

SUPREME COURT OF QUEENSLAND

CITATION: *R v Strbak* [2017] QSC 299

PARTIES: **R**
(prosecution)
v
HEIDI STRBAK
(defendant)

FILE NO: 1643 of 2016

DIVISION: Trial Division

PROCEEDING: Contested Sentence

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 11 December 2017

DELIVERED AT: Brisbane

HEARING DATE: 7, 8, 9, 10, 16 and 17 November 2017

JUDGE: Applegarth J

CATCHWORDS: CRIMINAL LAW – SENTENCE – CONTESTED – where the defendant pleads guilty to a charge of manslaughter on the basis of a criminally negligent omission to seek medical treatment for her son – where the prosecution contends that she applied blunt force to the child’s abdomen causing his death – where the defendant contests this and raises the hypothesis that her co-accused may have inflicted the fatal injuries – whether the evidence establishes the contested fact on the balance of probabilities with the degree of satisfaction required to be actually persuaded of that fact

Evidence Act 1977 (Qld) s 132C

Briginshaw v Briginshaw (1938) 60 CLR 336, cited
R v Geary [2002] 1 Qd R 64; [2002] QCA 33, cited
R v Miller [2004] 1 Qd R 548; [2003] QCA 404, cited

COUNSEL: P J McCarthy for the prosecution
G M McGuire for the defendant

SOLICITORS: Office of the Director of Public Prosecutions (Queensland)
for the prosecution
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[1] Tyrell Cobb died on the night of Sunday, 24 May 2009, aged four years and three months. He died as a result of abdominal injuries caused by blunt force trauma. The

defendant, Heidi Strbak, was indicted, along with Matthew Scown, for the manslaughter of her son.

- [2] On 11 October 2017 Scown pleaded guilty to manslaughter and was sentenced on the basis that he omitted to obtain medical assistance for Tyrell on 24 May 2009, when he observed Tyrell to be obviously and severely unwell. Scown's failure to obtain medical assistance made him criminally negligent for Tyrell's death.
- [3] On 1 November 2017 Strbak pleaded guilty to manslaughter, and the matter has proceeded to a contested sentence. The prosecution particularises the charge that she unlawfully killed Tyrell Cobb on two alternative bases. The first is that she applied force to his abdominal area causing his death. The alternative is that she omitted to, among other things, "provide the necessaries of life"¹ to Tyrell in failing to seek medical treatment for him.
- [4] Strbak concedes that she is guilty of manslaughter on this alternative basis. She contests that she applied blunt force trauma to her son which caused the abdominal injuries that led to his death. In particular, she submits that the prosecution has not proven this to the high standard required because of:
- (a) uncertainty about the number of blows which were inflicted, and when they were inflicted; and
 - (b) the possibility that the blunt force trauma which killed her son was inflicted by another individual who had the opportunity to do so.

One such individual who was present on the weekend of 23 and 24 May 2009 was Strbak's step-brother, Danial Allan. Another was Scown, with whom Strbak was in a relationship at the time, and Strbak points to times when Scown was alone with Tyrell that weekend.

- [5] There is no dispute that Tyrell's death was caused by a transected duodenum with an associated laceration of the mesentery. Those injuries caused leakage of the child's stomach contents and bleeding in the abdominal cavity. The combination of peritonitis (caused from the leaking stomach contents) and haemorrhage (bleeding) eventually resulted in shock and death.
- [6] Tyrell suffered other non-fatal, non-accidental injuries. These are relevant to the source and timing of his fatal injuries.
- [7] As for his fatal abdominal injuries, the preponderance of the expert medical opinion is that they were the result of two separate applications of blunt force trauma. Post-mortem examination of his abdomen, including inflammation around the duodenum, indicates that the inflammatory changes would take 24 to 48 hours to occur.
- [8] The medical evidence also indicates that a second application of blunt force trauma closer to the time of death caused a fresh haemorrhage. Early healing of the tears that had already been inflicted would have made the tissue more friable, and it is possible that less blunt force than had been applied to the abdomen a day or two earlier was required to cause the fresh haemorrhage and increase the size of the duodenal tear.

¹ *Criminal Code* 1899 (Qld) s 286.

- [9] The second blunt force trauma probably occurred within several hours of death, whereas the initial application of force occurred at least a day, and probably between 24 and 48 hours, prior to Tyrell's death.

The issue

- [10] The issue is whether I am satisfied to the required standard that Strbak applied one or more of the blunt forces that were a substantial cause of her son's fatal abdominal injuries.

Outline of the prosecution case

- [11] The prosecution contends that the evidence compels the conclusion that Strbak applied blunt force to the child's abdomen, and also perpetrated other injuries, including a burn scar to his leg inflicted by a cigarette lighter and bruises to parts of his body.
- [12] According to the prosecution, Strbak is a demonstrated liar who was prepared to lie to investigators about the events in question, including her son's condition that weekend. She did not disclose to even her mother the bruises and other injuries that Tyrell had accumulated by Sunday, 24 May 2009, or his dire state of health, despite speaking to her mother that evening.
- [13] The prosecution case is that Strbak opposed Scown's suggestion that the child be taken to hospital. She refused to take him to hospital because she inflicted his injuries and knew that taking the child to hospital would put the cause of his injuries under investigation.
- [14] The prosecution points to other circumstantial evidence that Strbak was responsible for the child's injuries. According to the child's father, Strbak contacted him that weekend and asked him to take Tyrell from her. The inference is that she wanted the child taken from her because she could not cope with him and had injured him. There is evidence from neighbours that she would often yell abuse at the child. According to Scown, Strbak was a good mother when she was "stoned". On the weekend in question she did not have cannabis and left her sick child on Saturday night and then again on Sunday night in order to seek cannabis.
- [15] According to a neighbour, Ms Dyball, Strbak was "stressed out". On the afternoon of Sunday, 24 May 2009, at around 3 or 3:30 pm, Ms Dyball heard a child scream from Strbak's unit. After the child screamed "all of a sudden he stopped".
- [16] The prosecution case contrasts Strbak's alleged lies and concealment of the truth from even her mother with Scown's truthful evidence about the child's condition that weekend and about what was said and done. Scown's evidence is said to be supported by the medical evidence about Tyrell's likely state that weekend. Until matters turned against her in the course of a lengthy police investigation, Strbak did not criticise Scown in statements she made to police. In fact, she reported that Tyrell had never complained about Scown and had always said "Matt's a great bloke, he's my friend". Even at this stage, Strbak does not point to any direct evidence that Scown injured the child that weekend. The prosecution submits that there is no acceptable evidence that Scown inflicted the fatal injuries.

[17] In broad outline, the prosecution case involves:

- acceptance of Scown's evidence about the course of events and Tyrell's condition that weekend, as supported by the medical evidence;
- acceptance of Tyrell's father's evidence that suddenly that weekend, Strbak requested him to take Tyrell from her because she could not cope with him;
- findings that Strbak was responsible for non-fatal injuries inflicted on Tyrell, including a burn to his leg some weeks earlier and injuries to other parts of his body that weekend;
- findings that Strbak lied about her son's condition and concealed his true condition;
- findings that Strbak refrained from seeking medical assistance for her severely sick child throughout Sunday because to do so would reveal the injuries she inflicted on him.

These and other matters are said to present a compelling case that Strbak caused her son's abdominal injuries and the other non-accidental injuries he sustained.

Outline of the defence case

[18] The defence submits that, on the state of the evidence, we will never know what happened to Tyrell as far as who did what or when or how. The medical evidence about two separate applications of blunt force trauma to the abdomen is said to make it feasible that the second application of force occurred when Tyrell was alone with Scown for a period of about 25 minutes on the Sunday night, shortly before Tyrell's condition rapidly declined.

[19] The defence submits that even if Strbak was responsible for inflicting the scar to Tyrell's ankle by applying the heated end of a cigarette lighter to his skin, this does not support the inference that she was responsible for inflicting the far more serious injuries which he sustained on the weekend of 23 and 24 May 2009. In addition, if, as Scown reported to police on 25 May 2009, Strbak slapped the child on his face at dinner time on the Saturday evening, the slap did not cause any serious injury.

[20] The defence is not required to prove, nor does it seek to prove, that Scown caused the fatal injuries. Instead, it points to evidence which is said to make it more likely that Scown caused the injuries than Strbak. This includes Scown's admitted conduct some time earlier in kicking the child in the backside, and evidence that Tyrell complained to his father at some stage about being slapped across the top of his head by Scown's open palm.

[21] The defence also relies upon injuries that the child suffered when Scown was present with him, namely an injury sustained on 16 May 2009 when his finger was caught in the lid of a toy box, and injuries which he sustained in the shower on the night of Saturday, 23 May 2009. The defence points to evidence of Scown's aggression. It challenges the credibility and reliability of parts of Scown's evidence. It submits that even if one accepts his evidence about occasions when he saw Strbak being aggressive towards the

child, including slapping the child on the face that weekend, Scown's evidence and the other evidence about Strbak's aggression towards Tyrell does not prove that she applied one or more of the blunt forces that caused her son's fatal abdominal injuries.

[22] In summary, the defence's position is that:

- there is no direct evidence against either Strbak or Scown;
- there is a circumstantial case against each of them;
- the circumstantial case against Scown is stronger than it is against Strbak, such that one could not be satisfied, to the degree required, to make the adverse finding which the prosecution seeks.

The onus of proof, the standard of proof and the degree of satisfaction required

[23] Strbak is not required to prove that she did not inflict the fatal injuries. Nor is she required to prove that Scown probably did. The onus of proof is on the prosecution to prove the contested facts upon which it relies, and the ultimate contested fact that Strbak inflicted the fatal injuries.

[24] Proof that she inflicted other non-fatal injuries aids the prosecution case by, among other things, illuminating the nature of her relationship with her son at the time and enhancing the credibility and reliability of parts of Scown's testimony.

[25] Unlike a criminal trial, the standard of proof is not beyond reasonable doubt. A sentencing judge may act on an allegation of fact that is admitted or not challenged.² If an allegation of fact is not admitted or is challenged, the sentencing judge may act on the allegation if "satisfied on the balance of probabilities that the allegation is true".³

[26] In this statutory context, "the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true".⁴

[27] Under the common law of Australia there are only two standards of proof: beyond reasonable doubt and on the balance of probabilities. There is no intermediate standard. Instead, in a case in which proof on the balance of probabilities is required, and a party makes grave allegations of misconduct, courts require a high degree of satisfaction before finding the allegation proved on the balance of probabilities. As was stated by Dixon J in *Briginshaw v Briginshaw*:

"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."⁵

² *Evidence Act 1977* (Qld), s 132C(2).

³ *Ibid*, s 132C(3).

⁴ *Ibid*, s 132C(4). See also *R v Geary* [2002] 1 Qd R 64.

⁵ (1938) 60 CLR 336 at 362.

But as Dixon J pointed out, this does not mean that some standard of persuasion “is fixed intermediate between the satisfaction beyond reasonable doubt required on a criminal inquest” and reasonable satisfaction based on a preponderance of probability.⁶ Instead, it means “the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.”⁷ For a fact to be proved, the tribunal of fact “must feel an actual persuasion of its occurrence or existence before it can be found”.⁸

[28] Justice Gagelar recently wrote:

“What Dixon J was saying in *Briginshaw* was that satisfaction on the balance of probabilities involves the formation under conditions of acknowledged uncertainty of a subjective belief. The requisite belief is an “actual persuasion” that the fact in issue actually exists – that a past event the occurrence of which is uncertain and is disputed did indeed occur”⁹

[29] One of the matters mentioned in *Briginshaw* is reflected in s 132C(4) of the *Evidence Act 1977* (Qld), which refers to the adverse consequences to the person being sentenced of finding the allegation to be true. Accordingly, in determining the contested facts, and the ultimate contested fact (that Strbak applied blunt force trauma which caused her son’s fatal abdominal injuries), I must have regard to the consequences of finding the allegation to be true.

[30] The consequences include additional punishment and the additional reputational harm of being found to have applied the blunt forces that substantially caused her son’s death, as compared to the consequences of being criminally negligent for his death.

[31] As to the latter, on any fair assessment of the uncontested facts and facts which cannot be seriously disputed, Strbak was callously indifferent to her son’s condition. She concealed his true condition from the child’s father and from her own mother when each of them spoke to her on the telephone that weekend. She left the child with Scown and went in search of cannabis, rather than take him to the hospital or otherwise seek urgent medical care which would have saved him. On that basis, she deserves to be sentenced to a very substantial term of imprisonment. This is so even if an explanation for not seeking medical treatment that Sunday was that hospital staff and authorities would investigate her son’s obvious injuries and “do her for neglect”.

[32] It might be said that the culpability of a parent who allowed her child to die in the circumstances in which Tyrell died is not much different to what her culpability would be if she, in addition, inflicted a fatal blow to his abdomen. It might be said that the punishment for the gross neglect of the injured and very sick child should not be much less than if the prosecution additionally proves that she struck him in the abdomen.

[33] There is, however, a real difference between the punishment she might reasonably expect depending upon whether the prosecution proves the contested facts. The required proof includes the application of substantial force to the child’s abdomen on at least one occasion, and the prosecution seeks to prove that she inflicted other non-fatal injuries. These are very serious allegations and proof of them would be expected to

⁶ At 363.

⁷ Ibid.

⁸ At 361.

⁹ Justice Stephen Gagelar “Evidence and Truth” (2017) 13 *The Judicial Review* 1, 7.

have significant, additional consequences for Strbak. Therefore, a high degree of satisfaction is required before these allegations can be found to be true.

- [34] Some less important contested facts do not require the same degree of satisfaction. Some are contested simply because Strbak did not personally observe them, and they are readily proven to my satisfaction.
- [35] Although a high degree of satisfaction is required before certain contested facts can be found to be true, this is not a criminal trial. The task of fact finding by a judge in a contested sentence is not constrained by the presumption of innocence.
- [36] A sentencing judge may proceed, as common sense dictates, more readily to accept evidence or draw inferences invited by the prosecution in the absence of contradictory evidence. This proposition emerges from the judgment of Holmes J (as the Chief Justice then was, and with whom Williams JA and Muir J agreed) in *R v Miller*:

“It is true that he has a right to maintain his silence and that he cannot be compelled to give evidence on sentence; but those entitlements are not infringed by the drawing of an inference in favour of the prosecution case if he does not do so. ...

At the stage at which fact-finding on the sentence occurs, the situation, at least in Queensland, is more akin to that in a civil trial than that in the criminal trial which may have preceded it. The fact-finder is, of course, a judge, not a jury. Although the prosecution still carries an onus, it is, by virtue of s 132C of the *Evidence Act 1977*, to satisfy the sentencing judge on the balance of probabilities, with allowance for the *Briginshaw* standard by requiring a variation of the degree of satisfaction according to the consequences. ...

There is nothing, in my view, which would constrain a sentencing judge from proceeding, as common sense dictates, more readily to accept prosecution evidence or draw inferences invited by the prosecution in the absence of contradictory evidence.”¹⁰

Williams JA added that because the presumption of innocence is not relevant, one would ordinarily expect a party to give evidence in support of a contention about the disputed fact.

- [37] The parties in this case accept that these principles apply to the resolution of disputed questions of fact. The presumption of innocence does not apply. In the absence of sworn evidence by the defendant about matters about which she could give evidence and be cross-examined, I can more readily accept prosecution evidence and draw inferences invited by the prosecution.

Agreed facts, contested facts and the evidence

- [38] Many facts are agreed by the parties. Rather than reproduce them in the body of these reasons, they are attached as a schedule. The unshaded paragraphs are agreed. The

¹⁰ [2004] 1 Qd R 548 at 553[25] – 554[27].

shaded paragraphs are contested because Strbak either denies them or is unaware of certain matters and therefore declines to admit them. The agreed facts should be taken as being, in effect, incorporated into these reasons.

- [39] The evidence before me included 124 exhibits, consisting of expert reports, witness statements, transcripts, photographs and recordings of police interviews. During four days of evidence I heard from many lay witnesses and several medical experts. It is unnecessary for me to resolve every disputed question of fact. In due course, I will turn to the credibility and reliability of certain important lay witnesses, and also to the credibility and reliability of Strbak's account of events, as told to police in a two hour recorded interview early on the morning of 25 May 2009 (some hours after Tyrell's death), an hour long interview that evening, in a witness statement dated 7 July 2009 and in a "field interview" on 10 July 2015.
- [40] Strbak chose not to give oral evidence, and to thereby subject herself to cross-examination, at the hearing.

