HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

NATALIE BURNS APPELLANT

AND

THE QUEEN RESPONDENT

Burns v The Queen
[2012] HCA 35
Date of Order: 20 June 2012
Date of Publication of Reasons: 14 September 2012
S46/2012

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 1 April 2011, and in lieu thereof order that:*

   (a) the appeal to that Court be allowed;

   (b) the appellant's conviction for the manslaughter of David Hay be quashed; and

   (c) a verdict of acquittal be entered.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with G A Bashir and D P Barrow for the appellant (instructed by Legal Aid (NSW))

L A Babb SC with J A Girdham for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Burns v The Queen

Criminal law – Manslaughter by unlawful and dangerous act – Appellant party to joint enterprise to supply methadone to deceased – Deceased died from combined effect of methadone and prescription drug – Whether appellant's supply of prohibited drug to deceased unlawful and dangerous act – Whether sufficient evidence to warrant order for new trial on basis that appellant administered or assisted in administering drug to deceased.

Criminal law – Manslaughter by criminal negligence – Appellant party to joint enterprise to supply methadone to deceased – Deceased suffered adverse reaction to drugs in appellant's presence – Appellant failed to obtain medical treatment for deceased – Whether appellant under legal duty to take steps to preserve deceased's life.

Words and phrases – "legal duty", "omission", "supplier of prohibited drug", "unlawful and dangerous act".

FRENCH CJ.

Introduction

1 David Hay ("the deceased") died after ingesting methadone said to have been supplied to him on 9 February 2007 by the appellant, Natalie Burns, and her husband at the Burns' apartment in Belmore, a suburb of Sydney. On 20 July 2009, Mrs Burns was charged on indictment with the manslaughter of the deceased. She was also charged with four counts of supplying a prohibited drug, namely methadone. She pleaded not guilty to the charge of manslaughter and to one count of supplying methadone. She pleaded guilty to the three remaining counts. After trial before a judge and jury, she was found guilty of manslaughter and of supplying methadone. On 23 October 2009, Mrs Burns was sentenced on all counts to a total term of imprisonment of five years and eight months, with a non-parole period of four years and six months expiring on 13 January 2014. Her husband was tried separately on the same charges and convicted of manslaughter but died in custody shortly after he was sentenced.

2 The trial judge directed the jury that if Mrs Burns supplied methadone to the deceased and if that supply was dangerous and if it caused the death of the deceased she could be convicted of manslaughter. That direction was in error. It was not in dispute that the supply of methadone to the deceased was unlawful. However, the Crown case as put to the jury at the end of the trial did not involve a contention that the supply of the methadone was a dangerous act in the sense necessary to support a conviction for manslaughter. The Crown's case was that Mrs Burns and her husband had together injected the deceased with methadone and, in the alternative, that they had assisted the deceased to inject himself with the drug. The Crown alleged that their conduct in doing either of those things was an unlawful and dangerous act which caused the death of the deceased and would support a verdict of guilty of manslaughter.

3 The alternative case of manslaughter by criminal negligence was put to the jury based on Mrs Burns' failure to take steps to call for assistance for the deceased when he was showing signs of an adverse reaction to the methadone following his ingestion of it. Having regard to the trial judge's direction it cannot be known whether Mrs Burns was convicted of manslaughter by criminal negligence, or because the jury thought she supplied methadone to the deceased, that the supply was an unlawful and dangerous act and that it caused his death. Alternatively the route to conviction might have been a finding that she injected or assisted with injecting methadone in the deceased and that that was an

unlawful and dangerous act which caused his death. It may be that the basis of the conviction differed between different members of the jury[1].

4 The Crown accepted, on the hearing of the appeal to this Court, that the supply of methadone alone could not substantiate the commission of an unlawful and dangerous act. It was necessary to the "unlawful and dangerous act" limb of the Crown case that the jury be satisfied of the role of Mrs Burns either by herself or with her husband in assisting with the injection of the methadone. Counsel for the Crown argued that it was clear throughout the whole trial that the Crown case went well beyond mere supply. Nevertheless the possibility could not be excluded that Mrs Burns was convicted on the basis of the trial judge's misdirection. The appeal was therefore allowed and orders pronounced on 20 June 2012. Having regard to the state of the evidence in relation to the other bases upon which the Crown sought to support a conviction of manslaughter, it is not appropriate to direct a retrial. A verdict of acquittal was entered. My reasons for joining in those orders follow. Before turning to the evidence at trial and the trial judge's direction to the jury in more detail, it is necessary to say something about the law relating to involuntary manslaughter in New South Wales.

Involuntary manslaughter

5 The crime of manslaughter is punishable under s 24 of the *Crimes Act* 1900 (NSW) ("the Crimes Act"). It is defined negatively in s 18. Following the definition of murder in s 18(1)(a), s 18(1)(b) provides:

> "Every other punishable homicide shall be taken to be manslaughter."

The criteria of liability for manslaughter under the Crimes Act are those which give content to the words "other punishable homicide". Those criteria derive from the common law and from the statute.

6 Although the Crimes Act codifies aspects of the criminal law, it does not exclude the common law[2]. The crime of manslaughter as defined in the Crimes Act includes cases in which the elements of murder are established but the criminal liability of the accused is reduced, by the Crimes Act, to manslaughter. That occurs in cases of provocation[3] and substantial impairment caused by an

---

1 No suggestion was made that the trial judge should have asked the jury to indicate the basis of the verdict – as to whether it is open and appropriate to a trial judge to ask such questions for sentencing purposes, see *R v Isaacs* (1997) 41 NSWLR 374 at 377-380.

2 *R v Lavender* (2005) 222 CLR 67 at 70 [2] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2005] HCA 37.

3 Crimes Act, s 23.

abnormality of mind arising from an underlying condition[4]. Manslaughter in those cases is designated "voluntary manslaughter". Punishable homicide for the purposes of s 18(1)(b) otherwise falls into the category of "involuntary manslaughter". That term is used because, unlike voluntary manslaughter, it does not involve the intent to cause death or the other mental elements necessary for murder[5].

7 There are two criteria for liability for involuntary manslaughter to be found in the common law. They were stated by this Court in *Wilson v The Queen*[6], and restated in *R v Lavender*[7] in their application to the crime of manslaughter under the Crimes Act. The first is "manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury". The second is manslaughter by criminal negligence[8]. The criteria are not necessarily mutually exclusive. The same set of facts may give rise to liability under each of them[9].

8 An unlawful act for the purposes of unlawful and dangerous act manslaughter is one which is a breach of the criminal law[10]. The test for a dangerous act which was adopted by the majority in *Wilson*[11] applied, in modified form, a test formulated by Smith J in the Supreme Court of Victoria in *R v Holzer*[12]:

---

4 Crimes Act, s 23A.

5 *R v Lavender* (2005) 222 CLR 67 at 70 [2] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

6 (1992) 174 CLR 313; [1992] HCA 31.

7 (2005) 222 CLR 67.

8 *R v Lavender* (2005) 222 CLR 67 at 70 [2] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

9 *R v Willoughby* [2005] 1 WLR 1880 at 1885 [19]; *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2005 [21]; [2010] 1 All ER 13 at 18 [21].

10 *R v Holzer* [1968] VR 481 at 482; *Pemble v The Queen* (1971) 124 CLR 107 at 122 per Barwick CJ; [1971] HCA 20; *R v Lamb* [1967] 2 QB 981 at 988. See Roberts, "Unlawful and Dangerous Act Manslaughter: *R v Wills*" (1984) 10 *Monash University Law Review* 228.

11 (1992) 174 CLR 313 at 332-333 per Mason CJ, Toohey, Gaudron and McHugh JJ.

12 [1968] VR 481 at 482.

> "the circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury."

The modification was the deletion of the word "really" before "serious". The majority explained in *Wilson* that the test so modified gave "adequate recognition to the seriousness of manslaughter and to respect for human life" while maintaining a clear distinction between manslaughter and murder[13]. As Gleeson CJ observed in the Court of Criminal Appeal of New South Wales, shortly after the judgment in *Wilson* had been delivered[14]:

> "it should be explained to the jury in appropriate words that the test of what is a dangerous act is objective, not subjective, and that an act is dangerous if it is one that carries with it an appreciable risk of serious injury."

The requisite level of risk for the purposes of the common law in Australia is higher than that applied in the United Kingdom. There, liability for unlawful and dangerous act manslaughter requires "an act likely to injure another person"[15]and an act which "must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."[16]

9 The question whether an act is "dangerous" involves an assessment of risk in the sense of an ex ante probability that the act will cause serious injury to a person. If no causal pathway with a requisite level of probability can be identified, then the act is not able to be characterised as dangerous. The assessment of risk as "appreciable" is qualitative. The judgment it requires is

---

13 (1992) 174 CLR 313 at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ.

14 *R v O'Neill* unreported, Court of Criminal Appeal of New South Wales, 13 August 1992 at 3 per Gleeson CJ, Mahoney JA and Badgery-Parker J agreeing at 6.

15 *R v Larkin* (1942) 29 Cr App R 18 at 23 per Humphreys J, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 at 506-507 per Lord Salmon, Lord Diplock, Lord Simon of Glaisdale and Lord Kilbrandon agreeing at 506, Lord Edmund-Davies agreeing at 509, and in *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 at 270 per Lord Hope of Craighead.

16 *R v Church* [1966] 1 QB 59 at 70; see also *Goodfellow* (1986) 83 Cr App R 23 at 27, and generally Yeo, *Fault in Homicide* (1997) at 189-192.

linked to the judgment of causation and, like the judgment of causation in such cases, is[17]:

> "not a philosophical or a scientific question, but a question to be determined by [the jury] applying their common sense to the facts as they find them they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter."

Those observations are not intended to suggest the form of direction that should be given to a jury. As noted above, the test was set out by the majority in *Wilson* and what the jury should be told was explained by Gleeson CJ in *R v O'Neill*[18]. An example of a direction on dangerousness was given by Hunt CJ at CL in *R v Jones*[19].

10 It is for the jury to decide whether an unlawful act is dangerous in the sense explained in *Wilson* and *Lavender*. The question whether there is evidence capable of supporting a finding that the act is dangerous, in the relevant sense, is a matter for the judge. There was nothing in the evidence to support the proposition that the supply of a prescription quantity of methadone to an adult person of ordinary capacity could be characterised as carrying with it an appreciable risk of serious injury. The Crown did not put a case to the jury that supply of methadone to the deceased was itself an unlawful and dangerous act which would support a conviction for manslaughter. Nevertheless, the trial judge directed the jury on the basis that supply alone was capable of being so characterised.

11 The charge of manslaughter based upon supply of a drug to an adult person who dies as a result of its ingestion can raise difficult questions of principle and of the application of principle. The question whether supply can be characterised as dangerous depends upon the circumstances. It may be said that drug use in general is dangerous but as one academic commentator has written[20]:

---

17 *Campbell v The Queen* [1981] WAR 286 at 290 per Burt CJ, Jones and Smith JJ agreeing at 286; approved in *Royall v The Queen* (1991) 172 CLR 378 at 387 per Mason CJ, 411-412 per Deane and Dawson JJ, 423 per Toohey and Gaudron JJ, 441 per McHugh J; [1991] HCA 27.

18 Unreported, Court of Criminal Appeal of New South Wales, 13 August 1992 at 3 per Gleeson CJ, Mahoney JA and Badgery-Parker J agreeing at 6.

19 (1995) 38 NSWLR 652 at 657 and 663, Levine J agreeing at 664.

20 Wilson, "Dealing with Drug-induced Homicide", in Clarkson and Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008) 177 at 189.

> "the paradigm of unlawful act manslaughter, and one which limits the role of luck, involves an act which is dangerous in the specific context rather than dangerous as a more general social phenomenon."

There may be a case for specific legislation to cover culpable drug induced homicide[21]. It is undesirable to strain the criteria for liability for involuntary manslaughter at common law in order to cover drug-related deaths at the margins of those criteria[22].

