unlike the original particulars, they contained no allegations of incompetence in performing surgery or in providing post-operative care, except to the extent that the appellant's treatment of Mr Vowles and its consequences were said to provide "lessons of experience" in relation to the last patient, Mr Kemps.

226 *Inadmissible evidence of incompetent surgery.* Evidence of the appellant's conduct after he recommended surgery for Mr Vowles had, however, already been admitted. There was evidence of surgical incompetence: the stoma the appellant created was defective and needed revision. This caused numerous problems: it was "a horrendous time" for Mr Vowles and his family. The

revision by the appellant failed. It was undertaken too early. A further revision by another surgeon succeeded.

227 *Conclusion.* The irrelevance of this evidence as to what happened after the appellant had recommended surgery became even more marked once the summing up had been delivered.

Evidence relating to Mr Kemps

228 *What the revised particulars said.* The revised particulars relating to Mr Kemps alleged negligence in the decision to operate largely because it was pointless; because other, less dangerous, treatments were available; and because of the "lessons of experience". They contained, unlike the original particulars, no allegations of incompetence in performing the surgery or in providing post-operative care, save for the appellant's failure to stop Mr Kemps's internal bleeding in either operation and the appellant's delay in starting the second operation.

229 Some problems arise with the evidence relating to Mr Kemps. One concerns evidence which lay outside the prosecution case, as it was explained in the trial judge's summing up. Another relates to the "ventilator" evidence (which had been objected to before the trial).

230 *Inadmissible evidence of incompetent surgery.* The trial judge's direction to the jury that surgical and post-operative competence was not in issue was subject to a qualification in relation to Mr Kemps. The prosecution had not abandoned the allegations about the appellant's failure to stop Mr Kemps's bleeding and his tardy start to the second operation. Even so, there was still evidence before the jury that was irrelevant to the case it was to consider. It may be taken in chronological order. There was expert evidence that, contrary to basic principles of cancer surgery, not all the cancer cells had been removed from Mr Kemps because not enough of the oesophagus had been removed. There was evidence that, during the first operation on Mr Kemps, a nurse drew the appellant's attention to the fact that a Bellovac drain had no vacuum on it, was freely flowing and was over half full, to receive the reply, "That's what drains are for".

231 There was also inadmissible evidence concerning the second operation. Prejudicial evidence which went beyond proof of the objective facts on which the prosecution was relying was received. One example is that blood poured out of Mr Kemps and the nurses "scooped kidney basin after kidney basin" out of him. Another is that there were blood clots all over the floor and footprints of blood throughout the operating theatre. Another is that the appellant incompetently employed an unreliable indicator of blood loss by looking at the drain collecting the blood.

232 *Inadmissible evidence about post-operative events.* There were numerous examples of inadmissible evidence about events after, or distinct from, the operations. An example is evidence of Mr Kemps's widow that the appellant had misled her about the success of the first operation and that his notes did not accurately record a conversation with her. Another example is that when the appellant returned to the theatre and found Mr Kemps still there he expressed anger. Another is evidence that the appellant had claimed, in a loud and unprompted way, that Mr Kemps's bleeding was not the result of his surgery. There was also evidence that he repeated this claim to Mrs Kemps later. There was evidence that this claim was wrong and not connected with reality. Another example is that, during the second operation, the appellant instructed junior doctors to keep "tight-lipped" and not discuss the matter with anyone. Another example is that the appellant remarked: "Maybe they're right, maybe we shouldn't do oesophagectomies here." Another example is evidence that the appellant said: "Maybe I should start thinking about not doing these type of procedures any more." Another example is evidence that the appellant had "a very uncaring look about him" after Mr Kemps had died. To that might be added evidence of the appellant's unprompted statement to a nurse after the second operation that it had been the worst day of his life. There was evidence that the death of Mr Kemps had not been referred to the coroner even though the appellant's team had been asked to do so and that it was the responsibility of the appellant to have done so. Finally, there was evidence that, on an occasion in some way connected with Mr Kemps, and after his death, the appellant had said that the local community was lucky to have someone like him because he had increased activity at Bundaberg Base Hospital and brought in a lot of money.