Essential facts and events

- [41] Strbak and Tyrell's father, Jason Cobb, lived together at Lightning Ridge, New South Wales for about a year before he was born. Tyrell was born at the Gold Coast Hospital and after his birth he and his parents returned to Lightning Ridge. They lived together until about six months before he died.
- [42] In late 2008 Strbak moved to the Gold Coast with Tyrell. Jason Cobb resided mainly in Lightning Ridge, but would visit his son when he could. Strbak's relationship with Scown commenced in late 2008. She met him through her step-brother, Danial Allan. Scown had his own son, who was five years old.
- [43] Strbak's parents owned a unit at 5/76 Brighton Street, Biggera Waters, and in December 2008 Strbak moved into it with Tyrell. Scown did not live with her there. He had his own place at Hope Island, but would regularly visit Strbak at her unit.
- [44] On or about 17 February 2009 Strbak moved with Tyrell into a unit at 6/45 Bayview Street, Runaway Bay.
- [45] Tyrell attended a pre-school three days a week. On 11 May 2009 he injured his arm when playing on a fort in the pre-school's playground. The arm became swollen, and that night a possible fracture was treated at the Gold Coast Hospital with a cast.
- [46] On 14 May 2009 when Strbak and Scown were packing up her belongings from her unit in preparation for her to move back to 5/76 Brighton Street, Tyrell was playing near a large wooden toy box which looked like a trunk. Scown had propped it open so Tyrell could reach into it and take toys. The prop fell away and Tyrell's hand was jammed, injuring a finger. It became infected and he was prescribed antibiotics by a general practitioner.
- [47] On 16 May 2009 Strbak and Tyrell moved back into 5/76 Brighton Street, Biggera Waters and Scown also stayed at that address. Strbak occupied a bedroom with Tyrell, who slept on a mattress on the floor. Scown slept on the floor in the main living area. On the night of 16 May, Scown placed a call to a locum medical service because he was

concerned about Tyrell's injured finger. A doctor attended and the injury was referred to the hospital. Tyrell was admitted to the Gold Coast Hospital that night, and examination showed an undisplaced fracture at the base of his finger. The infection associated with the injury was treated with intravenous antibiotics.

- [48] During his time at the hospital over the following days, no problems were detected with his abdomen. It was noted to be soft and non-tender. There was an isolated episode of vomiting food on 19 May 2009.
- [49] At midday on Wednesday, 20 May 2009, Tyrell was discharged from hospital, having been observed by physicians at the hospital to be well.
- [50] On Friday, 22 May 2009, he attended his pre-school. No incidents involving Tyrell were observed by pre-school staff or reported to them that day, and apart from his bandaged hand injury, no injuries were observed. Strbak collected Tyrell from the centre at around 4 pm that Friday. Tyrell returned home and remained at the unit until his death.
- [51] Jason Cobb would routinely telephone his son most evenings. Telephone records for Friday afternoon and evening, and for Saturday evening record a number of telephone calls made by Jason Cobb to Strbak's phone, and it seems likely that Jason Cobb spoke to his son on the Friday evening, and again on the Saturday evening.
- [52] According to Jason Cobb, during that weekend Strbak spoke to him on the telephone and requested that he take Tyrell from her. For reasons to be given, I find that such a conversation occurred, and that Jason Cobb was given to understand that the request was being made by Strbak because she could not cope with Tyrell.
- [53] At around lunchtime on Saturday, 23 May 2009, Strbak's step-brother Danial Allan attended Strbak's unit and observed Tyrell to lack energy, and not to be his "usual happy self". He observed that Tyrell had bruises on his head, ear and arms. Strbak indicated to him that the bruises were from Tyrell's pre-school.
- [54] Tyrell was unwell that Saturday afternoon, but he and Allan watched a movie in the lounge room before Allan left at around 5:30 pm.
- [55] That evening Strbak left the home in order to obtain cannabis from her dealer, Brett Archer. She later lied to police about the reason why she left her home and her son that night.
- [56] That evening, while she was absent, Scown cooked dinner and, at the same time, arranged for Tyrell to have a "bubble shower" in the shower recess. While he was cooking dinner he heard a bang, went into the bathroom and found Tyrell on the floor of the shower. Tyrell hit his head when falling, and when Strbak returned home, Tyrell's fall in the shower was reported to her.
- [57] Tyrell had been vomiting earlier that day and continued to vomit during the Saturday night.
- [58] Strbak stayed with him in their bedroom that night. The next morning Tyrell had not improved and for some time watched television in the living room.

- [59] Tyrell repeatedly vomited throughout Sunday, 24 May 2009. His vomit had the colour of bile. He could not keep food or liquids down throughout the day.
- [60] According to Scown, he told Strbak that Tyrell should be taken to the hospital or to see a doctor, but Strbak refused to do so, saying that she would be blamed for a bruise to her son's face, and would be investigated for neglect of her child. Strbak contests that she said these things.
- [61] On the evening of Sunday, 24 May 2009, Allan came to the unit again, and observed that Tyrell's condition had deteriorated. He observed more bruises to Tyrell than he had seen the day before.
- [62] Allan heard Strbak and Scown arguing on the verandah. She left the unit and placed a call to Jason Cobb from a payphone at 7:48 pm.
- [63] Some time after 8:30 pm Strbak and Allan left the unit. Strbak later told police that she left at around 9:10 pm to drive to another brother's home in order to get cigarettes. In fact, she left in order to obtain cannabis. When Strbak and Danial Allan left the apartment, Tyrell was asleep on his mattress in the bedroom. Scown was on the couch in the lounge room.
- [64] While he was watching television, Scown heard a gargling noise coming from Tyrell's room. He found Tyrell was limp and initially took him into the shower to attempt to revive him. He then placed Tyrell on the floor. At 9:37 pm he telephoned 000 and reported that Tyrell had vomit coming out of his mouth and nose. Strbak arrived home with Allan at about this time. Scown and Strbak each spoke to the 000 operator who attempted to have them administer CPR. A neighbour arrived at the scene and administered CPR.
- [65] The ambulance arrived at the address at about 9:45 pm. Tyrell was observed to be in a parlous condition. He had no heart rhythm and paramedics started CPR without success. Upon his arrival at the Gold Coast Hospital he was examined and found to have no pulse. Attempts to revive him failed and at 10:25 pm he was declared deceased. Doctors at the hospital noticed numerous bruises all over his body.

The timing of the fatal injuries

- [66] The evidence of the medical experts is important in reaching a conclusion about the timing of the fatal blunt force or forces which killed Tyrell Cobb. The medical evidence comes with its complexities. There are some subtle differences between the evidence of the medical experts. However, there is a broad consensus that the initial blunt force injury (or, in Dr Kimble's view, possibly the only blunt force injury) occurred a substantial time before death.
- [67] Dr Kimble was not convinced that there were two blows, but thought that a fatal blow occurred a substantial time, possibly around 36 hours, before death. He explained that the extent of peritonitis was consistent with 24 to 48 hours of irritation, and explained how it was possible for the child to have survived for a couple of days with that level of tear to the duodenum.

- [68] Dr Little thought that there were at least two episodes of traumatic injury because of the period during which the inflammatory process had occurred. She shares Dr Ong's opinion that there was a fresh haemorrhage in the hours prior to death which was the result of another application of force. This made both the injury to the duodenum and the injury to the mesentery worse. Professor Duflou also agreed that the inflammatory reaction was indicative of an injury which occurred some days earlier. Understandably, like other experts who favoured the two blow theory, he could not say precisely when the last blow occurred. It could have been a relatively short time before the child's collapse and death.

The sources and timing of non-fatal injuries

- [69] When seen at pre-school, at hospital and by some relatives in the days and weeks before 23 May 2009, Tyrell appeared relatively free of bruises and other injuries. However, one would expect any active four year old like Tyrell to carry a number of accidental injuries which resulted in abrasions and bruises. The two pre-school employees who gave evidence impressed me as professional and caring. It would be unrealistic, however, to expect even the most professional of pre-school teachers to monitor every abrasion or bruise that might be seen on a child, and such an employee would not be ordinarily expected to remove the child's clothing to see what injuries might be concealed by clothes. Tyrell was in hospital between 16 and 20 May 2009, being treated for the infected finger he injured in the lid of a large wooden toy box. One would not expect hospital staff treating an infected finger to give his body the same degree of close attention in terms of counting and analysing scratches, scars and bruises as they would in a case of suspected child abuse, or the close attention given in a post-mortem examination.
- [70] Therefore, it cannot be said, and it would be wrong to assume, that Tyrell's body was free from bruises and other injuries when he was in hospital or at pre-school. It is possible that minor injuries, including some non-accidental injuries, went unnoticed when he was at pre-school or was in hospital. For example, a u-shaped scar on his leg, upon close post-mortem forensic examination, was shown to have a sinister origin, being caused by the heated metal top of a cigarette lighter. This scar may not have been closely observed by others in the weeks prior to his death. If noticed by an untrained eye, it may have appeared to be a small and unremarkable scar on a young boy's leg.
- [71] When Tyrell attended pre-school with bandaged fingers on Friday, 22 May, he was carefully observed by Ms Tracey, a child care assistant. She did not notice any excessive bruising or injuries. Tyrell was not observed to have any major accidents at pre-school. He did not complain of any injuries or report to Ms Tracey that day, to his mother when she picked him up that afternoon or to Scown that evening that he had been hurt by anyone at pre-school, or that he had been hurt, for example, by accidentally falling off a bike or anything else.
- [72] By the time of his death, however, Tyrell had acquired a large number of injuries. Some, possibly many, particularly injuries on his legs, might be explained by falling over and other accidents. But even an accident-prone child could not have acquired all of the injuries which Tyrell did in the places which he did.
- [73] Dr Ong, the forensic pathologist who performed the autopsy, and whose findings were reviewed by other experts, numbered 70 different injuries in his report. They are

summarised and numbered differently in a schedule annexed to these reasons. Some were very minor and are the kind of abrasions or bruises which would be found on the limbs of most active four year olds. Dr Ong's autopsy report noted that most of the bruises found on Tyrell's body were small and oval in shape. Bruises are, by definition, caused by blunt force trauma. Dr Ong concluded that the bruises on Tyrell's body, together with the abrasions, were distributed over his entire body, and were not typical of those caused by accidental injuries. He reported that some of the bruises showed features (oval and some butterfly-shaped) that could be caused by fingers, either by fingertip pressure or pinching. The bruises were also of varying colours, and histology showed that they were of varying age. He concluded that most of the findings "would be consistent with the injuries being inflicted at different times, possibly over the past few days including the peri-mortem period."

[74] I was assisted also by the evidence of Associate Professor Sullivan, who has practised in paediatrics since 1971. He is an expert in child protection and child abuse. His report and oral evidence addressed the number of injuries and bruises, their location and the clustering of bruises. He also addressed the aging of bruises. His report dated 9 July 2014 concluded that, given the large number of bruises and abrasions on Tyrell's body, their position on the body, and their size, it was highly unlikely that these occurred in normal activities, and it is highly likely they were inflicted.

[75] Although Associate Professor Sullivan could not use the colour of the bruises to date them, he relied upon other information to do so. The intravenous treatment Tyrell received after 16 May for his infected finger explains bruising on the back of his left hand where a drip was inserted. As Associate Professor Sullivan notes, the extensive bruising and abrasions of his face, ear, chest, abdomen and back noted in the autopsy report were not noted by any paediatric nurse or doctor, indicating that these injuries occurred after discharge. Strbak told police that Tyrell had only a few marks on him when he left hospital. Associate Professor Sullivan concludes that the majority of the bruises on Tyrell's body occurred after discharge from hospital, namely between 20 and 24 May 2009. His report found it:

"implausible that these bruises occurred on a single occasion during that timeframe. This opinion is based not on the colour or appearance of the bruises but their total number, the widespread distribution on multiple body regions, and the wide distribution on body planes within those regions (e.g. front and back, left side and right side, inner and outer on the limbs). This distribution indicates impacts from multiple directions likely to have occurred on separate occasions."

[76] Associate Professor Sullivan considered, both in his 2014 report and in his oral evidence to this Court, whether certain incidents could account for some or all of the bruising and abrasions noted at the time of Tyrell's death.

[77] ***The fall from the fort/slide on 11 May 2009:*** This fall from a height of about a metre might explain a bruise around the elbow. The hospital notes do not record any bruising of the ear or elsewhere.

[78] Associate Professor Sullivan regarded Strbak's claim that she noted bruising on the top of Tyrell's ear and behind his ear after his discharge from hospital as implausible. He explained that this would imply multiple contact points during the fall, which is

unlikely. He described the area of the ear and lower jaw as part of the “protected triangle”. This is because when a person falls and one side strikes the ground, the point of the shoulder and the upper part of the head may strike the ground, but the lower jaw area and ear are protected within the cavity formed by the shoulder and head, and are rarely damaged. His report states:

“Ears have little blood supply and are hard to bruise and injuries to the ear are highly correlated with non-accidental injury”.

He elaborated on that aspect in his oral evidence and also referred to the time lapse between the date of the fall from the fort (when Strbak alleged Tyrell sustained the bruise to his ear) and the autopsy. No bruising was noticed during Tyrell’s time in hospital and, in any event, most bruising would have faded by 13 days after the fall from the fort/slide.

- [79] ***The fall upstairs:*** There is evidence that Tyrell slipped and fell forward while walking upstairs on the morning of Saturday, 23 May 2009. This incident was observed by Scown and immediately reported to Strbak. It seems he scuffed his leg and injured his shin, and also fell on the front of his body. Such a fall was extremely unlikely to have caused his fatal abdominal injuries, or to have caused the bruises to his abdomen that were noted post-mortem. Associate Professor Sullivan reports that bruising on the abdomen is rare in childhood. Bruising occurs when blood vessels are damaged and this occurs mainly over rigid bony surfaces. The soft-yielding abdomen rarely bruises even when severe abdominal injury occurs. Research in 2000 into whether stair falls could result in small intestine perforation reviewed hundreds of cases of small intestine perforation and none were due to stairway falls. Of 432 cases of children who had stairway falls, none had small bowel perforation. Associate Professor Sullivan concluded that it is highly unlikely that the fall up the stairs was the cause of Tyrell’s duodenal perforation.
- [80] He also observed in his oral evidence that one would not expect such a fall to have caused the bruises to the abdomen noted by Dr Ong’s post-mortem report. According to Associate Professor Sullivan, if there was bruising to the abdomen by a fall to the tread of a stair, one would expect a line, possibly, if it was going to cause a bruise at all.
- [81] ***The fall in the shower:*** There is evidence that Tyrell fell in the shower on the evening of Saturday, 23 May 2009. The child had been having a bubble shower, and reportedly slipped and fell onto the floor of the shower recess. Scown heard the noise and went into the bathroom where he saw Tyrell on the floor and observed, amongst other things, a red mark on his forehead. I will return, in due course, to Scown’s reported observations of that mark and other bruises, and Strbak’s account of the marks and bruises which she saw on Tyrell that weekend. For present purposes, it is sufficient to observe that, as with other reported accidents, such as the fall from the fort on 11 May and the fall up the stairs on the morning of 23 May, the fall in the shower could not account for all of Tyrell’s injuries and bruises.
- [82] Associate Professor Sullivan summarised the matter in his report as follows:

“I do not consider that these accidents, individually or in total, could account for the large number of injuries on multiple body areas and planes

noted in this case and, at most, may be the cause of a few individual lesions”.

His oral evidence was to like effect. As he explained, any single bruise can be due to an accident or can be due to an impact, and it is impossible if a person has one bruise to say exactly what caused it. However, in Tyrell’s case there were a constellation of injuries and multiple bruises to his back, to his front, to the left side of the face and to the forehead. Associate Professor Sullivan’s evidence was:

“I couldn’t say that any single injury may not have been accidental, but I could not see that the totality of these injuries could be accidental”.