12 The application of the common law criterion of unlawful and dangerous act to drug supply and injection cases in the United Kingdom has varied and evolved, reflecting the difficulties which particular cases can throw up[23]. *R v Cato*[24] concerned consensual but unlawful injection of a user which resulted in his death and was sufficient to establish liability without a separate consideration of dangerousness. The consent of the deceased was not a defence and there was no suggestion that it might be relevant to causation. In *R v Dalby*[25] the accused supplied a drug to the deceased who injected himself. The Court of Appeal identified as a "difficulty" the fact that the supply of the drug was not an act which caused "direct" harm[26]. The Court said[27]:

---

21 See Wilson, "Dealing with Drug-induced Homicide", in Clarkson and Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008) 177 at 191-195; Yeo, "Manslaughter Versus Special Homicide Offences: An Australian Perspective", in Clarkson and Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008) 199 at 207.

22 Horder, "Homicide Reform and the Changing Character of Legal Thought", in Clarkson and Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008) 11 at 23.

23 For discussions of the evolution of the case law in the United Kingdom, see: Jones, "Causation, Homicide and the Supply of Drugs" (2006) 26 *Legal Studies* 139; Williams, "Policy and Principle in Drugs Manslaughter Cases" (2005) 64 *Cambridge Law Journal* 66.

24 [1976] 1 WLR 110; [1976] 1 All ER 260.

25 [1982] 1 WLR 425; [1982] 1 All ER 916.

26 [1982] 1 WLR 425 at 428; [1982] 1 All ER 916 at 919.

27 [1982] 1 WLR 425 at 429; [1982] 1 All ER 916 at 919.

> "the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous."

Dalby was "explained" in *Goodfellow*[28] as "intending to say… that there must be no fresh intervening cause between the act and the death." *R v Dias*[29] resembled *Dalby*. The accused had handed a syringe containing heroin to the deceased who self-injected and died. Holding that the supply of the heroin was not an "unlawful and dangerous act", the Court of Appeal said that the deceased was an adult who could decide for himself whether or not to inject the heroin[30]:

> "His own action in injecting himself might well have been seen as an intervening act between the supply of the drug by the defendant and the death of [the deceased]."

13 *Dalby* and *Dias* were referred to with approval by the House of Lords in *R v Kennedy (No 2)*[31]. There, their Lordships said[32]:

> "the act of supplying, without more, could not harm the deceased in any physical way, let alone cause his death."

That observation was underpinned by a particular view of the criminal law as generally assuming the existence of free will[33]:

> "generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act".

That view was supported by reference to statements by Glanville Williams[34] and Hart and Honoré[35], which are quoted in the joint judgment[36]. Exceptions were

---

28 (1986) 83 Cr App R 23 at 27.

29 [2002] 2 Cr App R 96.

30 [2002] 2 Cr App R 96 at 99 [8].

31 [2008] AC 269. The long history of *Kennedy (No 2)* is referred to in the reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [80].

32 [2008] AC 269 at 274 [7].

33 [2008] AC 269 at 275 [14].

34 Williams, "*Finis* for *Novus Actus*?" (1989) 48 *Cambridge Law Journal* 391 at 392.

35 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 326.

acknowledged in the case of young people, those not fully responsible for their acts, the vulnerable and those subject to circumstances of duress, necessity, deception and mistake. The exceptions were treated by their Lordships as matters relevant to causation. They were also at least arguably relevant to whether the supply of drugs to another creates, by reason of an attribute or condition or circumstance of the other, "an appreciable risk of serious injury".

14 The House of Lords in *Kennedy (No 2)* was asked the question[37]:

> "When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?"

The answer given by their Lordships was[38]:

> "In the case of a fully-informed and responsible adult, never."

The absolute character of that answer directs attention to the cautious oxymoron "never say never". It is as much applicable to the law as other spheres of life and more so when it relates to an apparently normative statement based upon a narrow factual hypothesis. The joint judgment in this case however applies the proposition, which I accept, that underpins the reasoning in *Royall v The Queen*[39]: "that the voluntary and informed act of an adult negatives causal connection".

15 As their Honours point out[40] a different approach was taken in Scotland in *MacAngus v HM Advocate*[41]. In its discussion of causation, the High Court of Justiciary referred to *Kennedy (No 2)* and, after referring to Scottish authorities which had not been cited in the House of Lords, said[42]:

---

36 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [81].

37 [2008] AC 269 at 273 [2].

38 [2008] AC 269 at 279 [25].

39 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [86].

40 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [82]-[84].

41 2009 SLT 137.

42 2009 SLT 137 at 150 [42].

> "These Scottish authorities tend to suggest that the actions (including in some cases deliberate actions) of victims, among them victims of full age and without mental disability, do not necessarily break the chain of causation between the actings of the accused and the victim's death. What appears to be required is a judgment (essentially one of fact) as to whether, in the whole circumstances, including the inter-personal relations of the victim and the accused and the latter's conduct, that conduct can be said to be an immediate and direct cause of the death."

The Court quoted an observation of Lord Justice-Clerk Thomson who, in the context of civil proceedings in *Blaikie v British Transport Commission*[43], described the problem of causation as "a practical one rather than an intellectual one." He said:

> "It is easy and usual to bedevil it with subtleties, but the attitude of the law is that expediency and good sense dictate that for practical purposes a line has to be drawn somewhere, and that, in drawing it, the Court is to be guided by the practical experience of the reasonable man rather than by the theoretical speculations of the philosopher."

The Court in *MacAngus*, in a passage quoted in the joint judgment[44] which is not necessary to repeat here, could see no reason why the criminal law in Scotland should not adopt a "similar practical, but nonetheless principled, approach."[45] The approach favoured in *MacAngus*, however, does not represent the law in Australia.

16 Ultimately the Court of Criminal Appeal did not decide the question of causation by applying any novel principle. Rather, it held the trial judge's directions in relation to causation were appropriate on the basis that the evidence of the condition of the deceased when supplied with the methadone left open the question whether he was a fully informed and responsible adult at that time[46]. However, as explained in the joint judgment[47], the evidence did not support the proposition that the act of the deceased was not voluntary or informed. It was

---

43 1961 SC 44 at 49. See also *Royall v The Queen* (1991) 172 CLR 378 at 423 per Toohey and Gaudron JJ.

44 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [82].

45 2009 SLT 137 at 151 [48].

46 *Burns v The Queen* (2011) 205 A Crim R 240 at 271 [155] per McClellan CJ at CL and Howie AJ.

47 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [87].

voluntary in the sense that he made his own decision to take the drug. It was informed in the sense that he knew that what he was taking was methadone. I should add that, as appears from the joint judgment[48], this is not a case in which the Court has been invited to endorse the approach, also considered by the Court of Criminal Appeal[49], that the predictable responses of a sane adult to the act of another can be said to have been caused by that act.

17 In the present case, the concession made by the Crown in this Court may be taken as a concession that there is no evidence upon which it could have invited the jury to conclude that, if Mrs Burns had done no more than supply the deceased with methadone, that was a dangerous act which caused his death. As is explained later in these reasons, that concession is consistent with the basis upon which, after some change in its position between opening and closing addresses, the Crown put its case to the jury.

18 The Crown maintains that if the appeal were allowed on the basis of the trial judge's misdirection, the matter should be remitted for retrial on the basis of the Crown case that Mrs Burns had committed an unlawful and dangerous act by injecting or assisting with the injection of methadone in the deceased, and alternatively was criminally negligent in failing to obtain assistance for him. The latter basis, proposed in support of a retrial rather than entry of a verdict of acquittal, requires some reference to the common law relating to involuntary manslaughter by criminal negligence.

19 Involuntary manslaughter by criminal negligence at common law is made out if the prosecution shows that[50]:

> "the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved 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."

---

48 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [86].

49 (2011) 205 A Crim R 240 at 270 [151] per McClellan CJ at CL and Howie AJ.

50 *Nydam v The Queen* [1977] VR 430 at 445, approved in *Wilson v The Queen* (1992) 174 CLR 313 at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ; *R v Lavender* (2005) 222 CLR 67 at 75 [17] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *King v The Queen* (2012) 86 ALJR 833 at 842 [29] per French CJ, Crennan and Kiefel JJ, 855 [82] per Bell J; (2012) 288 ALR 565 at 575, 591; [2012] HCA 24.

20 A person has no civil or criminal liability at common law for negligent conduct unless that conduct involves a breach of a duty of care owed to another. The existence and breach of such a duty is a necessary condition of a finding of criminal negligence[51]. Lord Atkin in *Andrews v Director of Public Prosecutions*[52] equated negligence with "the omission of a duty to take care." In *R v Adomako*[53], Lord Mackay of Clashfern LC observed that "the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died." The question that follows is whether the breach of duty caused the death of the deceased and if so, whether the breach of duty could be characterised as gross negligence and therefore as a crime. The question of whether a given set of facts gives rise to a duty of care is a question for the judge. The question whether the facts exist is a question for the jury[54].

21 The issues of duty of care and criminally negligent breach of duty arise most acutely in cases of involuntary manslaughter by omission[55]. It was the breach of a duty to the deceased by criminally negligent omission that formed the basis of the Crown case against Mrs Burns for manslaughter by criminal negligence.

22 A frequently cited taxonomy of the duties of care that may support a charge of involuntary manslaughter was set out by Yeldham J in *R v Taktak*[56]. According to that taxonomy, which should not be regarded as exhaustive, criminal liability may arise for breach of a duty of care owed to another where[57]:

- A statute imposes the duty.

---

51 *Kelly v The King* (1923) 32 CLR 509 at 515; [1923] HCA 46.

52 [1937] AC 576 at 581.

53 [1995] 1 AC 171 at 187; a decision footnoted with apparent approval by the majority in *R v Lavender* (2005) 222 CLR 67 at 82 [37] footnote 39. See also *Airedale NHS Trust v Bland* [1993] AC 789 at 893 per Lord Mustill; *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2007 [31]; [2010] 1 All ER 13 at 21 [31].

54 *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2009 [39]; [2010] 1 All ER 13 at 23 [39].

55 Baker, *Textbook of Criminal Law*, 3rd ed (2012) at 12-005.

56 (1988) 14 NSWLR 226.

57 (1988) 14 NSWLR 226 at 243-244 per Yeldham J, citing *Jones v United States of America* 308 F 2d 307 (1962).

- The duty arises from a certain status relationship.
- The duty arises from a contract.
- The duty arises from the voluntary assumption of the care of another, so secluding a helpless person as to prevent others from rendering aid.

It is the last category of duty that was relied upon by the Crown in this case. In that category, as Yeldham J put it[58]:

> "the Crown must prove beyond reasonable doubt that the circumstances were such that the accused was under a duty to care for the deceased, which duty, as a result either of his gross negligence or perhaps of his recklessness, he failed to perform, with the consequence that death was caused or accelerated."

23 A duty of care may also arise where a defendant has played a causative part in the sequence of events which have given rise to the risk of injury, such that "a duty to take reasonable steps to avert or lessen the risk may arise."[59] That basis for a duty of care was relied upon by the Court of Criminal Appeal to support their Honours' conclusion that it was open to the jury to find that a duty of care did exist in this case. Against that background of general principle, it is necessary to turn to the evidence at, and conduct of, the trial.

The evidence at trial

24 The Court of Criminal Appeal[60] outlined the evidence in the case and conclusions said to be supported by that evidence:

- In February 2007, Mrs Burns and her late husband, who lived in an apartment in Belmore in Sydney, were drug addicts on a methadone treatment program.
- It was the practice of the prescribing medical practitioner at the treating clinic to explain the effects and side effects of methadone

---

58 (1988) 14 NSWLR 226 at 240 per Yeldham J.

59 *Mitchell v Glasgow City Council* [2009] AC 874 at 893 [40] per Lord Scott of Foscote. See also *R v Miller* [1983] 2 AC 161 at 179; *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2004 [18]; [2010] 1 All ER 13 at 18 [18].