233 *The "ventilator" evidence.* Eight witnesses gave evidence from which the jury could have reached the following conclusions. Before Mr Kemps's operation, it was perceived that a ventilator had to be available to assist Mr Kemps after the operation. A ventilator was being used to keep alive a female patient, Mrs Turton, who was terminally ill and brain-dead because of a cerebral bleed. The appellant, in an upset, angry, heated and petulant manner, demanded that Mrs Turton's ventilator be turned off prematurely. After some controversy between the appellant, an anaesthetist and a resident, the ventilator was turned off. Mrs Turton died. The appellant's motive was to ensure that the ventilator could be available to Mr Kemps so that the appellant could complete the operation on Mr Kemps in time to enable him to go on holidays.

234 This evidence was irrelevant to the prosecution case as defined in the original particulars. It was irrelevant to the prosecution case as defined in the revised particulars. It was irrelevant to the prosecution case as described by the trial judge to the jury. To none of these cases were haste, neglect of pre-procedures for surgery or failure to follow brain-death protocols relevant. The Court of Appeal concluded that the evidence was irrelevant. Despite that, in this Court the respondent submitted, both in written submissions and in the documentary summary of its oral address, that the ventilator evidence was

relevant. Only in oral argument did it concede that the evidence was irrelevant on the original particulars and on the revised particulars.

235 The trial judge considered that "potentially devastating prejudice" lay in the evidence. It lay not in the desire to go on holidays, but in the allegation that the appellant "arranged for the premature death of the patient on the ventilator." The trial judge thought this was "pretty nasty stuff before a jury." He also said: "This has a significant potential to have an effect upon the jury that is out of all proportion to its probative value". Some of the jurors may have held the view that there is no moral difference between shutting off a ventilator and murder. Clough expressed this view in "The Latest Decalogue"[114]:

> "Thou shalt not kill; but need'st not strive,
>
> Officiously to keep alive".

236 The Court of Appeal considered that the ventilator evidence was unlikely to have been prominent in the jury's deliberations. The trial judge's view is preferable. The respondent argued that any prejudicial effect of the evidence was "diffused". That is extremely doubtful. The prosecution's opening address referred to it at some length. Prosecution counsel said that the incident, coupled with the appellant's talk about going on holidays, was an indicator of unseemly haste, and a consequence of that "may well [have been] a lack of preparation done in staging the operation." Prosecution counsel in closing address also referred to the incident. He said:

> "[P]rior to the operation there was an elderly lady on the ventilator whose ventilation was turned off, and the significance of that is, you will recall evidence from the nurse Brennan about being shouted at, and evidence of a tantrum that Carter spoke of about that.
>
> What that points to is really a rush to do this. All of that evidence led up to Brennan reporting to us that the [appellant] said that he was going on holidays, and that's essentially why this had to be done, and it was coming up to Christmas-time, as we know.
>
> Now, I emphasise – I emphasise this: there is no criticism of the [appellant] over this issue with respect to turning off the ventilator for that unwell lady. It was her time. But the evidence about it prompts this conversation about the holiday and his urgency to get this done. That might, you might think, be a driver for his haste in doing this, for not consulting, for not getting all that wide array of opinions that we all know

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114 *Poems*, 3rd ed (1871) at 142.

> about now that are necessary before you undertake this scope of operation."

Defence counsel then addressed on the matter. That part of the transcript goes over two pages. The trial judge referred to what defence counsel said.

237 The Court of Appeal said that the ventilator evidence had "been made irrelevant by the change in particulars". That is not so. It was always irrelevant. The Court of Appeal said: "Part of that evidence cast the appellant in an unfavourable light." That is inaccurate. All of it was capable of casting him in an unfavourable light. The Court of Appeal then said:

> "But although it demonstrated that the appellant acted in relation to the Kemps operation with undue haste and ignored protocols concerning the turning off of ventilators, it would have been plain to the jury that there was no question of the appellant's wanting the ventilator switched off prematurely or misguidedly."