- [83] One other non-accidental injury should be noted at this point: the scar to Tyrell’s leg as shown on Exhibits 6 and 7. It was referred to in some evidence as a “smiley face” scar. The forensic evidence and Exhibit 94 in particular, convincingly proves that the scar injury had been caused by the application of the heated metal at the end of a cigarette lighter being applied to the child’s leg. Associate Professor Sullivan confirmed that the tissue damage that would have occurred to cause that scar would have placed the child in significant discomfort at the time and that pain would have subsisted for some time afterwards. The scar cannot be precisely aged but Dr Ong thought it may have been at least four to six weeks old.
- [84] Bruises cannot be precisely dated. The colour and appearance of bruises may be affected by individual characteristics or the places on the body at which they are located. However, experienced forensic pathologists, experienced paediatricians and other medical experts are able to give an estimate of when an injury which causes bruising was sustained. Sometimes their opinions are aided by histology reports. It will be necessary to return to the medical evidence about when significant injuries to Tyrell’s face, head and other parts of his body were probably sustained, and to other evidence about how and by whom injuries may have been inflicted. For example, there is evidence that on the evening of Saturday, 23 May 2009, Strbak slapped her son across the face.
- [85] It is not necessary or even possible for me to reach a conclusion about precisely when each of the apparently non-accidental, non-fatal injuries were inflicted. Instead, the inference to be drawn from the significant number of apparently non-accidental injuries which Tyrell suffered is that he was physically abused.
- [86] The infliction of a number of non-accidental injuries has a relevance to the source and timing of his fatal injuries.

The fatal injuries

- [87] The photographs of Tyrell’s body include bruises to his abdomen. Injuries 26 and 27 are each described in the autopsy report as a greenish brown bruise. Injury 25 in the autopsy report (which correlates with Injury 26 in the schedule) is described as a faint greenish bruise on the centre of the abdomen, just to the left of the umbilicus (belly button).
Dr Ong reported that there was an underlying red purple bruise, “3 x 2 centimetre in the rectus muscle and visceral peritoneum”. His internal examination of the abdomen found a near transection of the small intestine, with only one centimetre out of four

centimetres of the circumference of the intestine still attached. There also was a three centimetre long tear involving the mesentery of the small intestine near its attachment. The small intestine at this point lies directly above the ruptured portion of the duodenum. Internal examination of the muscular skeletal system revealed a perivertebral soft tissue haemorrhage on the front of vertebrae L2 and L3, underlying the area in which the intestines were perforated.

- [88] Abdominal injuries in children, according to the medical literature, can be insidious and not cause obvious symptoms initially. Typical symptoms include abdominal pain, distention, vomiting, fever and non-specific complaints such as general discomfort and unhappiness. Dr Kimble stated that initially the release of duodenal contents into the abdomen would cause some discomfort, but a child does not become “terribly unwell” until the initial chemical peritonitis develops into bacterial peritonitis. Therefore the severity of symptoms vary, and symptoms take a variable length of time to develop.
- [89] Dr Little stated, and this is not contested, that because of the placement of the duodenum at the back of the abdomen, it is possible for a duodenal injury to be “walled off”, which can mask symptoms.

Medical evidence

Dr Ong

- [90] Two important paragraphs of Dr Ong’s autopsy report should be quoted:

“A notable bruise was the bruise near the umbilicus (belly button) involving the rectus muscle and peritoneum (inner lining of the abdominal cavity). The site of the bruise was directly in front of the ruptured duodenum and lacerated mesentery. In addition, there was bleeding in the soft tissue around the lumbar vertebrae as well as bleeding within the intervertebral joints. The finding was consistent with a blunt impact or impacts against the abdominal wall impinging abdominal structures (in this case, the mesentery and then beneath that the fourth part of the duodenum) against the spine. This had resulted in laceration of and transection of the described structures. Consequent of the impact, there was bleeding in the tissue around the spine (vertebra) as well as in the intervertebral joints.

This abdominal injury was caused by blunt impact (e.g. by punches, impact with blunt objects). The force to cause this injury would have to be severe to cause these injuries. As the injury was extensive, the child would have experienced extreme pain locally and the symptoms would appear almost immediately after the injury was sustained. It was noted on histology that there was inflammatory reaction to these injuries in keeping with them being sustained earlier (at least 1 to 2 days’ duration). The inference from the findings was that the child had sustained similar blunt impacts to abdomen before. As the child had not complained of any abdominal pain before the terminal episode, the injuries sustained earlier were unlikely to cause intestinal or mesenteric rupture. The fatal injuries (rupture of the intestines and laceration of the mesentery) would have been sustained in the peri-mortem period.”

- [91] Dr Ong discussed the matter with another pathologist who brought to his attention certain articles which described how in similar cases the presentation of such injuries in children could be delayed. A leakage of contents resulting from the rupture of intestines may be limited initially to the site of the rupture. Dr Ong noted in his report that it was possible that in this case there had been a similar course, consistent with “vague presentation of vomiting present earlier in the same day”. However, in this case, a major finding was an intra-abdominal haemorrhage, rather than generalised peritonitis. The child’s peritonitis was only limited to the site of the rupture. This suggested to Dr Ong further acute trauma to the same site which had resulted in the haemorrhage. He concluded that it might take “a few hours after the last infliction of injury before clinical manifestation could be seen (in this case, cardiorespiratory collapse).” As there was healing process in the same area resulting in the tissue being more friable, it was “possible that less blunt trauma to the abdomen would be required to cause the haemorrhage”.
- [92] In his oral evidence, Dr Ong noted the coincidence between the injury to the duodenum, the injury to the mesentery and the haemorrhage seen at the L2 and L3 vertebrae. Those overlaying injuries suggested the application of a blunt force trauma as the mechanism causing all of those injuries. The injuries might be caused by a single punch or a kick to the child’s stomach. However, Dr Ong’s preferred view was that the injuries were not the result of a single traumatic episode, but were the result of force being applied on at least two different occasions. This was based upon the histopathological examination of the injuries, including the presence of fibrosis which indicating early healing and the presence of hemosiderin-laden macrophages, which is seen two or three days after injuries. This implied that the injury had occurred some time ago. However, the substantial haemorrhage in the abdominal cavity suggested at least a second trauma had been inflicted, causing the mesentery to tear.
- [93] In summary, Dr Ong’s opinion is that there were at least two traumatic injuries. His report suggested “one fairly remote, more than two to three days, another one could be hours before death”. The cause of death included peritonitis caused by the leakage of the contents of the duodenum into the abdominal cavity. When the child was admitted to the emergency department of the Gold Coast Hospital his haemoglobin level was 46 grams per litre. This low level was forensically important. It indicated to Dr Ong that for the haemoglobin to drop so dramatically there must have been an acute haemorrhage and that the haemorrhaging had been going on for at least four to six hours, possibly longer.
- [94] Reports of the child vomiting a green substance in the course of Sunday, 24 May 2009, expressing a desire to have liquids and being unable to raise himself, with pain in the stomach, were consistent with Dr Ong’s findings about the timing of a tear to the duodenum and haemorrhaging of the mesentery.
- [95] Dr Ong thought it very unlikely that the child would have been able to swing on a curtain in the early hours of the Sunday morning, as Strbak reported him doing in her first interview with the police.

Dr Little

- [96] Dr Little, a forensic pathologist employed by Queensland Health, peer reviewed Dr Ong’s report, and shares the opinion that there were at least two episodes of blunt force

trauma to the abdomen. This was evidenced by bruising and healing reactions around the rupture site and the nature of the tears to the duodenum and mesentery. In Dr Little's opinion, if the duodenum had been almost transected for several days, she would have expected much more severe inflammation than was present. According to Dr Little, and based upon Dr Ong's report that there was 250 mls of blood and intestinal contents at the time of autopsy, there was a significant haemorrhage. A blood loss of 250 mls would be about 20 per cent of Tyrell's expected blood volume. This was a significant blood loss but would not cause death alone. Instead, the transected duodenum would allow bowel contents to enter the abdominal cavity and increase the amount of shock caused by haemorrhaging.

- [97] In her oral evidence, Dr Little explained that the fact that Tyrell did not have widespread, severe peritonitis, but had a very large haemorrhage suggested a second injury closer to the time of death. The fact that the blood appeared to look fresh to Dr Ong suggested to Dr Little that although Tyrell sustained an injury in the days before his death, which explains the period of inflammation, this initial injury to his duodenum and also to the mesentery was made worse in the hours prior to this death.
- [98] Dr Little described Tyrell's haemoglobin level at the time he presented to the emergency department of the Gold Coast Hospital as extremely low. He had normal haemoglobin on his earlier admission to hospital, excluding the possibility that he was anaemic. A tear to the mesentery was a likely source of blood loss. Although Dr Little did not completely exclude the possibility that the second application of force could have been as recent as a half an hour or so before the child collapsed and required resuscitation, she doubted whether the blood loss was caused in such a short period. This is because the blood vessels in the mesentery are not that large.

Dr Kimble

- [99] Dr Kimble is a highly qualified consultant paediatric surgeon, and the Director of Burns and Trauma at the Lady Cilento Children's Hospital. His qualifications include the Degree of Doctor of Medicine (Research). He reported to the Coroner and concluded that Tyrell received severe blunt force trauma to his abdomen, consisting of one or more blows. These injuries would have been the result of a focused injury such as a kick or a punch or a blow from another blunt object. Having regard to the evidence before him in 2014 when he provided his report to the Coroner, he concluded that it could have taken at least 36 hours for Tyrell's injury to cause death. However, if Tyrell had suffered a tear to his duodenum on Friday, 24 May 2009, the pre-school staff would have noticed the effects of peritonitis. Dr Kimble is of the view that the injury would have happened after that time and that there would have been increasing abdominal pain from the peritonitis, with Tyrell being very unwell from the few hours after the bowel perforation until death. He would have become progressively dehydrated and felt thirsty, but anything he drank would be vomited.
- [100] In his oral evidence, Dr Kimble explained the progress of the condition and that Tyrell's condition would have taken some time to develop. His level of haemoglobin taken at the Gold Coast Hospital showed profound anaemia. Dr Kimble concluded that it was possible that Tyrell had suffered more than one blow to the abdomen. However, it was possible for a child in Tyrell's position to have survived with a tear to the duodenum for some time. Further, a duodenal injury may be difficult to diagnose, with acute sickness taking some time to be established. According to Dr Kimble, in the hours before death,

Tyrell would have been in extreme pain and unable to move because of the peritonitis. From his analysis of the evidence, Dr Kimble rejected the view that the tear to the duodenum happened within an hour of the child's collapse. This was insufficient time for the peritonitis to have taken effect. According to Dr Kimble, having regard to the inflammation in the abdominal cavity, something had been irritating it for a period of 24 to 48 hours.

Dr Duflou

- [101] Dr Duflou, a consulting forensic pathologist, agreed that whilst it was possible that there was only one impact causing the fatal pathology, he preferred the view that there were probably two or even more blows. Whilst acknowledging that it was possible that the last blow was sustained in the 25 minute period when Tyrell was in the unit with Scown on the Sunday night, Dr Duflou was unable to provide an opinion about the timing of the last blow. He also gave evidence that Tyrell's low haemoglobin did not mean that the final event did not occur a short time prior to collapse. The tear to the mesentery which led to the blood loss could have occurred some hours earlier.
- [102] According to Dr Duflou, the amount of inflammation in the inner lining of the abdomen was not particularly excessive and not such that one would expect it to have been there a number of days. He thought it likely that there was a further event which occurred and which resulted in a further deterioration and a further rupture of the duodenum and of the mesentery. It is possible that a large tear of the duodenum may be masked. He agreed that a relatively straightforward fall up the stairs would not cause injuries of this severity.

Dr Robertson

- [103] Dr Robertson is a specialist in forensic medicine and pathology based in Melbourne. Her report dated 20 May 2015 opined that the inflammatory changes associated with the abdominal injuries would have taken 24 to 48 hours to occur and were probably inflicted some time on 23 May 2009. In her report she could not exclude the possibility of further blunt force trauma at a later time in the hours before death, resulting in acute deterioration. This is because if all of the abdominal injuries occurred about 36 hours earlier, she would have expected the child's condition to have been worse and that he probably would not have survived as long as he did. In her oral evidence, Dr Robertson expressed the opinion that it was likely that there was a second application of force, but was unable to place a time upon it. Under cross-examination she accepted that it was possible that the initial injury happened on Friday, 22 May 2009.

Timeframes and opportunities to perpetrate assaults

- [104] There were times on the weekend on 23 and 24 May 2009 when Strbak, Scown or Danial Allan was alone with the child in a room, and times that weekend when Strbak or Scown was the only person in the unit with the child. For example, Strbak would have been alone with Tyrell in the bedroom they shared, and alone with him when Scown left the unit to obtain food. By way of further example, Scown was alone with the child on Saturday night during the time that Strbak left and he was cooking dinner. Danial Allan was with Tyrell on the Saturday and again on the Sunday when they watched films together. It seems that either Strbak or Scown was in, or in the vicinity of, the unit when Tyrell was on his own with Allan.

- [105] The defence emphasises the fact that Scown was present alone with the child on the Sunday night, after Strbak and Allan left the unit together. Some evidence suggests that Strbak was away for about 25 minutes. This is the period between 9:10 pm, when Strbak told police she went out, and the time when Scown made a 000 call. During this period the child became extremely ill, and was in a parlous state when Strbak returned. This leaves open the possibility that Scown inflicted the second fatal blow during this period and that this blow, and fresh haemorrhaging caused by it, accelerated Tyrell's decline and death. While this is a possibility, the medical evidence indicates that the second blow could have been inflicted at any time over a period of hours that Sunday. The medical evidence indicates that Tyrell would have been very sick by late on Sunday because of the effects of the first fatal blow which may have occurred a day or two earlier. His final and rapid decline some time after 9 pm on Sunday, 24 May 2009 does not mean that the second blow occurred after 9 pm on Sunday. It is consistent with the combined effects of the fatal blows, triggering shock to a physically weak little boy who had been vomiting all day and for much of Saturday.

Telephone communications between Strbak and Jason Cobb that weekend and her request that Cobb take Tyrell from her

- [106] An important and contentious piece of evidence is that on the weekend of 23 and 24 May, Strbak spoke to Jason Cobb by telephone and requested that he take Tyrell from her. Jason Cobb gave sworn evidence that she did and, for the reasons which follow, I am persuaded of that fact. Cobb did not initially mention this matter to police when he spoke to them on the Tuesday. This calls into question the content and timing of the relevant conversations. The fact that he did not mention the conversation when he first spoke to police is significant, but explicable. He was a grief-stricken father who had many more important things to think about. He may not have suspected the worst of Strbak. When he recalled the relevant conversation or conversations, he suggested that a conversation about taking Tyrell occurred at night, and occurred on the night he died. Cobb gave evidence at a committal on 11 November 2009, and made further statements in 2015 about the case, including statements to the Crime and Corruption Commission. On 6 July 2015, about six years after the event, he told the CCC of a telephone conversation with Strbak when he was home at Lightning Ridge in the company of a friend, Warwick Spicer. His evidence to the CCC was that Strbak said:

“Do you want to come and pick your son up?”

to which he replied that of course he did. He recalled that this conversation occurred late at night and that it was impractical to drive to the Gold Coast straight away, a journey that would take between eight and ten hours. Instead, he understandably decided to stay the night in Lightning Ridge and call Strbak the next day to see how she was then feeling about the matter.

- [107] His recollection was that in the conversation he asked Strbak when he could come and pick Tyrell up, to which she said:

“Oh leave it with me. I'll have to talk to Diane and see when it's a good time for you to come down.”

This gave Cobb the false impression that Strbak's mother and father might have been at the unit, in which a bedroom was reserved for their use. Cobb was not sure what Strbak meant, but thought he would clarify matters the next day. When he gave his evidence to the CCC in 2015 he could not be sure whether the conversation occurred on the Saturday night or the Sunday night. He explained that he did not initially tell police about the conversation because it "completely went over his head" at the time he spoke to them on Tuesday, 26 May 2009.