60 *Burns v The Queen* (2011) 205 A Crim R 240.

to clients and the risk of an overdose if methadone were used with other drugs[61].

- On 9 February 2007, Mrs Burns received a dose of 130mgs of methadone at the clinic and two takeaway doses of 130mgs each. Mr Burns also received two takeaway doses on that day[62].

- The deceased had suffered serious injuries, including some brain damage, as the result of a motor vehicle accident in April 2005[63]. At the time of his death he had been prescribed drugs known as olanzapine[64] and endone[65]. He had ingested olanzapine[66] and cannabis[67] in the hours prior to his death.

- Methadone is a very dangerous drug in combination with other drugs. It can easily cause serious harm or even death to a person who is narcotically naive[68].

- If taken orally methadone is stored in the liver and released over a period of time into the body. Injection of methadone, on the other hand, leads to very high levels of the drug in the brain where respiratory function and blood pressure are regulated[69].

- On 9 February 2007 sometime after 5pm, the deceased attended the Burns' apartment in order to obtain methadone. Mr and Mrs Burns supplied him with methadone[70] and either injected him with it

---

61 (2011) 205 A Crim R 240 at 252 [52] per McClellan CJ at CL and Howie AJ.

62 (2011) 205 A Crim R 240 at 252 [51] per McClellan CJ at CL and Howie AJ.

63 (2011) 205 A Crim R 240 at 250 [32] and 252 [55] per McClellan CJ at CL and Howie AJ.

64 (2011) 205 A Crim R 240 at 246-247 [15] per McClellan CJ at CL and Howie AJ.

65 (2011) 205 A Crim R 240 at 251 [41] per McClellan CJ at CL and Howie AJ.

66 (2011) 205 A Crim R 240 at 253 [59] per McClellan CJ at CL and Howie AJ.

67 (2011) 205 A Crim R 240 at 253 [57] per McClellan CJ at CL and Howie AJ.

68 (2011) 205 A Crim R 240 at 252 [50] per McClellan CJ at CL and Howie AJ.

69 (2011) 205 A Crim R 240 at 254 [67] per McClellan CJ at CL and Howie AJ.

70 (2011) 205 A Crim R 240 at 264 [122] per McClellan CJ at CL and Howie AJ.

using equipment they had at the apartment or assisted him to inject himself[71]. The question whether there was evidence capable of supporting a finding of injection or assisted self-injection was disputed before this Court. Mrs Burns denied having supplied the deceased with methadone and denied having injected him or assisting him to inject himself with it.

- Shortly after the deceased arrived at the apartment another person, Felicity Malouf, arrived to purchase methadone. She observed the deceased to be unresponsive at the time, and sitting in an armchair[72].

- Ms Malouf and Mr Burns got the deceased up from the chair in which he was sitting and walked him in a circle four or five times. Mr Burns told the deceased that they were going to call an ambulance but the deceased responded "No, no I'm right" or something to that effect[73].

- Mrs Burns came into the room and said that the deceased could not remain. She spoke angrily to her husband. He told the deceased it was time to go and that he would put him outside and keep an eye on him. The deceased got up without assistance and left. Mr Burns followed him out[74].

- On the following day, the deceased's body was discovered in a toilet block at the rear of the apartments[75]. To access the block, the deceased would have walked down a number of stairs and crossed a yard.

- It was very likely that the cause of death was the result of a combination of methadone and olanzapine. The level of olanzapine detected in the body of the deceased was high but not lethal. Neither the individual dosage of methadone or olanzapine would

---

71 (2011) 205 A Crim R 240 at 272-273 [157]-[160] per McClellan CJ at CL and Howie AJ.

72 (2011) 205 A Crim R 240 at 255 [77] per McClellan CJ at CL and Howie AJ.

73 (2011) 205 A Crim R 240 at 255 [78] per McClellan CJ at CL and Howie AJ.

74 (2011) 205 A Crim R 240 at 255-256 [79]-[80] per McClellan CJ at CL and Howie AJ.

75 (2011) 205 A Crim R 240 at 246 [11] per McClellan CJ at CL and Howie AJ.

> have been fatal by itself but they could have an additive effect[76]. In combination they could cause unconsciousness and respiratory depression. There was a remote possibility that the olanzapine alone caused the death of the deceased[77].

25 There was no evidence that Mrs Burns knew the deceased was not an experienced methadone user, that he had suffered brain damage or that he was on any other, and if so what, medication.

The Crown case at trial

26 In his opening address to the jury, the Crown Prosecutor identified two bases for the manslaughter charge against Mrs Burns:

1. In a joint enterprise with her husband she committed an unlawful act, namely supplying the drug methadone to the deceased knowing that he would ingest it either by injection or orally and that for him that was a dangerous thing to do.

2. Mrs Burns breached the duty of care that she owed to the deceased because she failed to render assistance or ask for assistance when he was in need of assistance and insisted that he leave her apartment.

The Crown Prosecutor did not suggest in opening that it was the Crown case that Mrs Burns had injected methadone into the deceased's body or assisted the deceased to inject himself with methadone.

27 At the close of the Crown case, in the course of an application by defence counsel for a directed verdict of acquittal of manslaughter, the trial judge asked the Crown Prosecutor to specify the unlawful and dangerous act relied upon by the Crown to support that charge. The Prosecutor said:

> "as to unlawful the selling of the methadone or the supply of methadone. As to dangerous that it was, on the evidence, within the knowledge of the accused that it was a dangerous drug and it was dangerous to share the drug or to give it away especially to people who are on a program."

And further:

---

76 (2011) 205 A Crim R 240 at 252 [54] and 254-255 [71] per McClellan CJ at CL and Howie AJ.

77 (2011) 205 A Crim R 240 at 253 [63] and 255 [71] per McClellan CJ at CL and Howie AJ.

> "Then, your Honour, it was further a danger to David Hay because on [the appellant's] statement [he] was already affected when he came to the apartment by something else; drugs or alcohol or both."

Defence counsel submitted, in support of his application, that the supply of the drug had not caused the deceased's death because he had made a voluntary and informed decision to take it[78]. The trial judge held, in effect, that the defence submission was one which might be made to the jury but was not a basis for a directed verdict.

28 Before closing addresses to the jury, a difference emerged between defence counsel and the Crown Prosecutor about the nature of the Crown's unlawful and dangerous act manslaughter case. Defence counsel observed correctly that the Crown had opened its case on supply of methadone to the deceased and submitted that the Crown should put its case to the jury in the way in which it had been opened and not on the basis that Mrs Burns had been involved in the administration of the drug[79].

29 The trial judge asked the Crown Prosecutor about the possibility that the deceased was simply given the drug and injected it himself. The simple case that the supply of the drug was the unlawful and dangerous act appears to have been abandoned by the Crown at this point. The Crown Prosecutor responded "[t]hat's where the omission aspect comes in", referring then, in the context of the Crown's criminal negligence case, to the alleged breach by Mrs Burns of a legal duty of care to the deceased. That response by the Crown Prosecutor in answer to the trial judge's question made it clear that, by that stage of the trial, the Crown was not contending that the mere supply of methadone would have constituted an unlawful and dangerous act.

30 Before commencing his closing address, defence counsel again raised with the trial judge the nature of the Crown case. He referred to a suggestion by the Crown Prosecutor in closing address that Mrs Burns' husband had injected the deceased with methadone. Counsel said it had never been his understanding that that was the Crown case. The trial judge rejected the defence complaint, taking the view that the Crown had not changed "the whole fundamentals of the case." In this his Honour was, with respect, incorrect. There was a significant difference between the act of supplying a prescription quantity of methadone

---

78 Counsel also submitted that the presence of olanzapine in the deceased's body was a possible cause of his death. That submission is not material for present purposes.

79 Supply and administration are distinct offences under the *Drug Misuse and Trafficking Act* 1985 (NSW). Supply is an indictable offence under s 25 of that Act. Self-administration, administration and aiding self-administration are summary offences under ss 12, 13 and 19 respectively.

which could be taken orally and the act of administering the methadone intravenously or assisting the deceased to administer it intravenously.

The trial judge's directions

31 In his written directions to the jury, which were largely reflected in his oral directions, the trial judge said that, in order to establish Mrs Burns' guilt of the offence of manslaughter, the Crown had to prove:

> "that the accused, by an unlawful and dangerous act, or by a grossly negligent omission in breach of a duty of care which she owed to the deceased (or by both such an act and omission) caused the death of David Hay."

32 As to the "unlawful and dangerous act" limb of the Crown case, the trial judge told the jury that, as at 9 February 2007, it was a crime and hence unlawful for a person in New South Wales to supply methadone to another person. Supply for that purpose included "giving or handing the drug over to someone, whether or not by way of sale and whether or not immediately consumed" by the person to whom it was supplied. His Honour went on:

> "In order for you to be able to find the accused guilty of manslaughter on the basis of 'unlawful and dangerous act' it is necessary that you are satisfied beyond reasonable doubt:
>
> (a) that the accused (either by herself or jointly with her husband) did in fact supply methadone to David Hay; and
>
> (b) that the act of supplying the methadone was intentional on the part of the accused; and
>
> (c) that a reasonable person in the accused's position, performing the very act which the accused performed, would have appreciated that the supply of the methadone was dangerous in that it carried with it a risk of serious injury to David Hay;
>
> (d) and that the supply of the methadone caused the death of David Hay in that it substantially contributed to the death."

His Honour did not direct the jury that it was necessary to be satisfied beyond reasonable doubt that, as an element of the conduct said to constitute the unlawful and dangerous act, Mrs Burns and her husband had injected the deceased with methadone or assisted him to self-inject.

33 On the criminal negligence limb of the Crown case, the trial judge directed the jury that there may be manslaughter where the accused "voluntarily assumes a duty of care towards another person and by a grossly negligent

omission, breaches that duty of care, causing death". His Honour elaborated upon that direction by saying:

> "If a person voluntarily invites or permits potential recipients to attend his or her home for the purpose of a prohibited drug supply transaction where the drugs are to be consumed on the premises, and where such a recipient may be or become seriously affected by drugs to the point where his or her life may be endangered, the drug supplier has a duty to conduct himself toward the drug recipient without being grossly or criminally neglectful."

The decision of the Court of Criminal Appeal

34 The reasons for judgment of the Court of Criminal Appeal were delivered jointly by McClellan CJ at CL and Howie AJ. Schmidt J agreed with them[80].

35 There were four grounds of appeal in the Court of Criminal Appeal. The first two related to the question whether Mrs Burns had owed a duty of care to the deceased which she had breached in such a way as to constitute criminal negligence. By the third ground Mrs Burns contended that the verdict of guilty of manslaughter was unreasonable and against the weight of the evidence. The fourth ground was that the trial judge had erred in refusing to withdraw the unlawful and dangerous act case from the jury. All grounds were rejected.

36 On the criminal negligence issue, their Honours held that it was open to the jury to conclude that Mrs Burns was aware of the deceased's state and, even though he had declined assistance, it was open to the jury to determine that she had a duty to seek medical attention for him[81]. The Court was satisfied that the evidence supported a finding of manslaughter by criminal negligence[82]. Their Honours said[83]:

> "Having regard to the evidence of the deceased's condition, which we are satisfied deteriorated after he had received methadone, it was negligent in the extreme for the appellant to require him to be taken from her apartment and abandoned. An ambulance should have been called. If it had the evidence is persuasive that the deceased would most likely have survived."

---

80 (2011) 205 A Crim R 240 at 273 [167].

81 (2011) 205 A Crim R 240 at 263 [114] per McClellan CJ at CL and Howie AJ.

82 (2011) 205 A Crim R 240 at 264-266 [121]-[130] per McClellan CJ at CL and Howie AJ.

83 (2011) 205 A Crim R 240 at 266 [129] per McClellan CJ at CL and Howie AJ.