This fine distinction may have been plain to some jurors. It may not have been plain to others. The Court of Appeal then said: "The evidence in relation to the ventilator was a relatively small body of evidence led in a 58 day trial in which evidence was led over approximately 39 days." The evidence came from eight witnesses. It was given more than halfway through the trial on four days, spread over a five-day period. The Court of Appeal said: "That piece of evidence was thus unlikely to have had prominence in the jury's deliberations, either in respect of the count concerning Mr Kemps or the other counts." It certainly should not have had prominence – for it had no relevance whatever – on the other counts. Even if the evidence can be characterised, as the Court of Appeal did, as "short", deference should be paid to the view of the trial judge that it was "pretty nasty". That was the assessment of a lawyer with very great experience of criminal trials by jury. He was uniquely placed to assess prejudice in relation to this particular jury. The evidence showed graphically, on one view of it, that the appellant was prepared to ignore and break hospital rules that were in place for good reasons and that he was prepared to show a callous disregard for human life by prematurely ending it in order to fit in with his holiday plans. The evidence was objected to in a pre-trial hearing conducted by a judge other than the trial judge at a time before any particulars were supplied. That judge said:

> "[The appellant's] actions in relation to securing the provision of a ventilator are quite proximate in time to his surgery on Mr Kemps. They provide some evidence of a motivation on [the appellant's] part, unrelated to a concern about the most appropriate treatment for either patient. They also provide some context for the evidence relating to his failure to undertake proper preparation for the surgery."

That was said in response to a submission that the appellant failed to undertake the "necessary staging", or was guilty of "inadequate surgical workup" before commencing surgery. The supply of the original particulars made it clear that the evidence was irrelevant. But by then it would have been very difficult to persuade the trial judge to reverse the other judge's earlier ruling that the evidence was admissible. The evidence continued to be totally irrelevant once the original particulars were revised so as to centre on the appellant's decision to operate on Mr Kemps. It was totally irrelevant to the decision to operate. Even if it had been relevant, its prejudicial effect was grossly disproportionate to its probative value.

238 *Conclusion.* Some of the evidence relating to Mr Kemps was inadmissible even before the original particulars were supplied. Some became inadmissible after the revised particulars were supplied. Some became inadmissible after the trial judge's summing up.

239 The Court of Appeal observed, correctly, that the defence had not applied for the ventilator evidence to be excluded on discretionary grounds, and had not applied for any particular direction to be given about it. It is now necessary to give reasons why those failures should not debar the appellant's arguments from succeeding in relation to both the ventilator evidence and the enormous quantities of other evidence which either was inadmissible from the start or which became inadmissible after the prosecution case changed.

The failure to object and the failure to ask for directions

240 A lot of the evidence which the appellant now argues is inadmissible was not objected to when it was tendered. No application to exclude it was made after the particulars changed. No application for any jury direction about it was made. The respondent attempted to make much of this.

241 *Failure to object.* There is no doubt that a complaint on appeal that evidence not objected to at trial is inadmissible is ordinarily one that is very hard to make good. The appellant's success in this appeal, despite a failure to object, should not be taken as an auspicious precedent, capable of fructifying into widespread future use. But the circumstances of the appellant's trial were not ordinary.

242 Some of the prosecution evidence was never admissible. A lot of the evidence – not all, but a lot – which the appellant now complains about was admissible on the original particulars, unsatisfactory though the trial judge kept saying that they were. Other parts of the evidence fell outside them. While others might have objected to evidence inadmissible even on the original particulars, the decisions of defence counsel not to do so are understandable. The jury could have been angered by repeated objection, or provoked into thinking that defence counsel was attempting to conceal something very damning.

243 The trial judge had repeatedly said that the original particulars were incoherent, had permitted the deployment of every possible complaint about the appellant and had led to mud slinging. But he declined either to discharge the jury or to grant an adjournment for the particulars to be regularised. It is therefore very likely that the trial judge would have been unreceptive to complaints that evidence fell outside the particulars (putting aside some evidence which, even if within the particulars, might have been excludable on discretionary grounds). Any objection to evidence of incompetent surgery or post-operative care would inevitably have failed. If the particulars had been narrow it would have been much easier to object on grounds of relevance and discretionary exclusion. The original particulars were so wide as to preclude a great many of the objections which later became available. Much of the evidence admissible under the original particulars ceased to be admissible when the particulars were revised. Even more of it ceased to be admissible when the trial judge, without protest from the prosecution, narrowed the case further in his summing up. Once the discharge application on the forty-fourth day failed, there was no point in defence counsel trying to have the objectionable evidence rejected at that late hour. It had had its impact – the thirty-nine days of mud throwing to which the trial judge had often referred. That impact was inexpungible. Defence counsel's failures to object therefore lack determinative significance.