- [108] The timing of telephone conversations between Strbak and Cobb that weekend does not depend entirely upon recollection. There are comprehensive telephone records and Exhibit 87 conveniently compiles telephone calls, including calls which Strbak made from a nearby payphone. They are consistent with Cobb making regular calls of an evening to Strbak's phone in order to speak to his son before his son went to sleep. There are calls from Cobb to Strbak's phone on many evenings, including the evening of Friday, 22 May 2009 at around 8:40 pm when there was a conversation which took about four and a half minutes.
- [109] On Saturday, 23 May 2009, call records indicate a number of telephone calls between Jason Cobb and Strbak. It seems that Strbak called him from a payphone at 6:20 pm. The call lasted just over three minutes. Jason Cobb called Strbak's phone at 6:51 pm and the call lasted one minute. Strbak called him again at 8:33 pm. It was a very short call, probably to save her phone credit. He then called her phone at 8:34 pm and the call lasted more than three minutes. She sent him a text at 8:40 pm.
- [110] On Sunday, 24 May 2009, Strbak sent another SMS to Cobb's phone at 1:51 am. She made a three second call at 4:12 am, and another call of only four seconds at 9:28 am.
- [111] At 7:48 on the Sunday night Strbak made a call from a payphone at Biggera Waters to Cobb. The call lasted one minute and four seconds. This timing is reflected in agreed fact 56. Danial Allan heard Strbak and Scown arguing on the verandah of the unit. He heard Strbak saying she was going to the payphone, and that she left the unit and made that call.
- [112] Not long before this contested hearing, and I infer after being questioned about the timing of the relevant calls, Jason Cobb adopted the position that the telephone call in which Strbak asked him to take Tyrell from her occurred on the Saturday. In any event, he recalled a conversation that occurred one morning. His evidence was that the call occurred at around 10 or 10:30 in the morning and that Strbak asked:

"Can you come and pick up this boy? I can't handle him no more."

Cobb says that he asked what was wrong and she just said, "Come and get him. I can't handle him". His evidence was that Strbak sounded very frustrated and his impression was that "she just didn't really want to deal with Tyrell any more". This was what he inferred by what she had said.

- [113] Jason Cobb was "over the moon" that he could have his son back. Strbak's suggestion that he take the boy to live with him was unexpected. Strbak had the primary care of Tyrell. On occasions when he would ask to come and see Tyrell on the Gold Coast, Strbak would say things like "Something's happening this weekend", or "Not a good

time". She had never previously suggested that Tyrell should go and live with Cobb, despite Tyrell asking "Can we come (and) live with you, Dad?"

- [114] I am persuaded that a telephone conversation substantially to the effect described by Jason Cobb occurred that weekend. Jason Cobb impressed me as an honest witness. Giving evidence and being cross-examined about the circumstances leading up to his son's death could not have been easy. I did not detect any malice in his evidence directed towards Strbak or Scown. He did not try to suggest that Strbak was a bad mother. Mr Cobb visited Tyrell and Strbak on the Gold Coast late in 2008 and early in 2009. The last time he saw Tyrell was a few months before he died. When Mr Cobb washed or showered Tyrell he did not notice any suspicious bruises or scars. He had bruises and scabs of the kind one would expect on a normal child who suffers bumps and accidents. Mr Cobb had never noticed any suspicious injuries to Tyrell when he and Strbak were living together. He had never seen her use excessive force on Tyrell when they were living together. When he was on the Gold Coast for about two weeks over the Christmas period, things seemed good. He did not see anything that concerned him about Tyrell. If anything, there were occasions when Strbak was overprotective towards Tyrell.
- [115] When Mr Cobb came up to the Gold Coast just after Tyrell died, he was very emotional. Because he had never seen Strbak being violent to Tyrell, the thought that she had injured him did not cross his mind. This point assumes significance in assessing the contested issue of whether Strbak asked Mr Cobb to take Tyrell from her that weekend, and, if she did, why he did not report that conversation when he spoke to police on Tuesday,
26 May 2009.
- [116] Given my favourable assessment of Mr Cobb's credibility and general reliability, and considering probabilities, I find it very improbable that he has imagined a conversation that did not occur. The telephone records bear out the fact that there were a number of telephone communications between Cobb and Strbak that weekend. It is possible, indeed probable, that the topic of Tyrell going to stay with Cobb was discussed in more than one telephone call. It is understandable that in attempting to recall the relevant conversation or conversations, Mr Cobb recalled a telephone conversation on either the Saturday night or the Sunday night and tended to think that the conversation occurred on the Sunday night when Tyrell died. There was, in fact, a conversation between Strbak and Cobb at 7:48 pm on Sunday and I conclude that it probably discussed both Tyrell's health and tentative plans for Jason Cobb to collect him in the near future. Mr Cobb's evidence, which I accept, is that on the night of Tyrell's death Strbak informed him that Tyrell was feeling sick. I find that Strbak did not disclose to Mr Cobb that night just how sick Tyrell had been all weekend, or that he was carrying many bruises.
- [117] In retrospect, Mr Cobb must regret not jumping in his car on the Saturday or Sunday once Strbak asked him to take Tyrell from her. However, he was not to know Tyrell's true condition, and Strbak did not tell him. In addition, it was entirely understandable that he would not travel late at night and make a journey on outback roads, but would wait to speak again to Strbak the next day to see if her request stood or whether she had changed her mind.
- [118] Mr Cobb's evidence that there was such a request is supported by the evidence of his friend, Warwick Spicer, who had moved in with Jason Cobb at his unit at Lightning

Ridge after Strbak left. Mr Spicer recalled a telephone conversation that weekend which Cobb put on loudspeaker. Mr Spicer's evidence is that Strbak said:

“You've got to come and get Tyrell. I can't handle this anymore. I can't deal with him Jason. Please come and get him”.

Mr Spicer thought that the call was in the morning and that later on that night Diane Strbak telephoned with the news that Tyrell had died. As to the relevant call, Mr Spicer said that it was fairly short phone call and that there were a few calls like it that weekend. His recollection is that he and Jason Cobb were going to pick up Tyrell the next day, but they received the phone call that night saying that Tyrell had passed away. I take into account that Mr Spicer did not give evidence about these matters until 2015 when he was contacted by police. However, I am inclined to accept his evidence, and that he has an honest recollection that a phone call to say “Come and get him” occurred one morning. There was a short call by Strbak to Cobb at 9:30 am that Sunday.

- [119] I take into account the distinct possibility that, in attempting to recall the relevant conversation or conversations, Mr Cobb and Mr Spicer have each reconstructed what they think was said, rather than recalled the precise words that there said. I also take into account the likelihood that they have spoken to each other about these matters over the years and that this has affected their recollections. However, the evidence of Jason Cobb and the evidence of Warwick Spicer persuades me that Strbak did speak by phone to Jason Cobb that weekend and said words to the effect “Can you come and pick up this boy?”
- [120] A call made by Strbak from a pay phone at 6:20 pm on Saturday, 23 May 2009 to Jason Cobb, which lasted just over three minutes, probably discussed the matter. As noted, there was a call which lasted more than three minutes between Cobb's phone and Strbak's phone at 8:34 pm. It is possible, and indeed probable, that Jason Cobb spoke to his son during this call, but perhaps not for the entire three minutes. Mr Cobb's recollection is that he asked Strbak to put Tyrell on the phone, that she did so and that his conversation with Tyrell did not last long. Tyrell sounded tired. After Tyrell said goodnight to his father, Strbak took the phone back and said “He's too sick to keep talking to you”.
- [121] Whilst Strbak contests the allegation that, over the weekend, she requested Jason Cobb to take Tyrell from her, his evidence and the evidence of Mr Spicer about such a request is not contradicted by evidence from her. In the circumstances, I find contested fact numbered 37 proved.
- [122] I am not convinced that Strbak added “I can't handle him” or words to like effect. It is quite possible that she said this to Jason Cobb, since the evidence is that she was not coping well with him that weekend which, incidentally was a period when she apparently did not have cannabis to consume. If she did not in fact say to Jason Cobb “I can't handle him”, then this was the impression he gained from her frustrated tone and from the unexpected decision to allow him to take Tyrell from her. Therefore, it is possible that Jason Cobb has honestly reconstructed a recollection that words to the effect of “I can't handle him” were actually used, when this was an impression which was clearly conveyed by other words and Strbak's tone, but left unstated. By that weekend Strbak was not coping well. A neighbour in an adjoining unit, Ms Dyball, said

that Strbak was “stressed out” after she moved back into the unit. Neighbours in nearby units regularly heard her screaming at Tyrell.

Telephone communications between Strbak and her mother that weekend

- [123] On the weekend of 23 and 24 May 2009, Strbak’s mother, Diane Strbak, who is a nurse, was residing in Lightning Ridge. The telephone records show a pattern whereby Diane Strbak would call her daughter for up to three minutes so that she did not have to pay for calls. On various dates in May she called her daughter. During a telephone call on Saturday, 23 May 2009, she was told by her daughter that Tyrell had vomited some clear fluids. Strbak also told her mother that Tyrell had fallen up the stairs when returning to the unit, but did not cry.
- [124] On Sunday, 24 May 2009 Strbak spoke to her mother by telephone at 10:35 am for just under three minutes, at 4:07 pm for about four minutes, for just over a minute at 5:57 pm, and then in a series of consecutive calls commencing at 8:08 pm until about 8:20 pm. During one of these calls Diane Strbak says that she spoke to Tyrell about a planned trip. He sounded tired. Diane Strbak’s evidence is that she had no inkling that there was anything wrong with him, although she also says that she had been again told by her daughter that Tyrell had been bringing up clear fluids, and one of them was a bit yellow. Diane Strbak recalls Strbak mentioning only one occasion when Tyrell’s vomit was not clear. She acknowledged that her recollection of the content of the calls is unclear because of the passage of time. She thinks that she may have spoken to Tyrell that evening about eating his dinner. However, the evidence is that he did not eat dinner that night and had difficulty keeping even water down. She thought that Tyrell had told her that he had eaten his pasta. Her best recollection is that she spoke to him on the evening of 24 May and that he sounded “a bit tired”.
- [125] Other evidence about the extent to which Tyrell vomited throughout Sunday, and just how dehydrated he must have been, is difficult to reconcile with Diane Strbak’s impression that Tyrell “was fine, apart from being a bit tired”. This disparity does not force me to take an adverse view of Diane Strbak’s credibility, and to conclude that she has tailored her evidence to fit the defence theory that Tyrell was not so unwell when Strbak went out some time after 8:30 pm. It is sufficient to conclude that:
1. Diane Strbak was not in a position to observe Tyrell’s physical condition; and
 2. Heidi Strbak did not disclose to her mother on the Sunday how sick and injured the child was.
- [126] The evidence is that Tyrell repeatedly vomited throughout Sunday, 24 May 2009 and that his vomit was a green colour, with the appearance of bile. He was listless and moved very little. He was taken by Scown to sit out on the balcony to get some fresh air. He was very sick, not just a little bit tired. Diane Strbak was not aware of just how sick he was and could only get an impression from what he said over the telephone. Whilst she may have been able to speak to her grandson some time on the evening of Sunday, 24 May, she did not appreciate from the telephone call or from anything her daughter had told her, just how ill Tyrell was. Moreover, Strbak had concealed from her mother the extent of his illness, and the bruises and other injuries that he carried. Strbak’s

withholding of this information from her mother is suspicious since she was in the habit of seeking advice from her mother who is a nurse.

Danial Allan

- [127] Danial Allan is the son of Diane Strbak (formerly Allan). Danial Allan met Heidi Strbak when his mother and her father commenced a relationship more than 20 years ago. Heidi Strbak was a few years younger than Danial Allan and these children got along as brother and sister, along with Danial Allan's brother, Brad, who is the same age as Heidi. Although Diane Strbak is Heidi's step-mother, because of the family dynamics I have referred to her as Heidi Strbak's mother.
- [128] Danial Allan met Scown when he was about 18 years of age. He, Scown and friends would smoke cannabis together. They had a shared interest in boats. Scown employed Danial Allan at some stage. Danial Allan and Scown had a falling out when, instead of using money given to him to buy cannabis, Allan went to the hotel and spent the money on alcohol. Scown assaulted Allan after Allan lied to him about the stolen money.
- [129] In 2009 when Danial Allan visited his nephew, he had little to do with Scown. Allan told police in a statement dated 22 July 2014 that when he visited Tyrell on 23 May 2009, Tyrell did not appear to be his usual happy self and did not seem to have much energy. Allan saw some bruises on Tyrell that day, on his head, ear and arms. He asked Tyrell what had happened and, according to Allan, Tyrell said something about falling off a bike. He says that Heidi Strbak told him that the bruises were from kindly. That day Allan and Tyrell watched a movie in the lounge room area. He left the unit at around 5:30 pm.
- [130] The following evening, at around sunset, Allan returned to the unit. Tyrell looked worse than he had appeared the day before and Allan recalls that he was vomiting green bile.
- [131] Later that evening when he was watching another movie with Tyrell, Allan observed that he was "covered in bruises", including a bruise above his groin area.
- [132] While Allan and Tyrell were watching television, Scown and Strbak were arguing loudly, apparently about a phone call.
- [133] Allan's July 2014 witness statement was provided for the purpose of being considered for an indemnity against prosecution. In it he said that at one stage that evening when he was sitting on a lounge chair, Tyrell said to him "Uncle Dan, Matt punched me in the tummy". Danial Allan gave similar evidence on oath on 10 November 2017. I found his evidence about that alleged conversation unbelievable. If Danial Allan was to be believed, his four year old nephew, who he loved, reported being punched in the stomach by Scown. At that time Scown was not in his peripheral vision but was elsewhere in the unit. Any ordinary person would be furious, and would at least confront the alleged perpetrator of a physical attack on a four year old. Allan did no such thing and could not provide any explanation to me as to why he did not do so. In addition, he did not report the matter, and his concerns, to his sister, the mother of the child. Instead, he and his step-sister left the house not long after, leaving Tyrell in the care of Scown. Allan could not explain why he left the child alone with the alleged

perpetrator of such violence. His evidence was that it did not enter his mind that this was something about which he should tell the mother of the child.

- [134] Danial Allan's evidence about being told by Tyrell that Scown had punched him in the stomach is incredible. Strbak's submissions did not urge me to accept his evidence about this matter.
- [135] According to Allan, he did not actually recall this incident until some time after Tyrell's death, and when he was with a previous partner "I've opened up to her, apparently". It is possible that through some odd mental process, or possibly through the effects of drugs, Danial Allan has honestly, but mistakenly, constructed such a significant recollection. However, I am inclined to conclude that Danial Allan gave untrue evidence in this regard to police and to this Court so as to falsely implicate Scown, and to thereby assist his step-sister's defence. Allan was an extremely unimpressive witness in his recollection of this contentious conversation.

Strbak's unsworn evidence

- [136] Strbak spoke to police in the early hours of Monday, 25 May 2009 and in further interviews on the evening of 25 May. She provided an addendum statement to police on 7 July 2009. Police spoke to her again on 10 July 2015.
- [137] In her interviews on 25 May 2009 she gave a somewhat confusing account of Tyrell's condition over the crucial weekend and when she first observed bruises on him. She did, however, say positive things about Scown and his relationship with Tyrell. By 2015 Strbak and Scown were not on good terms and she said adverse things about him. However, at no stage did she purport to witness acts of physical violence or verbal aggression exhibited by Scown towards Tyrell, including on the weekend of 23 and 24 May 2009.
- [138] I treat her unsworn evidence with reserve. Her account of how ill Tyrell was does not align well with observations made by Scown or with the medical experts about how ill Tyrell must have been late on Sunday, 24 May 2009. Her plea of guilty to manslaughter is on the basis that the child was obviously unwell and required urgent medical treatment, that she was criminally negligent in failing to obtain it, and that her criminal negligence caused her child's death. The reliable evidence about Tyrell's condition that day, and the admissions which are implicit in her guilty plea, cannot be easily reconciled with her statements to police, which tended to minimise how sick he was that day. In her initial interview with police Strbak suggested that Tyrell must have choked on his vomit.
- [139] A lawfully intercepted telephone call on 11 June 2015 between Strbak and her step-brother, Bradley Allan, is instructive about her honesty and preparedness to lie. She and her step-brother discuss what they should say to the CCC and joke about lying. They construct an account of the evidence that will be given about her movements on the Saturday night and a false explanation about why she went out. Strbak seems to admit that she has lied for half of her life and knows how to lie.
- [140] Despite the reservations which I have about Strbak's credibility and the reliability of many of the things which she told police, I remind myself that my rejection of parts of

her evidence or disinclination to accept it when it conflicts with other, more reliable evidence, does not necessarily lead to the conclusion that the contested facts are thereby proven. The onus remains upon the prosecution to prove the contested facts, if it can. In addition, my reservations about the credibility and reliability of parts of her account of events does not automatically bolster the credibility and reliability of certain prosecution witnesses, such as Scown. The evidence relied upon by the prosecution must warrant acceptance in its own right.