37 In rejecting the fourth ground, the Court of Criminal Appeal said it did so[84]:

> "because, if for no other reason, there was evidence from which the jury could conclude that the deceased did not make a rational, voluntary and informed decision to take the methadone. There being evidence which could satisfy the jury that the deceased was not capable of such a decision his Honour rightly left the matter with the jury."

38 Their Honours held that it was open to the jury to conclude that Mrs Burns or her husband administered the injection[85]. Nevertheless their Honours treated the unlawful and dangerous act as "supply" rather than "administration" of the drug[86]:

> "In the present case it was accepted that the unlawful act for the purposes of the charged offence was the supply of methadone to the deceased without a medical prescription. There was no issue at the trial and it was not submitted to this Court that *a breach of this section could not be an occasion for unlawful and dangerous act manslaughter*. The debate in this Court was confined to the issue of causation." (emphasis added)

Disposition

39 The first four grounds of appeal in this Court, like the first two grounds in the Court of Criminal Appeal, were concerned with whether the evidence disclosed circumstances capable of giving rise to a duty of care owed by Mrs Burns to the deceased, whether a causal connection between her conduct and the death of the deceased could be established on the evidence and whether the judge had misdirected the jury on duty of care and causation. A fifth ground was added by leave at the hearing of the appeal in this Court:

> "The Court of Criminal Appeal should have held that the trial judge erred in declining the application to remove unlawful and dangerous act manslaughter based on supply of methadone."

The disposition of this appeal turns primarily on the fifth ground.

---

84 (2011) 205 A Crim R 240 at 272 [156] per McClellan CJ at CL and Howie AJ.

85 (2011) 205 A Crim R 240 at 272-273 [160] per McClellan CJ at CL and Howie AJ.

86 (2011) 205 A Crim R 240 at 273 [162] per McClellan CJ at CL and Howie AJ.

40 The trial judge told the jury that they could find Mrs Burns guilty of manslaughter if they were satisfied beyond reasonable doubt that she intentionally supplied methadone to the deceased, that a reasonable person in her position would have appreciated that the supply was dangerous in carrying with it a risk of serious injury to the deceased and that the supply of the methadone caused the death of the deceased in that it substantially contributed to his death.

41 That was not the case which had been put by the Crown. The evidence did not exclude the possibility that the deceased was capable of making and made a free and voluntary decision to ingest the methadone and did so himself. Having regard to the state of the evidence and the concession, correctly made by the Crown, a conviction for manslaughter was not open on the basis that Mrs Burns had supplied methadone to the deceased. It is not possible to exclude the hypothesis that the verdict of guilty of manslaughter was based upon that direction. The appeal being allowed on that basis, the question then arose whether there should be a new trial as submitted by the Crown, or entry of a verdict of acquittal as submitted by counsel for Mrs Burns.

42 For the reasons given in the joint judgment, I agreed that the alternative Crown case that Mrs Burns was involved in injecting the deceased with methadone or assisting in injecting him with that drug would not warrant an order for a retrial. As their Honours observe, the state of the evidence did not exclude the reasonable possibility that the deceased injected himself with the methadone without assistance[87]. It would not have been open to a jury to conclude beyond reasonable doubt that Mrs Burns had engaged in an unlawful and dangerous act by way of injecting or assisting with the injection of methadone in the deceased. There remained the question whether the matter should be remitted for retrial on the basis of involuntary manslaughter by criminal negligence.

43 The question whether the case should be remitted for retrial confined to involuntary manslaughter by criminal negligence required consideration of Mrs Burns' submissions on grounds 1 and 2 in the Court of Criminal Appeal that she did not owe to the deceased the legal duty of care necessary to support a finding of criminal negligence. In rejecting those submissions, the Court of Criminal Appeal adopted the approach taken in a number of English cases. McClellan CJ at CL and Howie AJ referred in particular to the judgment of the

---

87 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [92].

English Court of Appeal in *R v Evans (Gemma)*[88] and the statement in that judgment that[89]:

> "when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise."

44 Their Honours held that it was open to the jury to conclude that a duty of care did exist. Their reasoning involved the following steps:

- Mrs Burns knew that methadone was dangerous[90].
- It was open to the jury to conclude that the deceased was vulnerable because of his naivety as a user of methadone and his physical condition at the time[91].
- Even though the deceased refused medical assistance, it was open to the jury to conclude that Mrs Burns was aware of his compromised state and, even though he declined assistance, to determine that she had a duty, notwithstanding any protestation from the deceased, to seek medical attention for him[92].
- The evidence was capable of supporting the conclusion that the deceased needed assistance to stand or walk, yet Mrs Burns required that he be put outside without further care for his welfare[93].

Some elements of that reasoning appear to have conflated questions of duty and breach.

---

88 [2009] 1 WLR 1999; [2010] 1 All ER 13.

89 [2009] 1 WLR 1999 at 2007 [31]; [2010] 1 All ER 13 at 21 [31], cited at (2011) 205 A Crim R 240 at 261 [111].

90 (2011) 205 A Crim R 240 at 263 [114] per McClellan CJ at CL and Howie AJ.

91 (2011) 205 A Crim R 240 at 263 [114] per McClellan CJ at CL and Howie AJ.

92 (2011) 205 A Crim R 240 at 263 [114] per McClellan CJ at CL and Howie AJ.

93 (2011) 205 A Crim R 240 at 263 [114] per McClellan CJ at CL and Howie AJ.

45 The question was whether there was evidence from which the jury could have found that Mrs Burns owed a duty of care to the deceased and if so, that she breached that duty in such a serious way as to constitute criminal negligence and that the breach caused his death.

46 Applying the taxonomy adopted by Yeldham J in *Taktak*, there was no statutory duty, no duty arising from a status relationship and no duty arising from contract. Mrs Burns could not be said to have voluntarily assumed the care of the deceased. Nor could it be said that she had so secluded him as to prevent others from rendering assistance. The only remaining basis for the imposition of a duty on her, and the basis relied upon in the Court of Criminal Appeal, was her allegedly causative role in the sequence of events said to have given rise to a risk to the deceased of serious injury or death on his part.

47 As explained in the joint reasons and noted above, it was not open to exclude as a reasonable possibility that the deceased injected himself with the methadone and that his decision to do so was voluntary. For present purposes therefore, the existence of a duty of care relevant to criminal negligence must be determined on the hypothesis, which cannot be excluded, that the deceased did so inject himself. That possibility, which cannot be excluded, marks a point of distinction between this case and cases in which the accused has created a danger to other people, for example by starting a fire, and thereafter failing to take any steps to remove the danger or warn those at risk of the danger[94].

48 If the deceased had ingested the drug himself and had rebuffed a suggestion that an ambulance be called, there could be no basis to support a finding that Mrs Burns owed a duty to him. On that hypothesis, which cannot be excluded, the deceased had created the danger to himself. While Mrs Burns may well have been under a strong moral duty to take positive steps to dissuade him from leaving until medical assistance could be called, there was, in the circumstances, no legal duty, breach of which would support a finding of criminal negligence. For these reasons, and the reasons given in the joint judgment, I agree that there should not be a new trial.

---

94 *R v Miller* [1983] 2 AC 161.

49 GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. The appellant and her husband supplied methadone to a man named David Hay. David Hay died as the result of the combined effect of the methadone and a prescription drug. The appellant and her husband were each charged with his manslaughter. They were tried separately before the New South Wales District Court (Woods DCJ QC)[95]. At the appellant's trial, the prosecution case was left to the jury on either of two bases. The first basis was that the supply of the methadone was an unlawful and dangerous act which caused the death of the deceased. The second basis was that the appellant's failure to seek medical attention for the deceased was a grossly negligent cause of his death. The appellant was convicted of the manslaughter of the deceased.

50 The appellant appealed against her conviction to the New South Wales Court of Criminal Appeal (McClellan CJ at CL, Schmidt J and Howie AJ). The principal focus of the appeal in that Court was whether the appellant was subject to a legal duty to take steps to preserve the life of the deceased[96]. After the hearing of the appeal, the appellant was granted leave to add a further ground challenging the trial judge's refusal to take the case in unlawful and dangerous act manslaughter from the jury[97]. Little attention appears to have been given to the identification of the unlawful act in the parties' submissions addressing this ground. The Court of Criminal Appeal initially characterised the unlawful act as "the *supply* of the methadone *by injection* to the deceased"[98]. In stating its conclusion, the Court said that it was accepted that the unlawful act was "the *supply* of methadone to the deceased without a medical prescription"[99]. It recorded that there had been no issue at the trial or on the appeal that the unlawful supply of a drug "could not be an occasion for unlawful and dangerous act manslaughter"[100]. In the event, the Court was satisfied that the appellant was complicit in injecting the deceased with the methadone and that "the *act of*

---

95 The appellant's husband, Brian Burns, was convicted of the manslaughter of David Hay.

96 *Burns v The Queen* (2011) 205 A Crim R 240 at 245 [4], 257 [91].

97 *Burns v The Queen* (2011) 205 A Crim R 240 at 245 [4], 266 [131].

98 *Burns v The Queen* (2011) 205 A Crim R 240 at 245 [8] (emphasis added).

99 *Burns v The Queen* (2011) 205 A Crim R 240 at 273 [162] (emphasis added).

100 *Burns v The Queen* (2011) 205 A Crim R 240 at 273 [162].

injection was unlawful", "plainly dangerous" and caused the death of the deceased[101].

51 The Court of Criminal Appeal also considered that the case of negligent manslaughter had been rightly left to the jury. It held that the supplier of a prohibited drug owes a duty of care to a person to whom they supply the drug when the drug is taken in the supplier's presence[102]. The appellant's appeal against her conviction was dismissed.

52 The appellant was granted special leave to appeal by order of Gummow, Hayne and Heydon JJ on 10 February 2012 on grounds which challenged the existence of the duty, the directions on duty and breach in the case in negligent manslaughter, and causation on either case.

53 On 20 June 2012, this Court made orders allowing the appeal, setting aside the order of the Court of Criminal Appeal made on 1 April 2011 and in lieu thereof allowing the appeal to that Court, quashing the appellant's conviction for the manslaughter of David Hay and ordering the entry of a verdict of acquittal. These are our reasons for joining in the making of those orders.

54 On the hearing of the appeal in this Court, the Crown conceded that the supply of methadone to the deceased without more was not an unlawful act that was capable of supporting the appellant's conviction for manslaughter by unlawful and dangerous act. The appellant was granted leave to add a further ground contending that manslaughter by unlawful and dangerous act should not have been left to the jury.

55 Notwithstanding the Crown's concession, it sought to maintain the jury's verdict. It was submitted that the Crown case at trial had been conducted throughout on the basis that the appellant, or her husband with whom she was acting in concert, had injected or assisted to inject the deceased with the drug. Reliance was placed on the Court of Criminal Appeal's finding[103] that such a case had been established beyond reasonable doubt. As will appear, the Crown case at trial shifted in closing submissions from being a case that the appellant was

---

101 *Burns v The Queen* (2011) 205 A Crim R 240 at 272-273 [160] (emphasis added).

102 *Burns v The Queen* (2011) 205 A Crim R 240 at 260-261 [105]-[112].

103 *Burns v The Queen* (2011) 205 A Crim R 240 at 272-273 [160].

complicit in supplying the drug[104] to the deceased to a case that she was complicit in administering the drug[105] to him. Regardless of the way the Crown case was put in final address, the directions left manslaughter by unlawful and dangerous act on the basis that the act was the *supply* of methadone to the deceased. Moreover, the underlying joint criminal enterprise was at all times confined to "*supply[ing]* the prohibited drug, methadone, to David Hay" (emphasis added).

56 For the reasons to be given, the Crown's belated concession in this Court, that the supply of methadone is not capable of supporting the appellant's conviction for manslaughter by unlawful and dangerous act, must be accepted. Since the basis on which the verdict was returned is not known, it follows that the appeal must be allowed. Consideration of the consequential order required attention to the parties' arguments respecting the capacity of the evidence at trial to establish the appellant's liability for manslaughter, either on a case that her unlawful act was the administration of the drug to the deceased or because she was under a legal duty to seek medical assistance for him. In order to understand those arguments, it is necessary to describe the evidence given at the trial in some detail.

