# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Patel* [2010] QSC 199 |
| PARTIES: | **R**<br>v<br>**JAYANT MUKUNDRAY PATEL** |
| FILE NO/S: | Indictment No. 387 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Criminal Trial – Ruling No. 4 |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 4 June 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 2 June 2010 |
| JUDGE: | Byrne SJA |
| RULING: | **Section 288 of the *Criminal Code Act 1899*, in its terms, extends to a negligent decision by a surgeon to undertake surgical treatment.** |
| CATCHWORDS: | CRIMINAL LAW – MANSLAUGHTER – CRIMINAL NEGLIGENCE – Interpretation of *Criminal Code Act 1899* (Qld), s 288 – Meaning of "surgical…treatment" – Where surgeon charged with manslaughter and grievous bodily harm arising out of criminal negligence – Where evidence suggested surgery should not have been undertaken but when it was undertaken, was performed competently – Whether in administering "surgical…treatment" the "duty…to have reasonable skill and to use reasonable care in doing such act" extends to decisions to operate – s 288 encompasses the decision to commend surgical treatment to a consenting patient<br><br>*Criminal Code Act 1899* (Qld), ss 282, 288<br><br>*Attorney-General's Reference (No. 6 of 1980)* [1981] 1 QB 715, considered<br>*Chew v R* (1992) 173 CLR 626, cited<br>*Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, cited |

*Department of Health & Community Services v JWB & SMB ("Marion's Case")* (1992) 175 CLR 218, considered
*Kelsey v Hill* [1995] 1 Qd R 182, cited
*R v Barlow* (1997) 188 CLR 1, cited
*R v Brown* [1994] 1 AC 212, cited
*R v LK; R v RK* (2010) 266 ALR 399, cited
*Royston Cook* (1979) 2 A Crim R 151, followed

COUNSEL: R G Martin SC and D Meredith for the Director of Public Prosecutions
M J Byrne QC and M Woodford for the Defendant

SOLICITORS: Director of Public Prosecutions
Raniga Lawyers for the Defendant

HIS HONOUR: The latest question of statutory interpretation concerns the application of s 288 of the *Code* to circumstances where a surgeon performs, with reasonable skill and care, a procedure that should not have been undertaken.

s 288 stipulates:

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

The patients consented to the procedures. Three – Mr Morris, Mr Phillips and Mr Kemps – died. Mr Morris and Mr Phillips died from post-operative complications. The bleeding that led to the death of Mr Kemps started during his oesophagectomy.

The prosecution contends that the operations were, in a word, unnecessary.

Removal of Mr Morris's sigmoid colon is said to have been inappropriate because the bleeding problem that the surgery was supposed to address was sourced in his rectum.

In two manslaughter cases – those relating to Mr Phillips and Mr Kemps – the essential contention is that the patient's health was too precarious to justify confronting the dangers of an oesophagectomy, which is major surgery.

The fourth operation is said not to have been sensible because, contrary to the Accused's perception that Mr Vowles was "most likely" suffering from colon cancer, he was not. So removal of the colon was pointless.

The Accused apparently carried out the operations competently. (Kemps may be an exception.)

Nonetheless, the prosecution contends that the operations were unnecessary; and, for that reason, s 288 required that the Accused not perform the surgery.

In other words, "in doing" the "act" of administering "surgical…treatment", the Accused was obliged not to perform the surgery.

The defence argues that s 288 does not extend to misadventures attributable to pre-surgery incompetence in diagnosis or in commending an inappropriate procedure to the patient.

Emphasising the phrase "… in doing such act", s 288 is said to be restricted in its reach to surgery done badly, not comprehending the anterior decision to embark on the procedure.

There is something odd about the notion that a duty to exercise skill and care "in doing" surgery requires that it not be done.

For one thing, "in doing" contemplates action; not inaction.

And the *Code* shows that its author was well acquainted with language apt to criminalise an absence of reasonable care in an initial decision to perform surgery.

s 282, as it stood until amendments last year (to extend to medical treatment leading to an abortion), stipulated:

> "A person is not criminally responsible for performing in good faith and with reasonable care

> and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case."

That protection from criminal responsibility requires, in addition to good faith and that the surgery be intended to benefit the patient, that: (i) the operation be performed "with reasonable care and skill"; and (ii) the decision to perform it be "… reasonable".

s 288 does speak of skill and care "in doing" the "act" of administering surgical treatment. It does not, in terms, mention the decision to perform the operation.

There are, therefore, two textual indications that the duty s 288 imposes is not directed to the decision to perform surgery.

The prosecution, however, points to "absurd" consequences if s 288 does not extend to circumstances where a patient is persuaded to submit to a dangerous procedure that no surgeon of ordinary competence would have commended.

If s 288 is not accorded the meaning the prosecution favours, the consequences are peculiar.