[141] In addition, the decision of Strbak not to give sworn evidence and to verify contentious parts of her statements to police means that I accord that evidence less weight than I would accord it if given on oath, and tested by cross-examination.

[142] To the extent that there is a conflict between the sworn evidence of Scown and the unsworn evidence of Strbak, including about the course of events that weekend, I prefer the evidence of Scown. This is not only because it was tested by cross-examination. It is because it accords with the medical evidence of Tyrell's probable condition that weekend, including his condition late on Sunday. I also have reservations about the credibility and reliability of Strbak's account of events to police because the evidence shows that she lied to police about what she did and where she went that weekend, and in 2015 spoke to her brother, Bradley Allan, about lying to the CCC.

[143] I conclude that Strbak did not give an accurate report of Tyrell's condition to her mother. Therefore, Diane Strbak's impressions of Tyrell's condition on the Sunday night were based neither on personal observations nor accurate reporting of his condition. Strbak's concealment from her mother of Tyrell's true condition is a significant piece of circumstantial evidence in the prosecution case against her.

Assessment of Scown's evidence

[144] As with other witnesses who had difficulty in recalling events which occurred more than eight years ago, Scown had problems accurately recalling the precise times when events occurred and some matters of detail. Over the years, in making statements to police, and in giving evidence to the CCC and to courts, there has been some variation in his recollections. For example, in later accounts of the slap to the face incident, his evidence suggested that it was delivered with more force than his statement to police on 25 May 2009 indicated. The phenomenon of an honest witness reconstructing recollections over a period of years is common. Therefore, changes in Scown's recollection of how much force was used in the slap does not discredit him on the substance of the allegation. While it may prevent a confident finding being made about the amount of force that was used, it does not render unreliable his recollection that there was a slap. His early report of it to police makes it likely that there was such an incident.

[145] While the passage of time and the process of reconstructing recollections are reasons to doubt the reliability of some of his evidence on points of detail, I found his evidence on critical matters and events to be plausible and reliable.

[146] Scown's sworn evidence derives support from the medical evidence about Tyrell's likely state of health that weekend. His evidence about Tyrell's condition, as disclosed to police and as given in evidence, was contrary to Scown's own interests in that it increased his exposure to criminal liability for failing to take care of Tyrell, and exposed

him to a greater penalty for his failure to do so. Scown's evidence about the course of events is supported by objective evidence in the form of telephone records.

- [147] In assessing his evidence, I take account of his admitted discreditable conduct. First and foremost, there is the criminal offence to which he has pleaded guilty arising from his failure to obtain medical assistance, despite Strbak's refusal to do so for fear that she would be "done for neglect". Next, Scown's admitted conduct in kicking Tyrell in the backside in Aril 2009 does him no credit, even if it was provoked. However, he was honest enough to promptly disclose the incident to police. His verbal and text message disputes with Jason Cobb in 2009, including Scown's use of a term of racial abuse, do neither of them credit. Scown permitted himself to be caught up in acrimony between Strbak and Jason Cobb. In assessing the credibility of his evidence, I have regard to these failings.
- [148] Scown was forthright and not evasive in giving his evidence. He made appropriate admissions and concessions. He was a credible witness. I accept his evidence on critical matters, including his denial of having inflicted the injuries which Tyrell sustained on the weekend of 23 and 24 May 2009.

Observations of bruises and injuries that weekend

Strbak's statements to police

- [149] Early in her interview with police, shortly after 3 am on 25 May 2009, Strbak said that after Tyrell injured his elbow at pre-school¹¹, and she took Tyrell home, she saw that he had “bruising behind his ear, on top of his ear and he had little cuts to his head.” It is significant that no-one at Tyrell’s pre-school reported that he had hit his head, and that no doctor, nurse or pre-school employee noticed a bruise to his ear over the following 12 day period. Upon post-mortem examination, Dr Ong found a purple bruise on the outer rim of Tyrell’s right ear, with associated local swelling.
- [150] Later in her initial police interview, Strbak said that when she brought Tyrell home from hospital (which would have been on 20 May 2009) Tyrell did not have any marks on him whatsoever. She promptly qualified this and referred to the bruising on his arm caused by the cannula in hospital. She also added that he “still had a little bit of bruising on his ear”.
- [151] She said that he had no bruises on Friday before he went to pre-school and that since she showered him every morning and every night, she notices “every little scratch, mark or anything on my son’s body.”
- [152] She recounted the episode on the Saturday morning when Tyrell had gone downstairs to help Scown to clean the garden and on his way back up the stairs had fallen, and then run inside to her where she noticed that he had taken the skin off his shins and bruised them. It also appeared that he had hit the front of his body because he had a red line that indicated that he had fallen. After running inside to her he reported that he had fallen over and pointed to his legs and to his belly. Tyrell reported to her – “I fell up the steps”.
- [153] Strbak also told police about Tyrell’s fall in the shower on the Saturday night. She reported what she had been told by Scown about the bubble bath, and also that Tyrell had told her that he had “fallen over in the shower and he bumped his head”.
- [154] Strbak told police that when she showered Tyrell on the Friday night she noticed marks on his back, going up his spine to the base of his neck. She said that he mentioned another child’s name, and that there was bruising and that she noticed that the bruising came out on the Saturday so that it was really visible. She said that she kept asking him whether anyone at school had picked on him. She said that Tyrell also said that he had come off his bike, but Scown said to police “I can’t see how he could do that, coming off his bike at school”. She mentioned again that he had a bruise on his ear.
- [155] In the interview Strbak explained how on the Saturday morning Tyrell was “a little bit sooky” and was whingeing which was not unusual. He complained when he did not get what he wanted at breakfast and also said that he had a sore stomach. According to Strbak, she noticed “all the bruising on his back and on his arms and everywhere else” on the Saturday. She and Tyrell stayed home on the Saturday.

¹¹ An injury which occurred on 11 May 2009.

- [156] She also told police that, in the middle of Saturday, Tyrell told her that he had run into a marble-top coffee table that was in the unit. She said that there were not any real markings. However, on the Sunday morning she noticed bruising had come up above his groin and she asked Scown to look at it because it was not normal. Strbak said she did not believe that the marks had happened at school and when she pressed Tyrell about what really happened he told her that he had run into the table. Later in the interview and when asked about Tyrell's explanations as to how he received a bruise to his groin, Strbak said "I'm not 100%, because he said that he's been kicked and then he said he'd run into the table".
- [157] As for Tyrell's general condition over that weekend, Strbak says that after the accident in the shower in which Tyrell reportedly "banged his head", she decided to keep him awake in case he showed signs of concussion. She asked him if his head was sore. He apparently did not have a headache, but started to get a lump and a couple of marks on his forehead. According to Strbak, Tyrell was still throwing up that night and she was with him all that night. Despite being sick, Tyrell was able to play and, according to Strbak, at around 1:30 am he was "actually hanging off my curtains pretending to be Spiderman". As Strbak explained, Tyrell had been sick and throwing up before the fall in the shower.
- [158] As for Sunday, Strbak said that she told Scown that if Tyrell did not get much better in the following hours then she would ring the doctor. She said that Tyrell "was drinking heaps". Later in the interview she said that he vomited at least six times during Sunday. He rested on the mattress for much of the day but did not sleep much. She also said that when she left with Danial Allan on the Sunday night Tyrell was fine, asleep in bed. Allan had been lying next to him earlier, and Tyrell had been sick once in the bucket before going to bed.
- [159] In the further interview which commenced at 5:54 pm on Monday, 25 May 2009, Strbak recounted events on the weekend and how on the Sunday morning Tyrell had left the bedroom and watched TV in the lounge room. She tried to give him water but he had trouble keeping it down and was sick a couple of times up until lunchtime. Tyrell was quiet and tired, having been up all night. He complained that he had a sore stomach and when Strbak touched it, it felt tender. Strbak said that he did not have a high temperature.
- [160] During the afternoon, Tyrell sat on the verandah in the breeze with a blanket over him.
- [161] Strbak was again asked about noticing marks and she said that she and Scown had noticed the bruise to his groin on the Sunday morning, that Tyrell said that he had got kicked at school but that she found this "a bit far-fetched" because school had been on the Friday. She asked him again and he said that he had run into the coffee table in the lounge room.
- [162] She also recounted how she had noticed marks on the Friday night but had not seen prominent bruises on him until the Saturday morning. Her story appeared to alter from her earlier interview. In the Monday evening interview she said that she sent him to school and he did not have a bruise on him, whereas when he came home he had "bruises all over him". She said that he had a bruise on his cheek and down on his other cheek and she did not know where that came from.

- [163] She added that on the Sunday they were able to see a bruise from where he hit his head in the shower.
- [164] In a further brief interview after 7:34 pm on the Monday night, Strbak gave an account of Tyrell's condition when she and Danial Allan left on the Sunday night. She said that she went into her bedroom for about 30 seconds. Danial Allan had been laying there with Tyrell. Tyrell did not look like he was in any pain.
- [165] One part of Strbak's police interview on the morning of 25 May 2009 is relevant to an episode in which Scown recalls Strbak slapping Tyrell in the face. In recounting events from the Saturday night Strbak says that she was keeping the fluids up to him and trying to give him food and that he was "playing on being sick", chewing on bread and leaving it in his mouth. She encouraged him to swallow it, and she thought he was making himself sick. It is not clear whether this episode happened late on the Saturday night. Later during the same interview Strbak reiterated that she tried to give him dry bread to settle his stomach but that Tyrell did not want to swallow it, that he kept it in his mouth and that made him sick.

Scown's evidence

- [166] Scown gave evidence that on the weekend of 23 and 24 May 2009, Strbak slapped Tyrell across the face when he was sitting at the table. Scown's recollection was that Tyrell had just vomited and Strbak slapped him to the left side of his face. Scown could not say precisely what time this occurred, but said that after the incident a bruise came up on Tyrell's face under the eye. He says that he saw the bruise under the eye on the Sunday.
- [167] Scown gave evidence of another event when Strbak "frogmarched" Tyrell to his room, by holding him around the wrist area. According to Scown she also slapped him across the ribs area of his back.
- [168] Scown's evidence about Tyrell falling up the stairs on the Saturday morning and its aftermath is consistent with Strbak's evidence about what Tyrell told her about that incident. Scown and Tyrell had been hosing downstairs, cleaning up the area after a storm and Tyrell fell as he was walking up the stairs. He braced himself for a fall, but fell on his front. He had scuff marks on his legs and when he got to the top of the stairs he told his mother what had happened. He did not cry. Tyrell's account, as separately reported by Strbak and Scown, does not suggest that the fall up the stairs could explain his abdominal injuries, or bruises on other parts of his body.
- [169] As for injuries sustained when Tyrell was in the shower, Scown explained that Strbak went out for about 40 minutes in order to "score pot". He started cooking dinner and suggested that Tyrell hop in the shower. According to Scown, he gave Tyrell a quick scrub over and then walked into the kitchen. He does not recall seeing any injuries but said that he did not look. After Tyrell fell in the shower, Scown went in and picked him up. In his first interview with police on the Monday morning, Scown said that after coming out of hospital the only bruise which Tyrell had was on his arm (presumably the bruise caused by a cannula). He told police that when Tyrell slipped in the shower he heard a bang, ran in there and quickly washed the bubbles off Tyrell. At this stage he noticed "a bruise, like, a bruise on his right shoulder there". He also had bruises on his back and there were a couple on his neck. This evidence is not necessarily asserting

that the bruises were caused by the fall in the shower. Instead, as I understand this evidence, which was put to Scown in cross-examination, Scown only noticed the bruising after the fall in the shower. Scown's evidence in this proceeding is that the marks on Tyrell's forehead were not bruises but they were obviously red marks. There was one particularly noticeable red mark on the top right hand side of his forehead underneath his hairline. Scown could not say whether it was from the fall or whether it was already there. But he noticed it when he went into the shower and saw Tyrell sitting on the shower floor. It was at this point that Scown also noticed an injury to Tyrell's shoulder and upper back. They were small bruises at that stage.

- [170] Scown also gave evidence about the bruise above Tyrell's groin. Scown says that he only noticed it when it was shown to him on the Sunday morning. Strbak was showering Tyrell on the Sunday morning and drew Scown's attention to a large bruise above Tyrell's groin. According to Scown, he commented "there's no way that's normal". Scown's recollection is that Tyrell said something about running into a table after initially saying that he had been kicked at school.

Danial Allan's evidence

- [171] As noted, Danial Allan gave evidence about the bruises which he saw after he visited the unit at around lunchtime on the Saturday, and how by Sunday evening he observed Tyrell to be "covered in bruises".

Medical evidence

- [172] I have already summarised Associate Professor Sullivan's evidence about the number of bruises and their patterns. Dr Ong gave evidence before me about various injuries, including the likely age of certain bruises. He explained in his evidence that the use of colour to determine the age of a bruise is imprecise, and that changes in the colour of a bruise may be site-specific or depend upon individual characteristics of a person. In general, however, the colouration of bruises changes over time and that even after death has occurred a bruise may become slightly more prominent or slightly larger in dimension. In this case some bruising did not become evident until the second day of the autopsy.
- [173] Histological examination assists a pathologist in timing a particular injury and assists in determining whether an injury occurred close to the time of death. However, histological examination of healing processes is not precise. Some histological information may suggest that, from the extent of healing, a bruise occurred at a certain time because of the extent of inflammatory polymorphs followed by lymphocytes.
- [174] Dr Ong considered the injuries that were occasioned to Tyrell's forehead (numbered 3 and 4). His external and internal examination indicated that what appeared to be two separate bruises were in fact associated with blunt force trauma which may have been applied at the same time or at different times. However, the trauma beneath the skin had coalesced to form one big bruise. Injuries 5 and 6 above Tyrell's left eye were red in colour, denoting that they were "fairly recent". By that he meant usually within a day, based upon their external appearance. These bruises were not sampled histologically.

- [175] Dr Ong was asked about the bruise to the right ear (numbered 12 on his diagram and report), which was a purple bruise on the outer rim of the external ear. The bruise to the ear was consistent with blunt force, including a slap, but it could have been caused by pinching when the ear has been pulled. Dr Ong's opinion was that "at least moderate" force would have been required on the basis of a range of mild, moderate and severe.
- [176] Injuries numbered 7 and 9 in the autopsy report, being the bruises on the cheek, were red and were of fairly recent origin.
- [177] Dr Ong gave evidence about bruises to the torso, including the lower abdomen injuries numbered 26 and 27 in his report. Injury 26 was described in the report as a greenish brown bruise 1.5 x 1.5 centimetres on the left lower abdomen. Injury 27 was of a similar colour and size. Histological samples were taken of Injury 26 and analysis suggested to Dr Ong that the bruise was a day to two days' old.
- [178] Dr Ong gave evidence about another bruise to the front of the torso, which lay witnesses had described as the bruise in the groin area. Dr Ong's report described it as a diffuse red bruise with fading margins, 4.5 x 3.5 centimetres on the supra-pubic region. When asked whether he was able to give any indication as to how old the injury was, his evidence was "although it's red, but the margins are fading. So I think it's hours – hours to days".
- [179] Dr Ong gave evidence of bruises to Tyrell's wrists and hands, particularly Injury 42, being a red bruise on the front of his right wrist and other red bruises on his wrists and right palm. Dr Ong's evidence and the photographs of these bruises are consistent with Scown's evidence of the occasion when Strbak frogmarched Tyrell into his room. According to Dr Ong, these bruises were not consistent with any therapeutic intervention and there were no records of any medical interventions at those sites. His evidence was that the bruises were consistent with the child having been grabbed by a hand on that part of his body and being pulled along.