The evidence at trial

57 The appellant and her husband, Brian Burns, were registered participants in a methadone programme conducted by a Sydney clinic. Each was approved to receive doses of the drug to take away. They were in the business of selling some of their methadone to friends and acquaintances from their home, a unit in Belmore.

58 On Friday, 9 February 2007, the appellant and Brian Burns attended the clinic and each received a dose of methadone. Each was also given two 130 mg doses of methadone to take away.

59 The deceased was on friendly terms with Brian Burns. He made telephone contact with Brian Burns around midday on 9 February 2007. Later that afternoon, the deceased attended his psychiatrist, Dr Roberts. The deceased left Dr Roberts' rooms between 4.30 and 5.00pm. He was noticeably drowsy. He told Dr Roberts that he had taken Endone.

---

104 *Drug Misuse and Trafficking Act* 1985 (NSW), s 25(1).

105 *Drug Misuse and Trafficking Act* 1985 (NSW), s 13(1).

60 Sometime after 5.00pm on the same day, the deceased attended the Burns' unit to purchase methadone. A woman named Felicity Malouf also attended the Burns' unit that evening to purchase methadone. When she arrived, the deceased was in the lounge room with Brian Burns. The appellant was in another room. Ms Malouf observed that the deceased was "out of it". Brian Burns told her that the deceased had "wanted" or "had taken" some methadone. Ms Malouf did not see syringes or other equipment associated with the injection of drugs in the living room. She and Brian Burns roused the deceased and walked him around the living room several times. Brian Burns said "we're going to call an ambulance" but the deceased said "No, no I'm right". The appellant came into the lounge room and said in an angry tone, "he can't be here like that". Brian Burns told the deceased, "come on mate, it's time to go". He said that he would put the deceased outside and keep an eye on him. The deceased got up and left the unit without assistance. Brian Burns accompanied him out. The appellant and the deceased had been together in the lounge room with Brian Burns and Ms Malouf for around three to four minutes before the deceased left the unit.

61 Ms Malouf and the appellant remained in the unit. Ms Malouf was not overly concerned about the deceased's condition. She did not consider that it was unusual for a person to be sleepy after taking methadone. She had not thought that it was necessary to call an ambulance.

62 The deceased's body was discovered in the toilet block at the rear of the Burns' block of units a little after 12.30pm the following day. The deceased must have walked or been assisted down a number of stairs, crossed a yard and walked up some further stairs to get to the toilet block. No equipment associated with drug taking was found in the vicinity of the body.

63 Several weeks after the discovery of the body, the police installed a listening device in the Burns' unit. Discussions between the appellant and her husband included reference to the deceased's overdose and to him having been "out of it". The appellant spoke of the need to "get rid of those things". She also said that the deceased "had the best outfit, no more". In context, this was a reference to drug injecting equipment.

64 The appellant made a statement to the police on 3 March 2007 in connection with the death of the deceased. She gave the following account of events in that statement. The deceased attended their unit on the evening of 9 February 2007 and he was either drunk or "out of it". Ms Malouf was inside the unit when the deceased arrived and she suggested that they should call an ambulance. The deceased refused the offer. The appellant told her husband to

tell the deceased to leave, the deceased said "Don't worry about me, I'll be right" and got up and walked out of the unit with her husband.

65 The police searched the Burns' unit on 7 March 2007 and found syringes and tubes, known as "butterfly clips", which can be used to inject methadone.

66 Dr Duflou conducted the post-mortem examination. He attributed the cause of death to methadone and olanzapine toxicity. High levels of both drugs were detected in samples taken from the deceased's body. Olanzapine, the active ingredient in the drug marketed as Zyprexa, was detected at about 20 times the expected level for that drug. Methadone was present at 0.2 mg per litre, a level that was not extremely high. Neither drug individually was present in an amount that was necessarily fatal. The deceased was suffering from early pneumonia. This condition may have been developing in any event or may have been the result of breathing difficulties brought on particularly by the consumption of the methadone.

67 Dr Duflou considered that the combination of the two drugs had caused respiratory depression and death. He considered it a "remote possibility" that the olanzapine alone had caused death. Mr Farrar, a pharmacologist, said that it was not possible to determine whether methadone or olanzapine alone could have caused death. He considered that it was "unlikely" that olanzapine alone could have caused death, although he was not able to rule out that possibility.

68 In a conversation between the appellant, Brian Burns and Ms Malouf, which was recorded during the investigation, the appellant and Brian Burns counselled Ms Malouf to give a false account to the police that she had been present at the apartment when the deceased arrived. Ms Malouf gave the police an account along these lines which matched that given by the appellant in her statement. Ms Malouf was charged with concealing a serious indictable offence and with hindering police. She later agreed to cooperate with the authorities and the charges against her were terminated. She gave evidence in the Crown case at the appellant's trial.

69 The appellant was charged in the indictment with four counts of the supply of methadone as well as with the manslaughter of the deceased. Count two was particularised as the supply of methadone to the deceased on 9 February 2007. Count three was particularised as the supply of methadone to Ms Malouf on that day. Counts four and five charged supplies of methadone on 2 March 2007. The appellant pleaded not guilty to the supply of the drug to the deceased but guilty to counts three, four and five. Evidence of these supplies was received at the trial, apparently without objection, as evidence of the appellant's tendency

to supply methadone and to permit the recipients of the supply to consume the drug at her premises[106].

70 The appellant did not give evidence or call evidence at the trial.

Manslaughter by unlawful and dangerous act – the conduct of the trial

71 As earlier noted, the Crown case on manslaughter by unlawful and dangerous act was opened on the basis that the appellant was a party to a joint criminal enterprise with her husband to *supply* methadone to the deceased and that the *supply* of the drug was the unlawful act upon which her criminal liability depended. A difficulty with this case, acknowledged by the Crown in this Court, is evident from the way the Crown Prosecutor dealt with the requirement of dangerousness in opening. He told the jury that the appellant was aware that the deceased would take the drug "either by injection or orally" and "that was a dangerous thing to do". Dangerousness, it will be noted, was not a quality of supplying the drug but of taking the drug.

72 At the close of the Crown case, defence counsel applied for a verdict by direction. He submitted, with respect to unlawful and dangerous act manslaughter, that the supply of the drug was not the cause of the deceased's death. The Crown Prosecutor maintained that it was the prosecution case that the appellant and her husband had "suffered" the deceased to either drink or inject the methadone and that the supply of the drug was a dangerous act because it was within the knowledge of the appellant that it was a dangerous drug. As the argument developed, the Crown Prosecutor also submitted that "the dangerous and unlawful act, apart from having obvious qualities in it included that [the deceased] was either assisted in injecting or was injected". The trial judge queried the foundation for the latter submission, to which the Crown Prosecutor responded:

> "There wasn't any evidence that he was actually injected rather than injected himself but the Crown relies on the several circumstances which point to that being a possibility".

73 Defence counsel complained that the shift to a case that the appellant was complicit in administering the drug was a departure from the Crown case as particularised and conducted. The possible significance to the appellant's liability of the distinction between the supply and the administration of a

---

106 *Evidence Act* 1995 (NSW), s 97.

prohibited drug was not explored. The trial judge ruled that it was open to the Prosecutor to invite the jury to infer that the appellant was complicit in injecting or assisting to inject the drug. However, his Honour directed the jury that the prosecution alleged a joint criminal enterprise between the appellant and her husband to *supply* the methadone to the deceased, and that liability for manslaughter by unlawful and dangerous act was based upon the intentional *supply* of methadone to the deceased.

74 Turning to causation, his Honour directed that the supply of the methadone must have made a substantial contribution to the death of the deceased and that it would not have done so if the "true cause of David Hay's death was the simple fact that he made a **rational, voluntary and informed decision to take the methadone**" (emphasis in the original written direction). In determining whether the deceased's act was rational, voluntary and informed, the jury was invited to:

> "[C]onsider – amongst other matters you think relevant – the evidence as to David Hay's condition when he arrived at the Burns' flat, evidence from the post-mortem as to the condition of his brain, what he may or may not have known about methadone and its effects, and what he may or may not have known about the injection of drugs. You may think that David Hay was a rational adult man, who knew what he was doing so far as drugs were concerned, understood what methadone was and did, and voluntarily took it. … On the other hand, you might think that he died precisely because he **did not** know about methadone and its effects, that he already suffered some degree of brain damage from an earlier car accident, that by the time he took methadone he was already affected by olanzapine he had ingested, and so cannot be regarded as a person acting as a rational adult making an informed choice about taking methadone" (emphasis in the original written direction).

Manslaughter by unlawful and dangerous act – the supply of the methadone

75 In New South Wales, the elements of the offence of manslaughter are supplied by the common law[107]. Manslaughter by unlawful and dangerous act requires that the unlawful act causing death be an objectively dangerous act. A dangerous act is one that a reasonable person would realise exposes another to an

---

107 *R v Lavender* (2005) 222 CLR 67 at 76 [21] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2005] HCA 37.

appreciable risk of serious injury[108]. The quality of dangerousness inheres in the unlawful act. The unlawful act must be the cause of death.

76 To supply drugs to another may be an unlawful act but it is not in itself a dangerous act. Any danger lies in ingesting what is supplied.

77 There has not been any extended consideration in Australia of the application of the law of manslaughter to the illicit supplier of a drug that, when taken by the person to whom the drug is supplied, causes that person's death. But these issues have been explored by the English and Scots courts and it is useful to consider how these courts have dealt with them.

78 The Crown's concession in this case, that the supply of methadone to the deceased was not a dangerous act, accords with English authority that the supply of a controlled drug cannot support a conviction for unlawful and dangerous act manslaughter since the act of supply, without more, could not harm the deceased in any physical way[109]. The correctness of this conclusion was affirmed by the House of Lords in *R v Kennedy (No 2)*[110].

79 The Court of Criminal Appeal confined its analysis to causation and did not address the anterior question of whether the act of supply of the prohibited drug was relevantly "dangerous". It was disinclined to follow the English approach, that manslaughter by unlawful and dangerous act cannot be established where the supply of the drug is to a person who is a "fully informed and responsible adult"[111]. The Court preferred the approach adopted in Scotland in drug homicide cases[112].

---

108 *Wilson v The Queen* (1992) 174 CLR 313 at 332-333 per Mason CJ, Toohey, Gaudron and McHugh JJ; [1992] HCA 31.

109 *R v Dalby* [1982] 1 WLR 425 at 429; [1982] 1 All ER 916 at 919.

110 [2008] AC 269 at 274 [7].

111 *Burns v The Queen* (2011) 205 A Crim R 240 at 270 [150].

112 *Burns v The Queen* (2011) 205 A Crim R 240 at 270 [148], citing *MacAngus v HM Advocate* 2009 SLT 137.

80 There was no issue in *Kennedy (No 2)* that liability for unlawful and dangerous act manslaughter could not depend on the act of supply alone[113]. *Kennedy (No 2)* resolved a controversy concerning the liability of the person who provides assistance to the deceased in injecting the prohibited drug. In question was whether Kennedy's acts of preparing a dose of heroin and giving the syringe to the deceased at the deceased's request amounted to "administering" the drug contrary to the statute[114]. Kennedy's initial appeal against his conviction was dismissed by the Court of Appeal (Criminal Division)[115] in a decision that proved to be controversial[116] and which was later distinguished[117]. Subsequently, the Criminal Cases Review Commission referred Kennedy's conviction back to the Court of Appeal[118]. The Court of Appeal again affirmed the conviction, holding on this occasion that Kennedy had been jointly engaged in administering the drug[119]. It certified the following question for the opinion of the House of Lords[120]:

> "When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?"

81 The House of Lords answered the certified question: "In the case of a fully-informed and responsible adult, never."[121] Their Lordships' analysis of

---

113 *R v Kennedy (No 2)* [2008] AC 269 at 274 [7].