Take a surgeon who performs a minor surgical procedure with consent. During the operation, in circumstances

bespeaking criminal negligence, the surgeon lets the knife slip, wounding the patient.

The surgeon will have breached the s 288 duty and be guilty of unlawful wounding.

Now imagine a surgeon who commends major surgery to a patient with severe heart disease. The potential benefit to the patient is slight. The risk of death is high. Assume that, in circumstances involving grave moral guilt, the surgeon commends the operation to the patient, who gives such consent as suffices for the purposes of the criminal law. The surgeon conducts the surgery competently. The operation is too much for the heart to bear. The patient dies.

Unless the interpretation advanced by the prosecution is correct, the surgeon is not criminally responsible for the death.

Such an outcome could not have been intended, says the prosecution; and so, to give effect to the intention to be attributed to the legislature, it should be taken that s 288 comprehends the decision to operate.

When s 288 is set in its historical context, however, things bear a somewhat different aspect.

At common law, the general rule was that serious bodily injury intentionally inflicted on another was unlawful despite a victim's consent.

"Reasonable surgical interference" was an exception, being "needed in the public interest": *Attorney-General's Reference (No. 6 of 1980)* [1981] 1 QB 715, 719; cf. *R v Brown* [1994] 1 AC 212, 231-232; 242; 245; 266.

A competent patient's consent rendered surgical intervention lawful.

As was said in *Department of Health & Community Services v JWB & SMB ("Marion's Case")* (1992) 175 CLR 218, at p. 234:

> "The factor necessary to render such treatment lawful when it would otherwise be an assault is … consent."

Sir James Fitzjames Stephen, "that very celebrated criminal lawyer, jurist and judge" (Queensland, *Second reading of Criminal Code Bill*, Legislative Assembly, 8 November 1898, p. 1056 (Queensland Minister for Justice)), wrote in Article 204 of his *A Digest of the Criminal Law (Crimes and Punishments)* (3rd ed, 1883) p. 141, under the heading, "Right to Consent to Bodily Injury for Surgical Purposes":

> "Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical

> operation upon himself … but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto."

His footnote said:

> "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth."

The duties Stephen defined included that specified in Article 217 (pp. 149-150 under the heading "Duty of persons doing acts requiring special skill or knowledge"):

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

Stephen's draft *Criminal Code* was substantially adopted in the English *Criminal Code Bill 1880* (Vict) (see preface to Stephen's *Digest*, 3rd ed). Relevantly, the Bill provided:

> "158. Duty of persons doing dangerous acts.
>
> Every one who undertakes … to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge skill and care in doing any such act, and is criminally responsible for omitting without lawful excuse to discharge that duty if death is caused by such omission."

The proposal was influential in Queensland.

Sir Samuel Griffith, in an explanatory letter to the Attorney-General ("Draft of a Code of Criminal Law prepared for the Government of Queensland with Explanatory Letter, Table of Contents and Table of Statutory Provisions superseded", presented to both Houses of Parliament, Brisbane, 1897), stated:

> "In 1878 Lord Blackburn, Mr Justice Barry (of Ireland), Mr Justice Lush, and Sir James Fitzjames Stephen, were appointed by Royal Commission to be Commissioners to report on the provisions of a Draft Code of Criminal Law which had then lately been prepared in England. They submitted as an Appendix to their Report a Draft Code settled by them, which, with some modifications, was introduced into the House of Commons as a Bill in the session of 1880, but did not become law. I have freely drawn upon the labours of these distinguished lawyers, especially with respect to the statement of rules of the Common Law and the definition of Common Law offences."

In his draft code, Griffith referenced the *Criminal Code Bill 1880*'s s 158, proposing for Queensland:

> "295 Duty of Persons Doing Dangerous Acts
>
> It is the duty of every person who … undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act: and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty."

Stephen's choice of words had been modified slightly: "…duty to have and to use reasonable knowledge skill and

care in doing any such act…" became "…to have reasonable skill and to use reasonable care in doing such act…".

Griffith's proposal, like Stephen's, took for granted that consent absolved a surgeon of criminal responsibility for misadventure, unless the way in which the procedure was carried out was culpably negligent.

Historical considerations also explain why s 282 deals not only with reasonable skill and care in performing the surgery – as does s 288 – but also with the reasonableness of undertaking the procedure at all.

Stephen (*Digest* p.141), in Article 205, under "Surgical Operation on Person Incapable of Assent", wrote:

> "If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance."

Illustrations are provided in Article 205. The first concerns a person who is "rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses". "The amputation of his limb without his consent is not an offence"; or if the accident made him "mad, the amputation in spite of his resistance would be no offence", Stephen wrote.

These ideas found expression in s 68 of the *Criminal Code Bill 1880*. Headed "Surgical Operations", it provided:

> "Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit: Provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case."