Overview of observations of bruises and injuries that weekend

- [180] Care is required in the analysis of lay and medical evidence about the bruises and other injuries which were observed at different times. The post-mortem examination by Dr Ong was, by its nature, an extremely close analysis compared to the observations which might be made of a child under different circumstances. Next, some of the bruises may have been more prominent by the time hospital staff observed the body late on Sunday night, and by the time Dr Ong conducted his autopsy over the following two days, compared to the appearance of bruises at different times on the weekend.
- [181] Lay evidence about observations of bruising may be ambiguous or imprecise. For example, a witness may say that they saw a bruise on the Saturday, and again on the Sunday. What they may be intending to convey is that they saw a mark on the Saturday, which became a bruise on the Sunday. More generally, the credibility and reliability of particular witnesses about what bruises they saw and when they first saw them is open to question.
- [182] Tyrell's account of how he suffered bruises and injuries also requires consideration. If, for example, he said he sustained a particular bruise when he fell off a bike, or when he ran into a table, this may suggest a source of a particular injury. However, the absence

of independent evidence, by way of observation or report, that he, for instance, fell off a bike either at pre-school on the Friday or at his home on the weekend, casts doubt upon the likelihood of this account, and Strbak thought that the story of him falling off the bike at pre-school was far-fetched. The possibility that he ran into a table and sustained an injury to his groin cannot be excluded. The fact that Tyrell changed his story about how and when he suffered the bruise above his groin is a further reason to doubt either of his accounts, and to suspect that he was concealing the true source of his injury, namely someone he knew and who he did not wish to accuse.

- [183] The medical evidence concerning injuries to Tyrell's face, wrist and hands tends to support Scown's evidence that Strbak slapped Tyrell in the face, and also frogmarched him roughly when taking him to his room.
- [184] As Associate Professor Sullivan's evidence clearly establishes, not all of the suspicious bruises which Tyrell sustained, including the bruise to his groin or the bruises to his abdomen, are likely to have been caused by the fall up the stairs, an incident reported separately and promptly by Tyrell and Scown to Strbak. Some, but not all of the suspicious bruises, could be attributed to the fall in the shower on the Saturday evening. It is possible that a fall in the shower may have initially caused a red mark on Tyrell's forehead, which later developed into a bruise.
- [185] I return to Strbak's statements early in her police interview that when she brought him home from hospital he did not have any marks on him whatsoever, with the exception of the bruise to his wrist caused by the cannula in hospital and some bruising on his ear. It is simply improbable that any bruising to his ear was a result of the fall from the fort, and went unnoticed by everyone except Strbak over the following 12 days. The evidence suggests that it was of more recent origin. I conclude that Strbak gave a false account to police of seeing the bruise on his ear when she brought him home from hospital because she did not wish to reveal the truth, namely that the bruise to his ear and other bruises were sustained after she brought him home from pre-school that Friday afternoon.
- [186] Because I have found Strbak's evidence about when bruises were observed to be so questionable, and because she was prepared to lie to investigators about events, I place no reliance upon her assertion that Tyrell came home from pre-school on the Friday with a number of bruises.
- [187] The medical evidence, in conjunction with other evidence concerning observations of Tyrell when he was in hospital and at pre-school in the week prior to his death, tends to prove that bruises and injuries to his face, head and torso were sustained in the two days before his death.

Assessment of other lay witnesses

- [188] It is unnecessary to describe in detail the evidence given by various lay witnesses, particularly neighbours who heard or observed Strbak and Tyrell either at Bayview Street, Runaway Bay or at Brighton Street, Biggera Waters. Some accounts were given long after the events in question. Some were of a general kind about hearing yelling. A substantial body of reliable, apparently independent, evidence which establishes that Strbak was prone to scream and swear at Tyrell.

- [189] I accept Ms Dyball’s evidence, which I have earlier quoted, about Strbak being “stressed out” when she moved back into the Biggera Waters unit, and of hearing a child’s scream coming from Strbak’s next door unit at around 3 or 3:30 pm on Sunday 24 May 2009. Another witness, Mr Heslop, who lived with his family in a nearby unit, heard at different times, including May 2009, a female yelling at a child, and the child then crying. His partner, Ms Heslop-Burrows, heard similar things and described the female voice as stressed and angry. But she did not regard the yelling as “over the top” or violent. It was what one might expect of a mother who is stressed and yells at her children.
- [190] Mr Vincent, whose unit’s balcony was adjacent to the back of Strbak’s unit at Biggera Waters, would often see Strbak pull up in her car and yell at her boy in a frustrated tone. From early in the evening of Sunday 24 May 2009 he heard “fairly consistent screaming and arguing from the units next door”, but could not say that it was from a particular unit.
- [191] Neighbours at Strbak’s previous residence at Runaway Bay gave evidence about Strbak’s dealings with Tyrell. I found Mr Wrnekinck’s evidence of Strbak swearing at her child “fairly often” to be reliable. He would hear her yelling and the child crying every couple of days. Other witnesses gave evidence of yelling.
- [192] I place little reliance on Ms Brodie’s evidence, since there is the possibility of mistaken identity, and Ms Brodie is not independent. The incident she reported of an act of “extreme yanking” of a child out of a stroller, if it related to Strbak, was not a serious act of violence.
- [193] I accept the evidence of Ms Cremin, who lived in a unit close to Strbak’s unit in Bayview Street, Runaway Bay in early 2009. She was an impressive witness, who gave evidence of Strbak dragging her child faster than he could walk, yelling at him in an angry voice, and always telling him “to get to his effing room”. Ms Cremin would hear slapping, then doors slamming and the child being told to shut up. She would hear this “almost daily when no one else was around”.
- [194] It is important to not place excessive weight on evidence, even evidence from a number of apparently independent witnesses, which proves that Strbak was prone to lose her temper, yell and swear at Tyrell. This is not to condone aggressive language or behaviour by a mother towards a young child in her care. Instead, I should not lightly conclude that someone who was verbally aggressive, and occasionally physically aggressive, in dealing with her child is likely to have inflicted the numerous serious injuries which Tyrell sustained. However, the evidence of neighbours assists in determining certain contested facts.

Findings on contested facts and related findings

Contested fact 17 – abusive and aggressive behaviour towards Tyrell at Runaway Bay

- [195] This contested fact about Strbak’s abusive and aggressive behaviour towards Tyrell when they lived at Bayview Street, Runaway Bay is substantially proved by the evidence of neighbours, including Mr Wrnekinck and Ms Cremin.

Contested fact 19 – Scrown aids Tyrell’s injured arm – Strbak’s cannabis use

[196] Scown's evidence on this matter, which I accept, proves the following contested facts:

“19. Scown attended Strbak's unit at Bayview Street. Scown manufactured a sling for Tyrell using a pillow case. Scown encouraged Strbak to take Tyrell to the hospital. Strbak told him she would do it later as she wanted time to obtain cannabis from Brett Archer.”

[197] The evidence of Scown, which is uncontradicted by evidence from Strbak or any other evidence, is that Strbak used to buy cannabis from Brett Archer. I also accept his evidence that on 11 May 2009 after Tyrell injured his arm in the fall from a fort, Scown had a discussion with her about taking Tyrell to see a doctor, and she said she would “do it after she went to Brett Archer's place”.

[198] On the related issue of Strbak's cannabis use, I accept Jason Cobb's evidence that “she smoked a lot of weed”. When they were together Strbak and Cobb would normally smoke cannabis every night as a form of relaxation. Although Cobb's statement to police dated 8 June 2015 referred to the fact that “Heidi normally smoked weed every night”, this was not necessarily inconsistent with his oral evidence that she was a “regular smoker of weed”, whether it was during the day or night. Mr Cobb went so far as to say that if Strbak did not have to work, she would smoke all day. There probably is some element of exaggeration in this, and his evidence seemingly relates to the period when they lived together. However, there is no reason to doubt that Strbak's cannabis use continued after she relocated to the Gold Coast. Scown and she would smoke cannabis together, and used a bong. When she had access to cannabis she would use it on a daily basis. The following evidence by Scown explains Strbak's behaviour when she did not have cannabis:

“And can you comment upon what her demeanour was like when she wasn't using cannabis, or didn't have access to cannabis?--- Frantic, panicky.

What informed you of that?--- Her body actions and the way she used to carry on.

When you talk about her carrying on, what do you mean by that?--- She's just – it would just be arguing with Jason or arguing with myself.

And that was a differing demeanour to what you observed when she was consuming cannabis?--- Yes, that's correct.”

I accept this evidence, as well as the evidence to like effect given under cross-examination that:

“When she was stoned, yes, she was a good mum.”

Contested fact 25 – the accident with the toy box

[199] I am satisfied that the following disputed facts are proved about the incident on 14 May 2009:

“25. That afternoon Scown had propped open Tyrell's toy box with a toy so that Tyrell could reach in to take toys. Tyrell jammed his hand in

the toy box. Scown assisted Tyrell and he reported to his mother that he had hurt his hand in the toy box.”

- [200] Both Strbak and Scown were nearby when the incident happened. That Tyrell had jammed his hand in the toy box was immediately apparent to them. Tyrell reported what he had done. Scown’s evidence about having propped open the toy box is believable, and the fact that he might have propped open the toy box more securely does not alter the fact that he propped it open with an object which became dislodged, causing the top of the box to land on Tyrell’s hand. Some of the defence submissions and some of the cross-examination of Scown insinuated that there was something sinister about this event, such that the injury to the finger was not an accident. The contemporaneous observations and report suggest otherwise.

Contested fact 29 – Scown seeks medical treatment for Tyrell’s finger

- [201] As to the related dispute in paragraph 29 of the annexure, the evidence establishes that it was Scown, rather than Strbak, who was concerned about the state of Tyrell’s finger and made a call at 6:19 pm to a locum medical service. Phone records show that the call was made on Scown’s telephone, and that Strbak’s phone was available to be used and was in fact used by her at around this time. There is no reason to doubt Scown’s evidence, supported as it is by the telephone records, that he made the call to the medical service. That he did so is consistent with a concern by him for Tyrell’s welfare.

Contested fact 37 – the request by Strbak that Cobb take Tyrell from her

- [202] For the reasons given above I find that over the weekend of 23 and 24 May 2009, Strbak requested Cobb to take Tyrell from her.

Contested fact 38 – the slap on the face

- [203] I am persuaded of this fact, taking account of the seriousness of the allegation.
- [204] Scown reported such an incident to the police when he spoke to them soon after the events in question. His evidence about when the slap occurred and the force that was used to inflict it have varied over time. His evidence to me was that the incident happened when Strbak and Tyrell were sitting at the kitchen table and Tyrell either vomited or was keeping food in his mouth. Scown could not recall precisely when on the weekend the slap had occurred. His recollection was that the slap was to the left side of Tyrell’s face. In one account of this incident he said that Tyrell “got a little bit of a slap across the face”. Scown was insistent in his evidence before me that Tyrell was slapped in the face. He was cross-examined on the matter and I accept his evidence that there was a slap which he observed and that, subsequently, a bruise came up under Tyrell’s eye. It is possible that the slap did not cause the bruise, and that some other application of force at around this time did. However, this does not detract from Scown’s observation.
- [205] I also accept his evidence that the reason given by Strbak for not taking Tyrell to the hospital was because of the bruise which Scown associated with the slap which he had observed.
- [206] The fact that Scown could not be sure whether Tyrell was slapped because he vomited or because he was playing with food in his mouth and appeared to be mimicking a

vomiting action is relatively unimportant. Scown reported the slapping incident to police soon after the event and I am persuaded that such an incident occurred that weekend when Tyrell either refused to eat or was unable to eat.

- [207] Strbak did not give sworn, oral evidence denying that such a slapping incident occurred that weekend.

Contested fact 39 – the frogmarching incident

- [208] I am also persuaded that a day or two before the slapping incident, quite possibly after Tyrell had vomited or was playing with food in his mouth, Strbak lost her temper, grabbed him by the wrist, and frogmarched him to his room. This fact is proven by Scown's evidence and is uncontradicted by evidence given by Strbak. Scown's evidence was that she was frogmarching him and as she walked him into his room she slapped him in the area of his ribs.

- [209] I should add that Scown told police and gave evidence of another incident when Strbak was annoyed with Tyrell when they were in the car together and she slapped him on the legs. The incident in which Strbak slapped Tyrell on the face was, however, the most violent act Scown had ever seen Strbak commit on Tyrell. This was, of course, based upon what Scown had seen and he added in this part of his cross-examination that he was not around all of the time.

Contested facts 40 and 41 – the reason Tyrell was not taken to the hospital or a doctor

- [210] A contentious matter is whether Strbak told Scown that she would not take Tyrell to the hospital because if she did so she would be blamed for the bruise to his face and accused of neglect.

- [211] Such a conversation was not recalled or, at least, not recounted by Scown when he spoke to police on Monday, 25 May 2009. This may be because no such conversation occurred or because Scown did not recall it at the time. Another possibility is that he did not wish to accuse Strbak of causing the bruise to Tyrell's face. I have considered the possibility of whether, in their early statements to police, Strbak and Scown were inclined to minimise matters out of a concern that one or both of them would be accused of child neglect.

- [212] Scown's evidence before me is that Tyrell was vomiting constantly throughout Sunday and the vomit had a bile colour. Tyrell was very sick and, according to Scown, he told Strbak that they should take him up to the doctor. According to Scown, she said that she did not want to take him up to the doctor "because of the bruises on his face", and she said words to the effect that she would get "done for neglect". Under cross-examination Scown confirmed that Tyrell was sick and unable to eat. He had been vomiting and, as Scown said in his evidence "the next step if a kid's vomiting – hospital".

- [213] Scown's evidence on this matter was convincing. I find it likely that he did suggest that Tyrell be taken to the hospital or to a doctor. Although Strbak told others that she had intended to take Tyrell to the hospital late on Sunday night after she returned, and if his condition did not improve, I am unconvinced that she had such an intention. The evidence is clear that Tyrell had been vomiting all day and any person in Scown's

position would have suggested to the mother's child that he receive medical attention. I find that Scown suggested this. I also find it likely that in response Strbak said that she did not want to take him to the doctor because of the bruises on his face and that she would be accused of neglect. However, there may have been additional injuries and bruises that were a concern to Strbak and which prompted her refusal to obtain medical assistance for her son. However, the bruise that emerged on Tyrell's face was the reason she gave to Scown for not seeking medical treatment.

Contested fact 42 – the fall on the stairs

- [214] All of the evidence supports the conclusion that as Tyrell made his way back up the stairs to the unit on the morning of Saturday, 23 May 2009, he fell. This fact appears to be not admitted because Strbak did not directly observe the fall. However, it was soon reported to her by both Tyrell and Scown. As earlier noted, Scown's evidence is that Tyrell missed a step, tripped up the stair and fell forward. He braced himself for falling, but ended up lying on the stairs. He then went up the stairs, inside and told his mother what had happened. I accept this evidence. For completeness I add that if Scown had pushed Tyrell up the stairs and caused him to fall (and there is no evidence that he did, and this proposition was not put to Scown), it is likely that Tyrell would have reported it to his mother and others, just as he had reported the kick in the backside incident. Strbak's record of interview confirms what she was told by Tyrell about falling up the stairs and I find this is what happened.

Contested fact 44 – Strbak seeks drugs on the Saturday night

- [215] This matter is only contested to the extent that the paragraph might be read as meaning that Strbak in fact obtained cannabis from Brett Archer that Saturday night. The parties agree that on Saturday evening she left the home *in order* to obtain cannabis from Brett Archer. Strbak did not tell police her real reason for leaving the unit that night, and in fact lied to police about her purpose.

Contested fact 45- the fall in the shower

- [216] The evidence supports the conclusion that Scown arranged for Tyrell to have a shower that evening while Strbak was out. I accept Scown's evidence that he left Tyrell in the shower while he cooked dinner, that while doing so he heard a bang and then went into the bathroom where he saw Tyrell on the floor of the shower. My finding that this was the course of events is supported by Tyrell's report of the incident to his mother. Strbak explained in her record of interview that Tyrell told her that he had been covered in bubbles, that Scown had left the room and Tyrell had fallen over when he was rinsing himself off.

Contested facts 49 and 55 – discussions about the bruise above Tyrell's groin area

- [217] The evidence establishes that on Sunday, 24 May 2009 Scown and later Danial Allan were shown the large bruise that was above Tyrell's groin area, and that he said words to the effect that it was "okay for Mr Timmy to touch him". The meaning of what he said is not clear, but nothing is said to turn on it. A reasonable interpretation is that he was referring to the fact that a pre-school teacher would be allowed to touch him in certain situations, but that he understood that other most adults could not.