114 *Offences against the Person Act* 1861 (UK), s 23.

115 *R v Kennedy* [1999] Crim LR 65.

116 *R v Kennedy* [1999] Crim LR 65 (commentary by J C Smith) at 67-68; Ashworth, *Principles of Criminal Law*, 3rd ed (1999) at 129; Simester and Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed (2007) at 94-96.

117 *R v Dias* [2002] 2 Cr App R 96.

118 *Criminal Appeal Act* 1995 (UK), s 9.

119 *R v Kennedy (No 2)* [2005] 1 WLR 2159 at 2174-2175 [51]-[53].

120 *R v Kennedy (No 2)* [2008] AC 269 at 273 [2].

121 *R v Kennedy (No 2)* [2008] AC 269 at 279 [25].

causation proceeded upon acceptance that the law treats informed adults of sound mind as "autonomous beings able to make their own decisions how they will act"[122]. They referred with approval to Glanville Williams' statement of the principle[123]:

> "I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before."

And to that of Hart and Honoré[124]:

> "The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."

82 In Scotland, the supply of a controlled drug has been found to be a legal cause of the death of an adult who voluntarily consumed the drug[125]. This decision follows *Khaliq v HM Advocate*[126], in which the supply of solvents to children was held to be capable of being the cause of injury to children who inhaled the vapours from them. In *MacAngus v HM Advocate*[127], a bench of five was constituted to review this line of authority in the light of the decision in *Kennedy (No 2)*. In issue were preliminary challenges to counts charging culpable homicide against two accused. In one case, the unlawful act was the

---

122 *R v Kennedy (No 2)* [2008] AC 269 at 275 [14].

123 *R v Kennedy (No 2)* [2008] AC 269 at 275 [14], citing Williams, "*Finis* for *Novus Actus*?", [1989] *Cambridge Law Journal* 391 at 392.

124 *R v Kennedy (No 2)* [2008] AC 269 at 275-276 [14], citing *Causation in the Law*, 2nd ed (1985) at 326.

125 *Lord Advocate's Reference (No 1 of 1994)* 1995 SLT 248.

126 1984 JC 23 at 33.

127 2009 SLT 137 at 146 [32].

supply of a controlled drug to the deceased and, in the other, the act was the injection of the drug at the deceased's request[128]. In giving the judgment of the High Court of Justiciary, Lord Justice General Hamilton said this[129]:

> "We see no reason why the criminal law in Scotland should not, consistently with earlier authority in this jurisdiction, adopt a similar practical, but nonetheless principled, approach. The adult status and the deliberate conduct of a person to whom a controlled drug is recklessly supplied by another will be important, in some cases crucial, factors in determining whether that other's act was or was not, for the purposes of criminal responsibility, a cause of any death which follows upon the ingestion of the drug. But a deliberate decision by the victim of the reckless conduct to ingest the drug will not necessarily break the chain of causation."

83 The references to recklessness in the formulation of the principle are significant. Recklessness, the foundation of culpable homicide in Scots law in cases of this kind, was not "wholly irrelevant" to the causal determination[130]. The law, it was said, could more readily treat the reckless accused as responsible for consequences in the form of the actions of others "to whom he directs such recklessness"[131].

84 Recklessness does not inform unlawful and dangerous act manslaughter in Australia. The Court of Criminal Appeal did not embrace the reasoning of the High Court of Justiciary in this respect. However, it agreed with the conclusion that the voluntary act of an informed and responsible adult taking a prohibited drug might not prevent the anterior act of supply of the drug from being in law the cause of the drug taker's death. This is because[132]:

> "Where natural or physical events are being considered a voluntary human act may be the cause of that act. But when that human act is one which

---

128 *MacAngus v HM Advocate* 2009 SLT 137 at 139 [6]-[7].

129 *MacAngus v HM Advocate* 2009 SLT 137 at 151 [48].

130 *MacAngus v HM Advocate* 2009 SLT 137 at 150 [45].

131 *MacAngus v HM Advocate* 2009 SLT 137 at 150 [45].

132 *Burns v The Queen* (2011) 205 A Crim R 240 at 270 [151].

follows from the act of another human the position may be otherwise. The more predictable the response the more likely it is that the earlier act will be accepted to have caused, in the relevant sense, the later act."

85 This is in line with Professor Feinberg's theory of causation, which suggests that "the more expectable human behavior is, whether voluntary or not, the less likely it is to 'negative causal connection'"[133]. It is a theory commended by one commentator as better reflecting the moral dimension of a death occasioned by the supply of an unlawful drug[134]. The alternative view is that expressions of moral judgment should not intrude into the causal inquiry[135].

86 The analysis of the causation of homicide in *Royall v The Queen* is posited on an acceptance that the voluntary and informed act of an adult negatives causal connection[136]. Absent intimidation, mistake or other vitiating factor, what an adult of sound mind does is not in law treated as having been caused by another[137]. The introduction of the concept of the predictable response of the sane adult actor would radically change the rationale for and the nature of the causal inquiry. Neither party invited this Court to endorse that approach.

87 The deceased was a sane adult. It is not suggested that his decision to take the methadone was vitiated by mistake or duress. His ability to reason as to the wisdom of taking methadone is likely to have been affected by the drugs that he had already taken but this is not to deny that his act was voluntary and informed. It was informed because he knew that he was taking methadone. He chose to take methadone not knowing what effect that drug would have in combination with the drugs he had already taken. A foolish decision to take a prohibited drug

---

133 Feinberg, *Doing & Deserving: Essays in the Theory of Responsibility*, (1970) at 166.

134 Jones, "Causation, homicide and the supply of drugs", (2006) 26 *Legal Studies* 139 at 140.

135 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 403.

136 (1990) 172 CLR 378 at 388 per Mason CJ; 421 per Toohey and Gaudron JJ; 441-449 per McHugh J; [1991] HCA 27.

137 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 136-138; Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 391.

not knowing its likely effects is nonetheless the drug taker's voluntary and informed decision.

88 The Crown's concession that the unlawful supply of methadone was not an act capable of founding liability for manslaughter should be accepted. The supply of the methadone was not an act that carried an appreciable risk of serious injury. That risk arose when the drug was consumed. The cause of the death of the deceased in law was the consumption of the methadone and not the anterior act of supply of the drug[138].

89 Acceptance of the Crown's concession required that the appeal be allowed. The Crown submitted that the appropriate consequential order was for a new trial at which it should be permitted to present a case on manslaughter by unlawful and dangerous act based on the appellant's alleged complicity in injecting the deceased with methadone. This appeal is not the occasion to consider the responsibility for manslaughter, of a person who assists an adult at the adult's request with the administration of a prohibited drug. Nor is it necessary to consider whether the Crown should be permitted to run a new case relying on a different unlawful act[139]. This is because the evidence at the trial was not capable of establishing the appellant's complicity in injecting, or assisting to inject, the deceased with the drug. The Court of Criminal Appeal's conclusion to the contrary was based upon a misunderstanding of a concession made by the appellant.

90 The Court of Criminal Appeal relied on the following evidence as having established the appellant's complicity in injecting the deceased with the methadone. Dr Duflou considered that a puncture mark on the deceased's left elbow had been made eight to 12 hours prior to death. This circumstance pointed to the methadone as having been taken by injection. The deceased was not an experienced methadone user. Injecting methadone requires considerable skill[140]. The appellant's remark that the deceased "got the best outfit, no more" suggested that she had seen the syringe that had been used[141]. The Court went on to say[142]:

---

138 *Royall v The Queen* (1990) 172 CLR 378 at 445 per McHugh J; *R v Kennedy (No 2)* [2008] AC 269 at 274 [7].

139 Cf *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11.

140 *Burns v The Queen* (2011) 205 A Crim R 240 at 272 [157].

141 *Burns v The Queen* (2011) 205 A Crim R 240 at 272 [159].

> "In our opinion the evidence made it entirely unlikely that the victim injected the methadone. It was open to the jury to conclude to the relevant standard, as we would ourselves, that the appellant or Burns administered the injection. *The appellant accepted that they were acting in concert.* The act of injection was unlawful and in the circumstances plainly dangerous and tragically led to the deceased's death." (emphasis added)

91 The Court of Criminal Appeal had earlier, correctly, recorded the appellant's concession that it had been open to the jury to find that she was a party to a joint enterprise with Brian Burns to supply methadone to the deceased[143]. However, contrary to the tenor of the Court's statement extracted above, the appellant's concession was not that she was complicit in administering the drug.

92 There was no direct evidence of how the deceased consumed the methadone. The recent puncture mark provided a basis for inferring that the drug had been injected. However, the evidence supporting the conclusion that the deceased did not inject himself with the drug is less satisfactory. The suggestion that the deceased was not an experienced methadone user was based on the history that he supplied to Dr Roberts and his general practitioner and the fact that he was not a registered methadone user. All that is known of the deceased as an historian is that he gave a false account to Dr Roberts of the drugs that he had taken on 9 February 2007. He did not disclose that he had taken an excessive quantity of Zyprexa, which Dr Roberts had prescribed. Instead, he attributed his drowsy state to having taken Endone. Yet no Endone was detected in the blood and tissue samples that were analysed post-mortem. A second, older, puncture mark on the crook of the deceased's left elbow, might suggest that he was not an inexperienced injecting drug user. It was not open to exclude as a reasonable possibility that the deceased injected himself with the methadone. Moreover, when Ms Malouf arrived, the deceased was in the living room with Brian Burns. The appellant was in another part of the unit. Brian Burns' statement to the effect that the deceased had taken methadone supported an inference that he was present when that occurred. There was no basis for the further inference that the appellant was acting in concert with Brian Burns with respect to any assistance he may have given to the deceased to take the drug.

---

142 *Burns v The Queen* (2011) 205 A Crim R 240 at 272-273 [160].

143 *Burns v The Queen* (2011) 205 A Crim R 240 at 266 [131].

93 The prosecution sought and obtained leave to cross-examine Ms Malouf on aspects of her account. Notably, there was no challenge to her evidence that the appellant had not been present in the living room of the premises when she arrived.

94 The appellant's involvement with Brian Burns in inciting Ms Malouf to tell lies to the police in the course of the investigation was capable of supporting the inference that the appellant was complicit in the supply of methadone to the deceased. It was not capable of supporting the further inference that the appellant had injected, or assisted Brian Burns to inject, the deceased with the drug.

95 For these reasons there was no order for a new trial upon an allegation of manslaughter by unlawful and dangerous act.

96 The next consideration was whether there should be an order for a new trial confined to the case of manslaughter by gross negligence.

Manslaughter by gross negligence

97 Criminal liability does not fasten on the omission to act, save in the case of an omission to do something that a person is under a legal obligation to do[144]. As a general proposition, the law does not impose an obligation on individuals to rescue or otherwise to act to preserve human life[145]. Such an obligation may be imposed by statute or contract or because of the relationship between individuals. The relationships of parent and child, and doctor and patient, are recognised as imposing a duty of this kind. A person may voluntarily assume an obligation to care for a helpless person and thereby become subject to such a duty[146]. Outside

---

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

145 Stephen, *A Digest of the Criminal Law*, (1877), c 22 at 133-135.

146 *R v Stone and Dobinson* [1977] QB 354; *R v Taktak* (1988) 14 NSWLR 226; *R v Sinclair, Johnson and Smith* unreported, England and Wales Court of Appeal (Criminal Division), 21 August 1998. See also *Jones v United States of America* 308 F 2d 307 at 310 (1962); *People v Beardsley* 113 NW 1128 (1907).

limited exceptions, a person remains at liberty in law to refuse to hold out her hand to the person drowning in the shallow pool[147].