244 *Failure to seek special directions.* The prejudicial effect of evidence, which may once have been admissible but which had ceased to be after the particulars had narrowed, was so extensive that it could not be cured. There was no point in seeking special jury directions. Those directions could only remind the jurors of what some might have forgotten. It would have been self-defeating to ask the jurors to bring the prejudicial evidence to their minds, and, having got it clearly fixed there, then to ask them to put it back out of their minds. To refer to each piece of inadmissible evidence and say that it was inadmissible would have taken a very long time. To redact the transcript would, as the trial judge said, have been a time-consuming exercise. It would not have addressed the fact that many jurors had been taking notes. It would have called for a complex dissection of the lengthy expert evidence into what remained admissible and what did not. Special directions and redactions of the transcript would have intensified the problems they were directed to solve. It was probably beyond human power to remove from the jury's purview all the irrelevant, or relevant but prejudicial, evidence that had been admitted against the appellant. The trial judge appears to have embarked on a praiseworthy attempt to solve the problem by simplifying the prosecution case as being even narrower than his initial view of the revised particulars. That technique revealed how the prosecution might have run the case if it had employed more economy and discrimination. But, in its own way, the trial judge's technique increased the extent to which masses of evidence became inadmissible.

245 The appellant correctly submitted that a further problem arose from the trial judge's directions. In giving a conventional direction that the jury was bound by his Honour's directions on the law only, the trial judge said: "You are to determine the facts of the case based on the evidence that has been placed before you." That could have left the jurors with the impression that they were at liberty to use any part of the evidence which had been placed before them for any purpose they thought fit. That evidence included the "welter of prejudicial material" to which the trial judge had referred[115]. That comment did little to reduce the potential for a miscarriage of justice. The trial was long. Much of the evidence was technical. Much of it concerned operative technique, post-operative treatment, the sufferings of the patients, and the distress of their families. Much of the evidence was also, in the light of both the revised particulars and the trial judge's summing up, irrelevant. The most comprehensible and moving parts of this irrelevant evidence concerned the sufferings of the appellant's patients and the distress of their families. The sheer volume and power of this evidence would have weighed on the lay jurors. The trial judge observed them taking notes about it[116]. While the jurors may have understood the trial judge's summation of the ultimate case as being largely about a decision to operate only, it is very difficult to think that they would not be fortified in reaching a guilty verdict by the "welter" of other prejudicial evidence heard. The jury had not been present when the trial judge repeatedly expressed to counsel his confusion about the prosecution case. The jurors had no reason to think that they were required to do anything other than pay close attention to the detail of the prejudicial evidence.

The respondent's stance in the appeal

246 The respondent contended that all the evidence which the appellant said was inadmissible because of the change in particulars was still admissible.

247 *Evidence of decline.* One argument of the respondent was that "the voluminous evidence given about the state of each patient between the operation and the time of death ... demonstrated the progression of health from operation by way of a steady decline to ultimate death". But the argument did not explain why that made the evidence admissible.

248 *Causation.* A second argument was that much of the evidence went to causation[117]. The argument was that all the post-operative care evidence was

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115 See above at [187].

116 See above at [192].

117 See above at [219].

necessary to exclude as causes of death any matters not connected with the decision to operate. There are difficulties in this argument.

249 One is that it cannot assist in relation to Mr Vowles, who did not die.

250 There is another, and wider, difficulty. Before the revised particulars were supplied, the prosecution case was that the death of Mr Morris was caused by incompetent advice that there be surgery, or incompetent surgery, or incompetent post-operative care, or any of those factors in combination. In the cases of Mr Phillips and Mr Kemps, the prosecution alleged that the deaths were caused by incompetent advice to undergo surgery, or incompetent surgery, or both. The only allegation of causation in the revised particulars was framed thus in the particulars supplied in relation to Mr Morris: "the patient died as a consequence of the surgical procedure because the [appellant] did not have reasonable skills and did not use reasonable care the details of which are set out below." There follow allegations that the decision to operate was wrong. The same formulation was used for Mr Phillips. It was also used for Mr Kemps, but failure to stop his bleeding was alleged as a cause of death as well. The revised particulars revealed a considerable about-face in tactics. The prosecution was saying in the case of Mr Morris that: "It was only the decision to operate which caused death, and we have excluded the other two as possibilities." In the case of Mr Phillips, the prosecution was saying that death was caused by incompetent advice to undergo surgery, and that it had excluded incompetent surgery. Only in the case of Mr Kemps did the prosecution maintain both advice to undergo surgery and the surgery itself as causes of death.