Contested fact 53 – vomiting on the Sunday

- [218] This contested fact about what Allan noticed on the Sunday is supported by Danial Allan’s witness statement and oral evidence. Allan saw Tyrell vomit many times on the Sunday. At some stage that weekend Strbak told Allan that Tyrell was sick from the antibiotics he was taking for his hand injury. Of course, he had been discharged from hospital some days earlier and been well enough to attend school on the Friday.
- [219] It is quite possible that Strbak told Danial Allan that Tyrell had been on antibiotics and had been sick in hospital. What she said may have implied that Tyrell was vomiting that weekend because of the effects of antibiotics. However, she told police that he had stopped antibiotics the day before he complained of a sore stomach.
- [220] The evidence also establishes that Tyrell vomited several times on the Sunday. Scown thought it was 10 times. Strbak told police she thought it was more than six times. The import of their evidence is that he could not keep food or liquid down throughout the day. Strbak said in her second interview that Tyrell was sitting on a chair. The evidence is that he was inactive that Sunday.

Contested fact 58 – Strbak’s departure to find drugs

- [221] It is very likely that after Tyrell’s death, Strbak told Jason Cobb that she and Danial Allan had gone to Bradley Allan’s place to obtain cannabis, leaving Scown home alone with Tyrell. This is the fact of the matter, as revealed in a covert recording of a conversation between Strbak and her step-brother, Bradley Allan. Mr Cobb confirmed that Strbak told him that she had gone to Bradley Allan’s to obtain cannabis.

Contested fact 59 – the emergency on the Sunday night

- [222] Scown’s evidence, the evidence of eye witnesses who attended the emergency and the contents of the 000 call establish these matters about how Scown heard a “gargling noise” from Tyrell’s room and tried to revive him, after which he tried to call Strbak and then contacted 000.

Contested fact 76 – the “smiley” injury to Tyrell’s leg

- [223] I will defer making findings in relation to facts 70 and 74 which are the critical issues of whether Strbak applied blunt force trauma to her son, causing his fatal abdominal injuries, and whether Strbak inflicted other non-accidental injuries on the weekend of 23 and 24 May 2009.
- [224] Contested fact 76 concerns the injury caused to Tyrell’s leg by a heated cigarette lighter. The age of this scar was imprecise. Dr Ong thought it was at least four to six weeks old.
- [225] Jason Cobb had seen Strbak inflict such a superficial scar upon herself some years earlier when they were living together at Lightning Ridge. He recalled the occasion when they were sitting out the back smoking cannabis, but he could not be sure whether this occurred before Tyrell was born or not. His evidence about observing Strbak inflict such a scar upon herself was convincing. I am satisfied that Strbak inflicted such a scar upon herself some years earlier, and that over the years such a superficial scar may have faded.

- [226] It was not put to Scown during his cross-examination that he caused the “smiley” injury to Tyrell’s leg. In fact, it was not put to Scown that he was responsible for any of the fatal or non-fatal injuries that were detected upon post-mortem examination of Tyrell. The reason for this is that there is no sufficient evidence to positively put such a case. Strbak had not observed him injure Tyrell. She did not hear any report from Tyrell that Scown had inflicted the smiley face burn to his leg. If Scown had inflicted such a painful injury then it seems likely that Tyrell would have reported it to his mother, and possibly others such as his father or grandmother. One reason for this is that Tyrell did not conceal the fact that Scown had kicked him in the backside after Tyrell urinated on the carpet in Scown’s flat. Scown self-reported this incident and Tyrell told his mother and his grandmother about it.
- [227] In any event, if one hypothesises that Scown or someone other than Strbak inflicted the smiley face scar on Tyrell’s leg, then one would expect Strbak to have observed it when bathing her son, at least when the burn scar was fresh, and to have asked her son how he sustained it. Strbak told police that she looked at her son’s body when she showered him each morning.
- [228] Strbak lived with her son at the time the scar was sustained. It was caused by the heated metal top of a cigarette lighter. It was intentionally inflicted, but seemingly not reported by Tyrell to any adult.
- [229] It is a serious thing to conclude that a mother could deliberately cause even a superficial burn scar to a four year old child’s leg. Even if the burn was relatively superficial, it would be a cruel thing to do and cause the child pain.
- [230] Being grossly and criminally neglectful of a child, as Strbak admittedly was on the weekend of 23 and 24 May 2009 does not, by itself, prove that she was likely to deliberately inflict injuries to her child. However, it says something highly adverse about her disposition to her child on occasions, particularly at times when she was not sedating herself with cannabis.
- [231] No-one says that they saw Strbak inflict the burn mark on her child’s leg. Proof of contested fact 76 depends on circumstantial evidence. The circumstantial evidence includes Strbak’s infliction of a similar scar upon herself and the opportunity which she had to inflict her child with such a scar when she was alone with him. It includes the evidence of some neighbours of her aggressive tone and behaviour towards Tyrell. Leaving aside the possibility of some kind of bizarre branding exercise, the infliction of such a burn may have been the product of frustration or anger or punishment for something which Tyrell was thought to have done or in fact done. I accept Scown’s evidence of the occasions upon which he observed physical violence perpetrated by Strbak upon Tyrell out of frustration, particularly the slap to the face incident and the frogmarching incident.
- [232] Strbak had an opportunity over weeks to observe the scar and to inquire of Tyrell how he sustained it. It is probable that she observed the scar when she showered him or on some other occasion. There is no evidence from Strbak to displace the probability that she saw the scar. There is no evidence from Strbak about how, when and why Tyrell sustained this scar. The circumstantial evidence, together with the absence of evidence from Strbak, leads me to conclude that she probably caused the “smiley” injury to her

son. I find that she did so by applying the heated metal part of a cigarette lighter to his skin and that this caused him significant pain at the time.

- [233] That Tyrell seemingly did not report his mother for inflicting such an injury suggests something about his likely reluctance to report other injuries she may have inflicted upon him.

Analysis of the ultimate contested issues

- [234] The ultimate contested issues are whether Strbak inflicted non-accidental injuries, and whether she applied the blunt force trauma which caused the fatal abdominal injuries (contested facts 70 and 74).

- [235] There is no direct evidence that Strbak inflicted those injuries; and no direct evidence that Scown inflicted them. Other possible causes of suspicious bruises, including the large bruise above the groin, exist. However, neither party urges the view that all or some of these injuries were caused by, for example, a fall from a bike at pre-school on the Friday or a fall from a bike at home. Counsel for the defendant accepted that if Tyrell had fallen off a bike and suffered the kind of injuries that gave him the bruise above the groin, then he probably would have ended up crying and promptly told either a pre-school employee or his mother that he had hurt himself.

- [236] I accept the prosecution's submissions that there is no reliable evidence that there was an injury to the duodenum associated with a playground event or an accidental event on the Friday. The prosecution notes in this regard that Strbak, in her second interview on the afternoon of Monday, 25 May 2009, told police that her son did not fall over and if he had done something to his stomach "I am sure he would have told me. He would have been crying". Tyrell did not report any incident that happened at his pre-school on the Friday to his mother when she collected him that afternoon or promptly report any accident that could account for his abdominal injuries or the injury to his groin. When pressed on the Sunday as to how he came to bruise himself in the groin, he came up with conflicting explanations of a fall on a bike, or running into a coffee table and may have even suggested that he was injured by another child at pre-school. The evidence does not support the conclusion that he was injured at pre-school on the Friday.

- [237] The evidence concerning the appearance of bruises and marks on the Saturday and Sunday, combined with the absence of contemporaneous reports of accidents or incidents at pre-school or at home on the Friday, supports the conclusion that the suspicious bruises and injuries were sustained on the weekend when Tyrell remained at home in the presence of Strbak, Scown or Danial Allan. Some bruising was apparent to Danial Allan when he arrived at the unit on the Saturday afternoon. This does not, of itself, exclude the possibility that he inflicted the fatal injuries to Tyrell when he was alone with him on the Saturday and then again on the Sunday. However, neither party advances this as a convincing hypothesis. The evidence narrows the potential sources of the non-accidental injuries, including the fatal injuries, to Strbak and Scown.

- [238] I find that the fatal blunt force traumas were caused by human intervention, rather than a fall on a step, a bicycle handle or anything else.

- [239] Neither party submits that I should conclude that Strbak was responsible for some of the injuries that were intentionally inflicted that weekend, and that Scown was responsible

for others. Each contends that I should proceed on the basis that the same person inflicted both the fatal abdominal injuries and other serious, non-accidental injuries. I am not bound by the position adopted by the parties, and therefore have considered the possibility that Strbak and Scown independently and separately inflicted injuries to Tyrell that weekend. While this possible scenario presents an interesting and more complex story, there is little to commend it. The alternative scenario I have identified was said by counsel for the defendant to be “an affront to common sense”, in that it is highly improbable that two different people would injure Tyrell in the stomach in the same place on the same weekend. The prosecution adopts the same position. I accept the parties’ submissions and find that the blunt force traumas which caused Tyrell’s death were inflicted by the same person.

[240] The prosecution has the onus of proving, on the balance of probabilities, that Strbak, rather than Scown, inflicted the fatal abdominal injuries. A high degree of satisfaction is required before I can find that allegation proven. It is convenient, in the context of the prosecution’s task, to identify the defence arguments which it must surmount. I have summarised them at the start of these reasons. In oral submissions, defence counsel submitted that I could not be satisfied that the only rational inference is that Strbak must have inflicted the injuries. While such a submission is reflective of the task facing the prosecution in a circumstantial case in which the standard of proof is beyond reasonable doubt, it conveniently captures the thrust of the defence submission that, on the state of the evidence, I cannot say “Well, she must have done it”.

[241] Expressed differently, the defence submits that, where I am left with two people each denying that they inflicted the fatal injuries, the state of the evidence is such that I could not be satisfied to the requisite standard that Scown did not inflict the injuries. The essential defence submission is that, given the unsatisfactory state of the evidence, we will never know what happened, such that I cannot be satisfied that the fatal injuries were inflicted by Strbak.

[242] As appears from my findings in relation to contested facts, and from my assessment of the evidence, including the sworn evidence of witnesses, I have accepted Scown’s evidence about a number of important matters, including the slapping incident that weekend and the earlier frogmarching incident. I also accept his evidence in which he denies having inflicted the fatal injuries. Having accepted Scown’s evidence, and made other findings of fact about various accidents and incidents, I exclude the possibility that the fatal injuries were caused by an accident, such as the fall on the stairs on the Saturday morning. Having accepted Scown’s denial, having eliminated accidental causes of the fatal injuries, and having excluded other possible authors of intentionally-inflicted injuries, I conclude that Strbak probably inflicted the injuries, including the fatal injuries, that weekend. This finding is reached after an assessment of:

- (a) the strength of the circumstantial case against Strbak; and
- (b) the strength of the circumstantial case against Scown.

These two matters are not independent. The strong circumstantial case against Strbak necessarily reflects a weak circumstantial case against Scown. However, even a relatively weak circumstantial case against Scown might have been sufficient to not have the degree of satisfaction required to find the prosecution case proven, even on the balance of probabilities.

[243] I will outline my assessment of the relative strength of the circumstantial cases, before summarising my reasons for concluding that the prosecution has proven its case.

The circumstantial case against Strbak

[244] The circumstantial case against Strbak relies particularly upon:

1. The infliction by Strbak of non-fatal injuries, including two particular acts of violence observed by Scown and the infliction of the “smiley” burn injury to Tyrell’s leg;
2. Strbak’s demonstrated aggressiveness towards Tyrell on occasions;
3. Evidence that she was aggressive when not sedated by cannabis, and that she sought but did not obtain cannabis that weekend;
4. The exasperation she expressed in parts of her police interview over recent events involving Tyrell;
5. The fact that she concealed Tyrell’s true condition that weekend from both her mother and from the child’s father when they spoke to her by telephone;
6. The fact that she deliberately refrained from seeking medical assistance for Tyrell, despite his state, and despite Scown’s suggestion that she do so;
7. Her unexplained request to Jason Cobb that weekend that he take Tyrell from her, being a request which either stated or strongly suggested that she “could not handle him”.

Based on these and other matters, the prosecution submits that the compelling inference is that Strbak inflicted injuries to her son. The medical evidence and the reliable evidence about Tyrell’s condition that weekend support the conclusion that she applied blunt force trauma which caused an initial tear to the duodenum about 36 hours before Tyrell’s death, as well as a second abdominal injury in the hours leading up to his death. The evidence does not suggest that the second injury could only have taken place during the period of about 30 minutes when Scown was alone with the child on Sunday night.

[245] As against the strong circumstantial case presented by the prosecution, I must weigh other evidence, including evidence that in the weeks and months prior to Tyrell’s death he appeared at pre-school to be well cared for and well-presented. On occasions Strbak appeared to Jason Cobb to be over-protective of Tyrell. Further evidence of her care for him is that she would seek her mother’s advice. While there is evidence from neighbours that Strbak would verbally abuse and act aggressively towards Tyrell, Scown did not see much evidence of physical violence when he visited the Runaway Bay address or during the relatively short time that he lived at the Biggera Waters address. He could only nominate three incidents, one involving a slap to Tyrell’s legs when Strbak was driving one day, the frogmarching incident and the slap on the face on the Saturday night. Accordingly, this is not a case in which there is a lengthy history of physical violence and neglect by a mother of an infant.

[246] Also to be weighed against the strong prosecution circumstantial case is the possibility that, despite the inferences to be drawn from the matters relied upon by the prosecution and my acceptance of Scown's denial, Scown might have inflicted the fatal injuries.

[247] I turn to the seven matters which I have identified as important parts of the prosecution case.

Infliction of non-fatal injuries

[248] The fact that Strbak was violent towards Tyrell on the weekend he died, and some time earlier had deliberately burnt and scarred his leg, is a significant piece of circumstantial evidence. However, I should avoid jumping to the conclusion that because she inflicted other injuries, she must have inflicted the far more severe force which proved fatal and other, non-fatal injuries, such as the bruise above his groin.

[249] Defence counsel submits that, even if I am satisfied that the "smiley face" scar was inflicted by her, it is, at worst, "an immature though cruel thing to do, but not indicative of a past intent to seriously harm the child". As for the slap on the face, in his initial police interview on 25 May 2009, Scown did not suggest that it was a very forceful blow. Instead, it was depicted as a frustrated slap. Such a slap would not necessarily have caused the bruising which became apparent on his cheek. In later statements about the slap, Scown suggested that it was delivered with more force than he had originally told police. It is possible that his original account to police of the slap tended to minimise the force that was used. It is also possible, given its proximity in time to the reported event, that it was accurate, and that his recollections, years later, were the product of reconstruction, and less reliable. In the circumstances, I am prepared to proceed on the basis which is most favourable to Strbak, namely that the slap was not extremely forceful, and may not have been responsible for all of the bruising that was seen the next day on Tyrell's face.

[250] Whilst the prosecution relies upon the inference that the slap to the face on the Saturday night caused the bruising which was observed to Tyrell's face on the Sunday, it relies upon the slap to the face, the frogmarching incident and the infliction of the smiley face scar more generally as illuminating the true nature of the relationship between Strbak and her child, and as supporting the inference that she was the source of the non-accidental injuries inflicted to her son on the weekend, including the injuries which caused his death.

Previous demonstrations of aggression towards Tyrell

[251] As noted, there is evidence of Strbak behaving in an aggressive manner towards Tyrell on occasions. These were either heard or observed by neighbours. Her immediate neighbour, Ms Dyball described Strbak being "stressed out" after she moved back into the Biggera Waters unit. Previously, at her Runaway Bay unit, Ms Cremin frequently heard Strbak swearing at Tyrell, sounds of slapping and doors slamming, with the child crying and screaming.

Strbak's behaviour when not using cannabis

[252] I accept Scown's evidence about Strbak's frantic conduct when she was not using cannabis.

Strbak's exasperation at the time

[253] Some insight into how exasperated Strbak must have felt by the weekend emerges from one part of her interview with police. Strbak recounted what she said after she was told that Tyrell had fallen over in the shower. She told police:

“I said ‘What are we going to bloody do with ya?’ They were my words ‘cause he, just, the last week, if it hasn’t been something, it’s been something else. For the last two weeks, if it hasn’t been his arm, it’s been his finger. If it hasn’t been his finger, it’s been falling up the stairs. If it hasn’t been the stairs, it’s been the shower.”

[254] Whilst I have reservations about the reliability of parts of Strbak’s statements to police, this passage conveniently summarises what must have been the accumulated stress and frustration which Strbak experienced in the days leading up to Tyrell’s death: a trip to the hospital where his arm was placed in a cast; a finger injury which became infected, necessitating admission to hospital for days; a fall up the stairs on the Saturday morning and then a fall in the shower on Saturday evening.