98 The appellant had no relationship with the deceased beyond that of acquaintance. He called at her home to purchase prohibited drugs. He took the drugs in her home and suffered an adverse reaction to them in her presence. He left her home at her request while in a compromised state. He died within hours as the result of the combined effect of the drug supplied by the appellant and drugs that he had earlier taken. In question is the source of the legal duty which obliged the appellant to obtain medical assistance for the deceased and how her failure to do so can be said to have been a cause of his death.

99 The trial judge gave these directions as to the existence and scope of any duty:

> "If a person voluntarily invites or permits potential recipients to attend his or her home for the purpose of a prohibited drug supply transaction where the drugs are to be consumed on the premises, and where such a recipient may be or become seriously affected by drugs to the point where his or her life may be endangered, the drug supplier has a duty to conduct himself toward the drug recipient without being grossly or criminally neglectful."

100 In the event that the jury were satisfied that the appellant had "voluntarily take[n] upon herself such a duty", her failure to call an ambulance or obtain other medical assistance for the deceased and her conduct in expelling him from the unit when he was in a "grossly vulnerable condition" were the matters identified as capable of amounting to a criminally negligent breach of duty.

101 The appellant was not in a relationship with the deceased which the law recognises as imposing an obligation to act to preserve life. She had not voluntarily assumed the care of the deceased nor had she secluded him such as to deny him the opportunity that others would assist him. Different considerations may have applied in the trial of Brian Burns. At the appellant's trial, the Crown accepted that she had not been subject to any obligation to seek medical attention for the deceased after he left the unit in company with Brian Burns.

---

147 Stephen, *A Digest of the Criminal Law*, (1877), c 22 at 135.

102 Although the trial judge directed the jury to consider whether the appellant had voluntarily assumed a duty of care to the deceased, this was not the foundation for the duty which the Court of Criminal Appeal identified. It considered that the appellant had come under a duty of the kind found by the English Court of Appeal in *R v Evans (Gemma)*[148]. Gemma Evans supplied her 16 year old half-sister, Carly, with heroin. After Carly exhibited signs of opiate overdose, Gemma failed to seek medical assistance for her. The English Court considered that Gemma had been under "a plain and obvious duty to take reasonable steps to assist or provide assistance for Carly"[149]. The duty did not arise because of the sibling relationship, but because Gemma had "created or contributed to the creation of a state of affairs" which she knew, or ought reasonably to have known, had become life threatening[150]. This is a duty of a kind identified by the House of Lords in *R v Miller*[151].

103 In *Miller*, the accused was found to be criminally responsible for his failure to take reasonable steps to prevent a house fire. Miller was squatting in the house. He fell asleep holding a lighted cigarette and woke to find the mattress on fire. He got up and moved to the adjacent room and went back to sleep. The house was damaged by the fire which had been ignited by the lighted cigarette. Following Miller's conviction for arson, the question certified for the House of Lords was whether the accidental starting of a fire could be the actus reus of arson in circumstances in which the accused had subsequently failed to take steps to extinguish it, either intending to cause damage to property or being reckless as to that consequence[152]. Miller's conviction was upheld. In giving the judgment of the House of Lords, Lord Diplock said[153]:

> "I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take

---

148 [2009] 1 WLR 1999; [2010] 1 All ER 13.

149 *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2012 [49]; [2010] 1 All ER 13 at 25.

150 *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2007 [31]; [2010] 1 All ER 13 at 21.

151 [1983] 2 AC 161.

152 *R v Miller* [1983] 2 AC 161 at 174.

153 *R v Miller* [1983] 2 AC 161 at 176.

> measures that lie within one's power to counteract a danger that one has oneself created …
>
> I cannot see any good reason why, so far as liability under criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk that property of another will be damaged; provided that, at the moment of awareness, it lies within his power to take steps, either himself or by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk."

104 Sir John Smith has suggested that *Miller* is an example of a general principle, which he stated in these terms[154]:

> "[W]henever the defendant's act, though without his knowledge, imperils the person, liberty or property of another, or any other interest protected by the criminal law, and the defendant becomes aware of the events creating the peril, he has a duty to take reasonable steps to prevent the peril from resulting in the harm in question."

105 Whether this is a statement of the common law of Australia is not an issue presented by this appeal. Miller's criminal responsibility, analysed in terms of a duty to take steps to extinguish the fire[155], arose because it was his act that imperiled the property. By contrast, here, as earlier explained, the imperilment of the deceased was the result of his act in taking the methadone.

106 Lord Diplock commented in *Miller* on the difficulty of defining those who are to be made subject to criminal liability for being bad Samaritans[156]. Why is the appellant liable for the manslaughter of the deceased when Ms Malouf is not? It cannot be because the law imposes a general duty on suppliers of prohibited drugs to take reasonable steps to preserve the life of their customers. The supply

---

154 J C Smith, "Liability for omissions in the criminal law", (1984) 4 *Legal Studies* 88 at 94-95.

155 An alternative analysis of Miller's criminal responsibility recognised by the House of Lords was by way of "continuing act": *R v Miller* [1983] 2 AC 161 at 178-179.

156 [1983] 2 AC 161 at 175.

of prohibited drugs is visited by severe criminal punishment in recognition of the harm associated with their use. The notion that at the same time the law might seek to regulate the relationship between supplier and user, by imposing a duty on the former to take reasonable care for latter, is incongruous. What measures would reasonable care require? Should suppliers of prohibited drugs be required to supply clean needles and accurate information about safe levels of use? The duty that the Court of Criminal Appeal found the appellant to be under was not a general duty of this kind. It accepted the submission that a duty is imposed on the supplier of a prohibited drug in circumstances in which the drug is taken in the supplier's presence[157]. The rationale for that duty is not that the supplier has contributed to the endangerment of the user. Contribution to this state of affairs occurs at the point of supply, when, ordinarily, the supplier will have no control over whether and in what quantities the drug will be consumed. The duty that the Court of Criminal Appeal identified arose because, as it happened, the appellant was present when the deceased suffered the adverse reaction to the drug she had supplied. It is difficult to resist the conclusion that the duty is being imposed in these circumstances because it is an affront to morality that the supplier of a prohibited drug should not bear responsibility for the callous disregard for the life of the drug user.

107 However, courts must be circumspect in identifying categories of relations that give rise to a previously unrecognised legal obligation to act[158]. The relationship of supplier of prohibited drugs and recipient does not lend itself to the imposition of such a duty. Apart from considerations of incongruity, there is absent the element of control which is found in those relationships in which the law imposes a duty on a person to act to preserve life.

108 It is open to the legislature to criminalise the failure of the supplier of a prohibited drug to take reasonable steps to provide medical assistance to the drug user. This might be done by making the failure to act itself an offence or by imposing a statutory duty on the supplier with attendant liability for manslaughter in the case of gross breach. Difficult policy choices may be involved in the decision to enact an offence of either kind. The desirability of

---

157 *Burns v The Queen* (2011) 205 A Crim R 240 at 260-263 [105]-[114].

158 See, eg, *R v Sinclair, Johnson and Smith* unreported, England and Wales Court of Appeal (Criminal Division), 21 August 1998; B Hogan, "Omissions and the duty myth", in Smith (ed), *Criminal Law: Essays in Honour of J C Smith*, (1987) 85 at 87.

making drug suppliers responsible for the deaths of drug users is one objective to which reference has been made earlier in these reasons. Another objective may be to minimise the incidence of fatal drug overdoses. Exposing the supplier to the risk of conviction for manslaughter (or other serious offence) when the user dies of an overdose at the supplier's premises, while advancing the former objective, may not necessarily promote the latter. The development of the law along the lines urged by the Crown is a matter for the legislature and not the courts.

109 This conclusion made it unnecessary to address the parties' submissions respecting causation on the case in criminal negligence. It is sufficient to note that the circumstance that the deceased was capable of leaving and did leave the unit after evincing his disinclination for medical assistance presents a formidable obstacle to proof that the appellant's failure to call an ambulance was a cause of his death.

110 HEYDON J. There were three possible ways in which the appellant might have been convicted of manslaughter.

Three possible routes to a manslaughter conviction

111 The first possible route to a manslaughter conviction was that the appellant's supply of methadone to the deceased was an unlawful and dangerous act that caused his death.

112 The second possible route to a manslaughter conviction was that the appellant's administration of methadone to the deceased, or her assistance to him in an act of self-administration, was an unlawful and dangerous act that caused his death. One distinction between this route and the first is that the first concentrates on supply short of administration, while the second concentrates on administration as distinct from supply.

113 The third possible route to a manslaughter conviction was that the appellant's failure to seek medical attention for the deceased was a grossly negligent omission that caused his death.

The appellant's supply of methadone to the deceased

114 The written submissions of the respondent in this Court did not contend that this was an available route to a manslaughter conviction. Those submissions were directed to establishing a claim that either the second or third routes to a manslaughter conviction were available.

115 The oral submissions of the respondent in this Court maintained that it had not relied on this first route at the trial. Strictly speaking, that is not correct. This first route and the third route were advocated in the opening prosecution address. The prosecution opening address said:

> "The bases of the charge that she allegedly killed [the deceased] is that in a joint enterprise with her husband … that they supplied the drug, methadone, which is an unlawful act, knowing that [the deceased] would take on board either by injection or orally and that for [the deceased], that was a dangerous thing to do, it was a dangerous action. That is the supply of the drug to [the deceased]. The second basis of the charge of manslaughter is that [the appellant] breached the duty of care that she owed to [the deceased] because she failed to render assistance or ask for assistance when [the deceased] was in need of some help and in fact that she insisted that [the deceased] leave her apartment that afternoon."

However, in oral argument before this Court the respondent specifically conceded that "the supply by itself cannot substantiate the … unlawful and dangerous act, that it requires the further activity of ingesting the drug." That concession was never retracted or qualified.

116 The concession rests on a fine distinction. If V says to A: "Give me a dose of methadone and injecting equipment; I want to inject myself with it right now", A does so, V injects himself unassisted, and V then dies, on the respondent's concession A is not guilty of manslaughter. But if V says to A: "Give me a dose of methadone and help me inject myself with it", V does so and then dies, A may be guilty of manslaughter. Is that distinction sound? That is a difficult legal question. Resolving it would involve investigation of, among other things, the meaning in this context of expressions like "fully informed", "responsible", "volitional", "free", "deliberate" and "mistake".

117 The concession having been made, neither the appellant nor the respondent was concerned to dispute it. In the absence of a contradictor, it is not satisfactory for courts to endeavour to solve difficult legal problems which need not be resolved in order to protect the accused's interests in the particular case in which they arise.

118 On that unadventurous ground, the concession has to be accepted.

119 It is impossible to say whether the jury or any member of it convicted the appellant because of a belief in what the concession now accepts as wrong. The appeal must therefore be allowed. It remains to be decided whether there should be a new trial. That question depends on whether there is evidence, taken at its highest, on which a jury could convict the appellant of manslaughter under either the second or third routes set out above.

The appellant's administration of methadone to the deceased

120 Whether the appellant's administration of methadone to the deceased, or her assisting in self-administration by the deceased, could render her guilty of manslaughter depended on what the evidence of that administration or assistance was, and what could be inferred from it, taken at its highest.

121 In the prosecution's final address the following evidence was relied on to support the inference that the appellant was involved in injecting the deceased or helping him to inject himself. First, methadone is so viscous that it could not have been injected unless it had been watered down. Secondly, the watering down process makes the volume of methadone to be injected by a drug user very substantial. Thirdly, this substantial volume of methadone would have made it necessary to employ a "butterfly syringe" – a syringe with a big barrel held stable by a butterfly clip. This kind of apparatus operates more like a slow drip than a speedy injection. Fourthly, there were butterfly syringes in the appellant's flat. Fifthly, the appellant knew that a butterfly syringe had been employed to inject the methadone into the deceased. Covert telephone recordings made by the police recorded her as saying that the deceased had "got the best outfit" – ie, a butterfly syringe. At the least, that demonstrated that she had observed the equipment with which the deceased had been injected. Sixthly, the deceased was

not an experienced methadone user. Dr Roberts, the deceased's psychiatrist, regarded him as being "narcotically naive". By that, Dr Roberts meant that the deceased had not been exposed to circumstances in which he would develop tolerance to drug doses. The fact that the deceased was narcotically naive supports an inference that it was inherently dangerous for him to be injected with methadone. It also supports an inference that he would have had difficulty employing a butterfly syringe to inject himself. Seventhly, Dr Duflou, a medical examiner, observed injury to the veins under the surface of the crook of the deceased's left elbow within hours of the deceased's death. The location of the injury was a location suitable for, and commonly used for, injecting methadone. Dr Duflou thought that the injury indicated a very fine needle puncture mark. He thought that it would have been made 8 to 12 hours prior to death. Apart from a blood clot in a blood vessel which had been present "for many days, possibly weeks", there was no other evidence of injection.