251 The prosecution was thus reversing its case in relation to Mr Morris and Mr Phillips. Before the revised particulars, incompetent surgery and post-operative care were alleged as causes of Mr Morris's death. After that time they were not. Before the revised particulars, incompetent surgery was alleged to be a cause of Mr Phillips's death. After that time it was not. This is an extreme version of the problem that Lord Bingham of Cornhill CJ referred to in *R v Carr*[118]:

> "[A]ny defendant (not least a defendant accused of murder) is entitled to know whether the Crown relied on a kick or a punch or both … [W]e think it unfortunate, the prosecution having apparently nailed its colours to one version of events in opening, namely that the deceased was felled by a karate kick, that the prosecution sought, and the judge permitted, departure from that position in the course of the case, at any rate without making sure that the defendant was in no way prejudiced."

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118 [2000] 2 Cr App R 149 at 156-157 per Lord Bingham of Cornhill CJ (Scott Baker and Curtis JJ concurring).

The revision of the particulars was equal in significance to amending the indictment. In *R v Johal*, the English Court of Appeal said[119]:

> "amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."

And in *S v The Queen*[120], Dawson J said that amendments to the indictment "may only be allowed if it does not cause injustice or prejudice to the accused and that generally means that [they] cannot be made during the course of a trial".

252 In any event, it is not possible to sustain the continued admissibility of the evidence to which the appellant now objects by recourse to causation. The respondent submitted in this Court that "everything that happened to Mr Morris from the time of the operation until the end bore upon proof of causation in respect of [the decision to advise] the operation." That submission must be rejected. There was expert evidence about causation. The jury could, on that evidence, form a view as to whether causation was or was not made out. The mass of evidence about Mr Morris's sufferings was not necessary to prove the prosecution case on causation.

253 *Moral gravity.* A third argument of the respondent is that evidence of the appellant's incompetence went to showing that his alleged breaches of duty were morally grave. But the respondent did not explain how conduct of the appellant, not alleged to be itself a breach of the duties imposed by civil and criminal law to provide competent surgery and competent post-operative care, can establish that an earlier breach of duty in relation to advice about having an operation at all was morally grave.

254 *Consciousness of guilt.* A fourth argument is that some of the appellant's conduct after the surgery reveals a consciousness on his part that he had been negligent, and was admissible to prove criminal negligence and the gravity of that negligence. This matter was not debated in detail, whether at trial, in the Court of Appeal, or in this Court. Potentially difficult issues arise in relation to the admissibility of this type of evidence. Those who contend that it is admissible often have to descend to some degree of detail in justifying admissibility. This was not done here. In those circumstances, little will be said about the matter, particularly in view of the fact that a new trial is to be ordered.

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119 [1973] QB 475 at 481 per Karminski LJ, Ashworth and Hinchcliffe JJ, approved in *R v Radley* (1973) 58 Cr App R 394 at 403.

120 (1989) 168 CLR 266 at 274.

If that new trial takes place, admissibility may have to be debated in detail. To some degree at least, the incidents referred to appear to reflect no more than the reaction of a busy professional, under severe stress and prone to irritation, understandably troubled at the unfortunate consequences for his patients of their medical treatment. Incidents of that character may well be irrelevant, or excludable on discretionary grounds, or incapable of satisfying the tests for receiving evidence of admissions by conduct.

255 *Section 24(1) of the Code.* A fifth argument is that the evidence was relevant to the defence provided by s 24(1) of the Code. That sub-section provided:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

It was submitted that the evidence was relevant, both to the existence of the appellant's belief and to its reasonableness. This point was even less developed in argument than the last. In those circumstances it must be rejected.

Conclusion

256 The prosecution case, even on the revised particulars as the trial judge initially understood them, had rendered inadmissible a lot of evidence that may arguably have been admissible on the original particulars. And the prosecution case on the revised particulars in final address, as the trial judge summarised it to the jury, rendered even more evidence inadmissible. The bulk, intensity, significance and repetitiveness of the evidence thus rendered inadmissible is likely to have had a profound and illegitimate effect on the jury. Its prejudicial effect was increased by the fact that much of it was referred to in opening, at a time when its content would be likely to have had a considerable impact.