Griffith altered it by adding a reference to an operation "upon an unborn child for the preservation of the mother's life". Last year, that exemption from criminal responsibility was extended to encompass "medical treatment": see *Criminal Code (Medical Treatment) Amendment Act 2009*. These changes have no present significance.

s 282 conditions exemption from criminal responsibility on the performance of the operation being reasonable because it was intended to cope with surgery performed without consent. More is said on this topic in the reasons for my Ruling on Wednesday, 2 June 2010. See also Queensland Law Reform Commission, *Consent to Health Care of Young People*, Report No. 5 (December 1996) pp. 28, 40.

Whether by oversight or design, Stephen's Code did not, expressly at any rate, envisage that harm resulting from competently conducted surgery to which the patient had

consented, influenced by misdiagnosis or a surgeon's poor judgment, would attract criminal responsibility.

Historical considerations, however, cannot prevail over the text if its meaning is plain: *R v Barlow* (1997) 188 CLR 1, 18-19. See also *R v LK; R v RK* (2010) 266 ALR 399 at [96]-[97].

Has the *Code* made surgeons criminally responsible for misadventures where surgery is competently performed but the decision to embark on the operation is reprehensible?

s 282 undoubtedly achieves that for surgery performed without consent. Does s 288 do the same for surgery with consent? Or does an egregiously negligent decision to perform surgery only attract civil liability and expose the surgeon to disciplinary proceedings?

In other words, is the prosecution's contention that s 288 captures a case where it was wrong to undertake the surgery at all, as well as cases where the surgery was done poorly, correct?

In answering the question, it is to be kept in mind that, in a penal provision, "any real ambiguity persisting after the application of the ordinary rules of construction is to be resolved in favour of the most lenient construction": *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129,

145; cf. *Chew v R* (1992) 173 CLR 626, 632, 642; and *Kelsey v Hill* [1995] 1 Qd R 182, 185 ("a strict construction is required of a penal statute…, at least if the enactment is ambiguous").

The "act" to be done is not the performance of surgery as such.

The "act" is the administration of "surgical…treatment".

Typically, surgical treatment will be surgery.

But unless "surgical…treatment" is to be confined to surgical procedures, the expression may extend to diagnosis of the condition and advice to the patient concerning it.

If so, the duty s 288 imposes may, in some circumstances, oblige the surgeon not to commend surgery to the patient or not to perform it, even with consent.

The meaning of "surgical or medical treatment", in the different context of s 298 of the *Code*, was considered in *Royston Cook* (1979) 2 A Crim R 151.

At the time, s 298 provided:

> When a person does grievous bodily harm to another, and such other person has recourse to surgical or medical treatment, and death results either from the

> injury or the treatment, he is deemed to have killed that other person, although the immediate cause of death was the surgical or medical treatment, provided that the treatment was reasonably proper under the circumstances, and was applied in good faith.

A victim was stabbed in the spine. An operation was performed. The surgeon decided not to administer an anti-coagulant drug. The victim seemed to have recovered from the operation. Some days later, however, he died. A substantial clot had blocked an artery. The non-administration of the drug was held to be "…treatment".

Lucas J, with whom Kelly and Sheahan JJ agreed, said (at p.154):

> "Section 298, in my opinion, applies only in a case in which it is established that the immediate cause of a person's death was the surgical or medical treatment administered to him. The reason why the learned judge thought that s. 298 had no application was because he did not think that the word "treatment" in that section extended to cover the non-administration of the anti-coagulant drugs which, of course, was as a result of the deliberate decision which had been arrived at by the doctor in charge of the case. In my opinion, the non-administration of those drugs in these circumstances does constitute treatment within the meaning of s. 298. We were referred to the definition of that word used in the medical sense in the *Shorter Oxford English Dictionary* which says that the word means management in the application of remedies, medical or surgical. In my opinion, the word "treatment" in s. 298 extends to the whole management of the patient, to everything that is done in accordance with that management, and also to things which are not done as a result of a decision which is deliberately taken with regard to the management of the patient."

No factor, textual, historical or practical, requires a different content to be given to "surgical…treatment" in s 288.

On this construction, a surgeon about to embark on surgery, with consent, is not duty bound to persist with it: for example, where facts discovered after the surgeon undertakes to perform the procedure reveal that surgery to be inappropriate.

And, where a surgeon, having started an operation, discovers that nothing would be gained by continuing (for example, where, on opening, the surgeon discovers that cancer had metastasised to other organs, leaving the patient not long to live), reasonable care "in doing" the surgery will, ordinarily, require the surgeon to end the procedure prematurely.

The interpretation of s 288 the prosecution propounds is preferable.

The Accused is not absolved from criminal responsibility for the adverse outcomes for his patients merely because he had their consent to the procedures and (if it be the fact) performed them with reasonable skill and care.

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