122 There are at least three other pieces of evidence on which the prosecution's final address did not appear to rely. One is that no syringe was found near the deceased's body. Another is that the appellant revealed concern about the police searching her flat and finding butterfly syringes. And another is that on 3 March 2007, in a telephone conversation which the police covertly recorded, the appellant endeavoured to persuade Felicity Malouf to give a false account to the police of the events that took place in the appellant's flat before the deceased left on his way to die. The Court of Criminal Appeal found that[159]:

> "[Felicity Malouf] was to say that she arrived at the unit first and later the deceased arrived drunk. He said he did not want an ambulance and the appellant told him to leave. [Mr] Burns walked the deceased outside and Ms Malouf stayed another half an hour."

The evidence supporting that finding was as follows. Felicity Malouf said: "Now are you supposed to have been asleep in bed when I arrived or?" The appellant responded:

> "Well, no, it doesn't matter, no I was here … I was here, we were both here, you came over … and you were here I was here OK. I was here, you came over, you were here … you were here then he come over."

On the same day, Felicity Malouf gave a statement to the police along those lines. The account which the appellant asked Felicity Malouf to give to the police was the account which she herself gave to the police. The appellant spoke to the police on the same day, 3 March 2007. In her evidence in chief, Felicity Malouf admitted that the account which she gave to the police was false. In

---

159 *Burns v The Queen* (2011) 205 A Crim R 240 at 248 [23].

truth, the deceased was already at the appellant's flat when Felicity Malouf arrived. The appellant's discussions with Felicity Malouf were evidence capable of supporting an inference that the appellant knew that if Felicity Malouf was permitted to tell the truth to the police, it would have increased the strength of any available inference that the appellant had either injected the drug into the deceased, or helped him to inject himself. Felicity Malouf had not seen this happen. If there were evidence that she was at the appellant's flat the whole time that the deceased was there, that evidence would leave no interval of time available within which the appellant could have injected the deceased or helped him to inject himself. That evidence would completely exculpate the appellant of participating in an injection. The lie was designed to avoid the risk that the exculpatory effect of Felicity Malouf's evidence might operate over too short a period of time to be useful to her defence. The appellant was seeking to give herself a kind of alibi. She could not call evidence to say that she was not in her flat while the deceased was there. But the appellant tried to create a state of affairs in which a witness who was supposedly in the flat for the entire period relevant to the offence had seen no misconduct on her part. At the time when the accused was not generally a competent witness, Cockburn CJ said[160]: "[A] prisoner's making a false statement to increase his appearance of innocence is [not] necessarily a proof of his guilt; but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts". The same is true of an attempt by an accused person to persuade someone else to make a statement to increase the appearance of the accused person's innocence. There are possible arguments to put against the admissibility of this evidence. But their success is far from certain[161]. Those arguments would point out that some parts of the recorded conversations may be explicable as reflecting a consciousness of guilt concerning the illegal supply of drugs, not manslaughter. Thus they disclose the fears of the appellant about the police searching the flat. They disclose a discussion about the disposal of syringes and methadone. They disclose discussions about the importance of people not taking methadone in the apartment. But the conversations revealed a consciousness on the part of the appellant that she was guilty of more than just illegal drug supply. Assessing her consciousness of guilt depends on looking at all the circumstantial evidence together. There were discussions about the importance of not supplying methadone to people who were apparently under the influence of another drug. The appellant repeatedly and obsessively referred to the death of the deceased. And the appellant said to her husband about the deceased's death: "This is murder". If that death was capable of being seen as the form of unlawful homicide known as "murder", it was capable of being seen as that form of

---

160 *Moriarty v London, Chatham and Dover Railway Co* (1870) LR 5 QB 314 at 319. See also *R v Farquharson* (2009) 26 VR 410 at 454 [174].

161 Cf *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63.

unlawful homicide known as "manslaughter". The appellant now denies that the mere supply of methadone was manslaughter, and enthusiastically endorses the respondent's concession to that effect. The appellant also now denies that her failure to give assistance to the deceased was manslaughter, and this Court agrees. What else did the appellant mean by "murder"? All that is left is manslaughter by injecting the deceased or helping him to inject himself.

123 It is true that at a new trial it would be open to the defence to attack or weaken the effect of the pieces of evidence just summarised.

124 For example, Dr Robert's opinion could be attacked. Dr Roberts based his opinion that the deceased was narcotically naive on the history which the deceased had given him, and he attributed the deceased's drowsy state to having taken Endone. That was the explanation the deceased gave for the drowsiness which Dr Roberts noticed. The cross-examiner informed Dr Roberts that he anticipated that there would be testimony that after an autopsy of the deceased, blood and urine samples were taken, and they showed that there was no Endone to be found in the deceased's system. The cross-examiner asked Dr Roberts to "assume that that finding of there being no [E]ndone in [the deceased's] system meant that when he told you that he had taken [E]ndone it was a lie." The question continued:

> "Is it possible that when you described [the deceased] as being narcotically naive, that might well not be the case at all?"

The answer was:

> "In describing him as narcotically naive, I was basing that statement on what he had told me and what he had told others."

The next question and answer but one was:

> "Q. If he is lying to you about [E]ndone, there is no means other than what it is that [the deceased] told you, there is no means of you knowing whether he's narcotically naive or not?
>
> A. That is correct."

And in re-examination the following question and answer appear:

> "Q. Was there anything in the way you observed [the deceased] or related to him or he to you that gave you any cause for thought or doubt about his use of narcotics –
>
> A. No."

The next witness was John Andrew Farrar, a pharmacologist. It was his testimony to which the cross-examiner had referred. However, he did not assert in an unqualified way that the deceased had not taken Endone. He said that, according to an analyst's report, a screening process applied to a blood sample from the deceased had failed to find Endone. He continued: "[o]n that basis I believe that … Endone … was not present in the blood sample of the deceased at the time that he died and I don't believe that there was any or certainly enough of that material to cause [the deceased] to be 'on the nod' at the time he was visiting Dr Roberts." The assumption put to Dr Roberts on the strength of which he accepted the possibility of the deceased having lied to him did not correspond precisely or completely with the evidence which the cross-examiner had indicated would be given.

125 The evidence that the deceased was narcotically naive could also be attacked in another way. The blood clot Dr Duflou found suggested that at least once in the previous weeks or days the deceased had received or given himself a drug injection. But it does not follow that the deceased was experienced in the administration of methadone, let alone sufficiently experienced to inject himself with a large volume of diluted methadone.

126 Further, the defence could, at a new trial, seek to weaken the evidence summarised above by pointing out that it was the appellant's husband who, in the appellant's absence, told Felicity Malouf that the deceased had taken methadone. But that fact does not negate the possibility that the appellant had injected methadone into the deceased or assisted the deceased in injecting himself before Felicity Malouf arrived.

127 The question is not whether there is evidence which is so strong that at a second trial it would establish the appellant's guilt beyond reasonable doubt. The question is not whether there is evidence which at a second trial would exclude all reasonable possibility of an acquittal. The question is whether there is evidence which, taken at its highest, *could* establish the appellant's guilt beyond a reasonable doubt at a second trial, even though there may be other views of that evidence and even though other evidence may undermine or contradict it. On that basis, there is evidence on which the appellant could be convicted of unlawful and dangerous act manslaughter at a second trial.

Failure to seek medical attention

128 An omission to act where the act would have saved the life of another can be manslaughter. But omissions of this kind fall within confined categories. Those categories require particular kinds of relationship between the deceased and the accused. The relationship between the deceased and the appellant was insufficiently close to the accepted categories to justify its recognition as one of them. To extend those categories would be to change the criminal law retrospectively.

129 In 1879, Lord Blackburn, Mr Justice Barry, Mr Justice Lush and Sir James Fitzjames Stephen sat as a Royal Commission and issued a report annexing a Draft Code of Criminal Law[162]. The report dealt with what it saw as a fallacious attribution of "discretion" to judges deciding new cases[163]:

> "It seems to be assumed that when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas on the contrary he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to be found in previous judicial decisions or in books of recognized authority. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a Code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present.
>
> For example, it never could be suggested that a judge in this country has any discretion at the present day in determining what ingredients constitute the crime of murder, or what principles should be applied in dealing with such a charge under any possible state of circumstances: and yet the common law definition of murder has in its application received a remarkable amount of artificial interpretation. The same observation is applicable to every other known offence."

It is certainly applicable to the offence of manslaughter. To create a new category of omissions carrying responsibility for the crime of manslaughter would alter the ingredients of that crime.

130 On 20 October 1897, Sir Samuel Griffith wrote to the Attorney-General of Queensland enclosing his Draft Code of Criminal Law. In that letter, he referred to the Royal Commission's report. The Royal Commission's report proposed that all offences be prosecuted under the Code or some other statute only, not at common law. Sir Samuel quoted it as saying[164]:

---

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

163 United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C 2345] at 7-8.

164 Griffith, *Draft of a Code of Criminal Law*, (1897) at vi. See United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C 2345] at 9.

> "The result of this provision would be to put an end to a power attributed to the judges, in virtue of which they have (it has been said) declared acts to be offences at Common Law, although no such declaration was ever made before. And it is, indeed, the withdrawal of this supposed power of the judge to which the argument of want of elasticity is mainly addressed."

Sir Samuel also quoted the following words[165]:

> "In bygone ages when legislation was scanty and rare, the powers referred to may have been useful and even necessary; but that is not the case at the present day. Parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws Parliament will soon supply them. If Parliament is not disposed to provide punishment for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct against which the moral feeling and good sense of the community are the best protection. Besides, there is every reason to believe that the Criminal Law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals, which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought, in our opinion, to be left in the hands of Parliament."

It is plain that Sir Samuel agreed with these ideas.

131 The "moral feeling" of the community would probably be strongly hostile to the appellant's conduct in not summoning medical aid for the deceased. But that is no reason for a retrospective change in the criminal law to be made by this Court.

Orders

132 There should not be a new trial in relation to the first route towards a manslaughter conviction. The respondent does not seek this. In any event, there is no reason to depart from the respondent's concession. Nor should there be a new trial in relation to the third route because to treat the appellant's failure to summon medical aid for the deceased as a criminal omission would involve a retrospective change in the criminal law. But there is no reason why there should not be a new trial in relation to the second route towards a manslaughter conviction.

---

165 Griffith, *Draft of a Code of Criminal Law*, (1897) at vi. See United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C 2345] at 9-10.

133 Is an order for a new trial barred because the prosecution would be running a case of unlawful and dangerous act manslaughter at the new trial which was based on an unlawful and dangerous act that was different from the act on which it relied at the first trial? At the original trial, the prosecution case did at times exhibit confusion between the unlawful and dangerous act of supplying methadone and the unlawful and dangerous act of administering it. But at least by the time of the no case submission, the prosecution was alleging that the appellant had done the latter type of unlawful act. And in the prosecution's final address, it pressed the latter type of unlawful act. A case based on the latter type of unlawful act was open on the evidence called by the prosecution. A new trial run based on the second route to a manslaughter conviction would not be one raising a new case, but a narrower version of the old case.

134 For those reasons I disagree with the orders pronounced on 20 June 2012. There should have been an order for a new trial, limited as described.