257 The trial judge's endeavours throughout the trial to minimise the problems which eventually emerged were earnest, energetic, even heroic. But despite those endeavours, circumstances had conspired to ensure that the prejudice to which the prosecution's conduct of the trial had exposed the appellant was incapable of being overcome. None of the standard techniques for dealing with material which, having been received into evidence, turns out to be inadmissible could have surmounted it[121].

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121 *BBH v The Queen* (2012) 86 ALJR 357 at 378 [94]; 286 ALR 89 at 114; [2012] HCA 9.

258 The convictions were miscarriages of justice. They were miscarriages of justice because a "failure ... occurred in observing the conditions which … [were] essential to a satisfactory trial"[122]. It was a failure in process. "[T]he concepts of justice, and miscarriage of justice, bear two aspects: outcome and process. They are different, but related."[123] "[I]t is the process itself that is judged, not the individual performance of the participants in the process."[124] Subject to the proviso, the miscarriages of justice are sufficient to justify allowing the appeal.

The proviso

259 The respondent claimed that if the appellant's case in relation to the wrongful admission of evidence were sound, the appeal should be dismissed pursuant to the "proviso"[125]. The claim depends on this Court being "persuaded that the evidence *properly admitted at trial* proved, beyond reasonable doubt, the [appellant's] guilt of the offence[s] on which the jury returned its verdict[s] of guilty."[126] (emphasis added)

260 The respondent's proviso arguments rested on the assumption that all the evidence had been "properly admitted at trial". That is because they were directed to whether the proviso applied in the event that the appellant's construction of s 288 prevailed. That construction has not prevailed. The respondent's arguments were not directed to whether the proviso applied where much of the evidence had not been "properly admitted at trial". It is not surprising that the respondent did not present proviso arguments directed to that state of affairs. It would be very difficult to do so in the particular circumstances of this case. That is because the flaws in the revised particulars make it almost impossible to read the record of the trial putting to one side the inadmissible evidence. The revised particulars do not readily permit definitive decisions about the admissibility or inadmissibility of many pieces of evidence. It is relatively easy to consider whether to apply the proviso where there is one or a small

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122 *Davies v The King* (1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ; [1937] HCA 27.

123 *Nudd v The Queen* (2006) 80 ALJR 614 at 617 [3] per Gleeson CJ; 225 ALR 161 at 162; [2006] HCA 9.

124 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [8]; 225 ALR 161 at 164.

125 Section 668E(1A) provided: "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

126 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; [2005] HCA 81.

number of technical errors of procedure, evidentiary reception or misdirection. It is extremely difficult to do so where, as here, the prosecution tactics have created great prejudice and the now proffered criterion of evidentiary admissibility is in numerous respects unworkable. This is a case in which, to use the words of Gleeson CJ, the "departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case." That is because "the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant."[127] For those reasons, even taking the most charitable view of the respondent's position, it is not possible to say that no substantial miscarriage of justice has actually occurred. The truth is that the appellant was the victim of very substantial miscarriages of justice.

Omitted matters

261 The appellant presented arguments in relation to the admissibility of what the parties called "the Oregon order". In view of his success on other issues, it is not necessary to deal with them. Nor is it necessary to deal with questions about whether miscarriages of justice flowed from the trial judge's decisions to dismiss the first jury discharge application and to refuse the appellant's request for an adjournment with a view to the supply of proper particulars.

262 The appeal raises two very difficult questions, which were not articulated or debated by the parties. One is: to what extent can and should judges in a criminal trial by jury intervene of their own motion to reject evidence to which a party fails to object[128]? The other question is: when should judges in a criminal trial by jury compel the prosecution to provide particulars even though the defence has not pressed for them? One source of the difficulty in relation to each of these questions is that some think it undesirable to interfere with the autonomy of trial counsel in conducting trials as they see fit. These questions need not be answered in this appeal.

Order

263 The appeal must be allowed, the orders of the Court of Appeal set aside, the convictions quashed and a new trial ordered. Whether, in all the

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127 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [6]; 225 ALR 161 at 163.

128 The issue has been discussed in statutory contexts in *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 287 [149]; *Dhanhoa v The Queen* (2003) 217 CLR 1 at 8-9 [18]-[22]; [2003] HCA 40; *R v Kaddour* (2005) 156 A Crim R 11 at 26 [62] and *Gonzales v The Queen* (2007) 178 A Crim R 232 at 243-244 [24]-[26].

circumstances, a new trial should in fact take place is a matter for the prosecuting authorities.