Concealment of Tyrell's true condition from Strbak's mother and the child's father

[255] This is an important part of the prosecution’s circumstantial case.

[256] The constellation of injuries to Tyrell’s face, head and body were concealed by Strbak from her mother. Those injuries include injuries to the head which Strbak said she saw on the Saturday and which Danial Allan also saw on the Saturday, and which therefore cannot be attributed to the shower incident on the Saturday night.

[257] As the learned Crown prosecutor submitted, the evidence revealed a failure by Strbak to disclose to her mother, a nurse and who she normally looked to for advice, the numerous bruising injuries to Tyrell and just how sick Tyrell had become by late on the Sunday. As was submitted, “the failure to inform her mother is a remarkable one, irrespective of her failure to inform authority”.

[258] The failure arises in the context of almost daily telephone contact with her mother during which they would discuss Tyrell’s wellbeing. While Strbak may have told her mother about the fall up the stairs and the fall in the shower, she did not disclose the extent of his bruising or seek advice about what she should do.

[259] In addition, Strbak has not provided an explanation for the non-disclosures upon which the prosecution relies. Even at this late stage, there is no such explanation, for example, some assertion that Scown prevailed upon her to not disclose matters to her mother or others. In the absence of any explanation for Strbak’s remarkable non-disclosure to her mother of the nature and extent of Tyrell’s injuries and illness, I have considered the possible explanation that Tyrell did not appear to Strbak to be as injured or as ill as he in fact was. This is the thrust of parts of her statements to the police. However, in circumstances in which she lied to police and was prepared to lie to the CCC, I can place little reliance upon statements she made to police about his condition, or assertions that she intended to take Tyrell to hospital if his condition did not improve.

[260] Just how parlous Tyrell’s condition was emerges from the evidence of Scown. Tyrell’s condition that Sunday prompted him to suggest to Strbak on two occasions that Tyrell

receive medical treatment. I found Diane Strbak's assessment of Tyrell's condition when she spoke to him on the telephone on the Sunday unreliable, and I do not rule out the possibility that in protecting her daughter's interests in this proceeding she has deliberately understated what she understood to be the child's condition. Danial Allan's initial statements to police are inconsistent with Diane Strbak's account of how well Tyrell was. In his initial police interview he remarked how very quiet Tyrell had been and how, on the Sunday night, he was "mumbling". I find this account of Tyrell's condition on the Sunday night more reliable than parts of Danial Allan's evidence before me and later statements which tended to suggest that Tyrell was not that unwell and talking freely when Danial Allan departed the unit on Sunday night.

- [261] The medical evidence indicates that by that stage Tyrell would have been in great pain, and not just a little bit tired as Diane Strbak's evidence suggested. When Jason Cobb spoke to Tyrell for the last time on the Saturday evening, Tyrell sounded "tired and lethargic". All of the evidence is that his condition declined during the Sunday. When Strbak spoke to Jason Cobb from the payphone on the Sunday night, she refused to allow him to speak to Tyrell, saying that he was too ill to talk.
- [262] The medical evidence, Scown's observations and other evidence suggest that Tyrell was very ill by late on the Sunday. Despite this, Strbak did not report his true condition to her mother. In addition, and for reasons which have still not been explained by Strbak, she did not disclose to her mother the extent of bruises and other injuries that could be observed at that time on Tyrell's body.
- [263] The overwhelming inference is that Strbak did not do so because to tell the truth about Tyrell's injuries and his true condition would implicate her. She wanted to conceal the injuries which she had caused.

Deliberately refusing to seek medical treatment

- [264] A similar strong inference is derived from my finding that Strbak failed and, indeed, refused to take Tyrell to the hospital or to a doctor because of the bruises which were then apparent and her concern that she would get "done for neglect". In the absence of any contradictory sworn evidence from Strbak on the point, a reasonable inference in the circumstances is that she did not want doctors, government authorities and police investigating the injuries which she had inflicted.

The unexplained request that Cobb take Tyrell from her

- [265] Unexpectedly that weekend, Strbak asked Jason Cobb to take Tyrell from her. The inference drawn by Cobb at the time was that she was not coping with Tyrell. She may even have said "I can't handle him" or words to like effect. If she did not say those words then Jason Cobb drew that inference, which was an obvious one in the circumstances.
- [266] Defence counsel submitted that whilst I might have some concerns about Jason Cobb's evidence of Strbak saying "come and get him" and suggesting that she could not handle him, such a conversation does not prove that she had done something seriously wrong or that, if he did not come and get the child, she would. Strbak does not deny in evidence having said words to the effect "come and get him". According to defence counsel, that conversation takes the prosecution case "nowhere".

[267] I cannot agree. Viewed in isolation, an unexpected request by a mother to her estranged husband to take custody of a child might simply suggest that the mother needed a break and thought that the child's welfare was best served by transitioning custody for a while. However, the relevant conversation cannot be viewed in isolation. The father was not living just down the road. The transition would have required Tyrell to leave his pre-school and be a 10 hour drive from his mother. The request was made on the weekend, and at a time when both Strbak and Danial Allan had observed bruises on Tyrell. Strbak did not tell the child's father about the bruises when she spoke to him on various occasions that Saturday, or even on the Sunday night when she spoke to him from a payphone. Viewed in the context of all of the evidence, I am not persuaded that the request to "come and get him" was benign. In the circumstances, it suggests more than some exasperation by the child's mother. Strbak has not given evidence about the call or what prompted it. This makes me more inclined to find that she made the request because she knew she had done something seriously wrong in inflicting injuries to Tyrell, and that she was so stressed and frustrated that there was a risk that she would inflict further injuries upon him.

Overall assessment of the prosecution case

- [268] The prosecution case, including the seven points which I have summarised, presents a compelling circumstantial case that Strbak inflicted serious injuries that weekend on her son, including the fatal injuries. Strbak was prepared to conceal from her own mother and the boy's father what she had done. Her lies to police, including what she told police about the bruise to Tyrell's ear, is indicative of a consciousness on her part of her responsibility for the injuries which she had inflicted upon her son.
- [269] Before turning to the circumstantial case against Scown, it is appropriate to consider other matters which might be said to weigh against the prosecution's circumstantial case. As noted, these include evidence of Tyrell being well-presented and well-fed when he attended pre-school. Scown described her as a good mother when she was using cannabis as a means of addressing her anxiety. Although his evidence was that Strbak had a different demeanour when she was not consuming cannabis, and that during those times she would be frantic and panicky, his evidence that otherwise she was a good mother remains. He told police soon after these events that she was a good mother, and did not qualify this by saying that she was only a good mother when she was on cannabis.
- [270] The prosecution does not seek to prove that Tyrell was subjected to a lengthy period of serious physical violence or neglect during the weeks leading up to his death. Instead, it relies upon Scown's evidence of some particular incidents, and a variety of evidence from neighbours to indicate that Strbak was prone to verbal aggression towards her son and occasionally assaulted him. The overall picture then is a complex one, of someone who was a good mother at times but was prone to aggression, particularly when deprived of the cannabis upon which she relied.
- [271] A revealing matter is that, with encouragement from Scown, Strbak sought medical assistance for Tyrell's arm injury on 11 May 2009 and for his infected finger on 16 May 2009. Both injuries were accidental and both were less serious than the bruises and other injuries which Tyrell sustained on the weekend of 23 and 24 May 2009. Accordingly, one has the case of a mother who, with prompting from Scown, seeks appropriate treatment for accidental injuries to her child. It is unlike a case in which there is a habit of not seeking medical assistance when it is required. By contrast, Strbak did not seek medical treatment for Tyrell's injuries and acute and prolonged vomiting on the weekend of 23 and 24 May 2009. This was despite Scown twice suggesting that Tyrell receive medical treatment.
- [272] I do not accept that Strbak did not seek treatment because she thought that Tyrell's condition was one that did not require assistance. She did not seek assistance from doctors for the same reason that she did not seek advice and assistance from her own mother. She chose to conceal Tyrell's condition from her mother, from the child's father and from doctors who might treat it. In circumstances in which Strbak had previously sought medical assistance for less serious, but accidental injuries to Tyrell, the inference is that she did not seek treatment on 24 May 2009 because she knew that investigation into Tyrell's injuries would implicate her as the person who perpetrated them. I appreciate that this is a very serious finding. However, in the absence of any sworn explanation by Strbak for her failure to disclose Tyrell's true condition, and to seek treatment for him, it is the conclusion which I am satisfied should be drawn.

The circumstantial case against Scown

[273] By way of a similar summary, and noting again that the defence carries no burden of proving a circumstantial case against Scown, I consider the strength of the circumstantial case against him. Its elements include:

1. His act in kicking Tyrell in the backside in mid-April 2009;
2. Inconclusive evidence of an open-handed smack to Tyrell's head;
3. Aggressive acts towards adults on other occasions;
4. Suspicions in respect of the shower incident;
5. Other accidents that occurred after his arrival on the scene;
6. The possibility that the second blunt force trauma to the abdomen occurred when he was alone with Tyrell on the Sunday night;
7. The defence submission that men are more likely than women to punch somebody in the stomach.

The kick in the backside

[274] This episode places Scown in a bad light, even if his impulsive action was provoked by Tyrell's bad behaviour in urinating on Strbak's carpet after being asked a couple of times to use an available toilet. The force which Scown used is uncertain. It was sufficient to leave a bruise which became diffuse. Strbak reprimanded Scown over the incident. For what it is worth, she did not report this incident when she was initially interviewed by police. In fact, she told them how good Scown was in his treatment of Tyrell, and how much Tyrell liked him.

[275] Whilst not seeking to excuse Scown's action in kicking Tyrell in the backside, the prosecution points out that Scown admitted his action to Strbak immediately after the event, and also voluntarily disclosed this incident to police. The prosecution also points to the fact that Tyrell reported the incident both to his mother and to his grandmother.

The disputed open-handed slap

[276] Jason Cobb gave evidence to the CCC in 2015 that Tyrell had told him something like "Matt slapped me in the head", and that Tyrell demonstrated this by using an open palm and a sweeping motion to the top of Jason Cobb's head. The circumstances in which this slap allegedly happened were not detailed, so as to explain whether such an action was a form of discipline for misbehaviour or excessive force used in rough play. There is evidence of Scown engaging in rough play with Tyrell and also with his own son. In any case, Jason Cobb's recollection is that he spoke to Strbak first who said that Tyrell was just making it up, and then telephoned Scown. Cobb's evidence is that a verbal argument developed with Scown accusing him of being "a shit father", using a term of racial abuse and saying things like "You're just a fucking pussy anyway". The sequence in which Jason Cobb spoke to Strbak and then Scown was unclear. His earlier statement suggested that he spoke to Scown first and then to Strbak. His evidence before me was that it was in the other order.

- [277] The verbal argument between Scown and Jason Cobb was part of a pattern of acrimony. Scown felt that Cobb called Strbak too often. In the week before Tyrell's death, Jason Cobb sent a text message to Strbak suggesting that she take better care of her son "instead of that fuckwit you're with". Strbak sent a text to Cobb that was threatening. It is apparent that there was back and forth text messaging between the two. Scown described it as "constant bicker between me and him". Scown denies having had a conversation with Jason Cobb in which it was alleged that he had hit Tyrell in the head. His evidence is that the question was not raised with him, and, if it had been, he would have said that it was Heidi. In July 2015 when questioned by police, Strbak denied that Cobb had spoken to her about Scown hitting Tyrell in the head and denied that Tyrell had reported anything like that to her.
- [278] Given the different versions of events, the generally favourable view I take of the evidence of both Cobb and Scown and the vagaries of memory, I think it likely that Jason Cobb did raise some allegation with at least Strbak, based upon what Tyrell had told him, about the open-handed slap to the head. Any subsequent call by Cobb to Scown probably rapidly degenerated into an argument, rather than a discussion, about the specific allegation.
- [279] It seems likely that Tyrell told his father on more than one occasion that he wanted to "go home" with Cobb, by which he meant go back to Lightning Ridge and live with his father. I accept Jason Cobb's evidence that Tyrell gave an account of an open palm slap to the head, and accused Scown of doing this. Whether Scown engaged in such conduct, and the circumstances in which he did so, cannot be established on the evidence. However, the making of the allegation itself raises concerns about Scown's treatment of Tyrell. The prosecution's submission on this aspect is that if such an act occurred, then it was inappropriate, even if the by-product of rough play. The prosecution submits that it is not a significant piece of circumstantial evidence. Tellingly, if such an incident occurred, Tyrell reported Scown to his father. By contrast, he did not report to his father, his mother or his grandmother any assault by Scown in the days prior to his death.
- [280] In the present context it is relevant to consider other evidence about the nature of the relationship between Tyrell and Scown. There is evidence that on the morning of Saturday, 23 May 2009, Tyrell went to help Scown with cleaning up downstairs. For what it is worth, Strbak told police that Scown treated Tyrell well and that Tyrell liked Matt.

Aggressive acts towards adults

- [281] The defence points to aggressive behaviour by Scown on other occasions. In June 2008 Scown was involved in an incident at the home of his father. His father was in a relationship with Ms Rebecca Brodie, and at the time Scown did not get on with her. Scown says that he was intoxicated at the time of the incident. Brodie in her evidence before me did not profess to have a clear recollection of the incident. However, it led to police being called and an AVO being taken out against Scown. The allegation was that Scown arrived at his father's place and had a verbal argument with him. He was alleged to have armed himself with sticks and yelled abuse at Ms Brodie. Scown denied threatening her but admitted going into the unit. Although he could not remember the matter well because he was intoxicated, he thought he probably picked something up from outside. The police were called. Scown subsequently settled his differences with

Ms Brodie, who, along with Scown's father, visited him when he was in jail after being charged over Tyrell's death.

- [282] The second incident relied upon was an episode in which Scown gave Danial Allan money to purchase cannabis and Danial Allan stole the money and lied to Scown about the circumstances under which the money came to be lost. Scown's evidence was that this was the third occasion upon which Danial Allan, who he had given a job, had stolen money from him and then lied to him. They ended up in an altercation and Scown threw a punch at Allan.
- [283] The acts of aggression which Scown displayed in June 2008 in the context of a family dispute, and his physical fight with Danial Allan at some uncertain time in the circumstances that have been described, put Scown in a bad light as someone who was prepared to act in a physically aggressive manner, at least towards adults, when intoxicated or when provoked. Such discreditable conduct is a relevant matter in assessing the circumstantial case against Scown. However, the fact that on two occasions Scown acted as he did towards adults does not make it likely that he punched a defenceless child.
- [284] Reliance was also placed upon an incident in 2009 when Scown lost his phone and was frantically searching for it in the back of his car. He may have thrown refuse and other items out of the car in his search for it. According to one neighbour, his behaviour and yelling frightened Tyrell.
- [285] As against that episode, none of the neighbours who gave evidence reported hearing Scown yell at Tyrell or at Strbak. Instead, they heard Strbak's yelling at Tyrell and, in the case of Ms Cremin, overhearing a slapping noise when Strbak was alone with Tyrell in her unit.

The shower incident

- [286] The fact that Tyrell suffered an injury when he was in the shower on the Saturday night, at a time when he was alone in the unit with Scown, prompts suspicions. However, as outlined earlier in relation to contested findings of fact, the contemporaneous reports both by Tyrell and by Scown was of Tyrell slipping over whilst unsupervised and when Scown allowed him to have a "bubble shower". Scown observed a red mark on Tyrell's forehead and when examining him at the same time noticed other marks. Scown's evidence was not that each of these marks were caused by the fall in the shower. Strbak's account of the incident did not suggest that all of the marks on Tyrell's head or any part of his body was caused by the slip in the shower.
- [287] In light of the evidence, including the contemporaneous reports, I have earlier found that Tyrell slipped in the shower. It is far more probable that he slipped in the shower (as he had done before) because he was left standing up to have a bubble shower without adequate supervision against slipping on the bubble liquid. Whilst the incident was relied upon by the defence as suspicious, I have concluded that it was an accident. Scown gave a plausible explanation of the incident, and his account was supported by contemporaneous reports, including a report by Tyrell to his mother soon after the incident about what had happened.

Other accidents

- [288] In his submissions, defence counsel made the rhetorical point that bad things happened to Tyrell after Scown came on the scene. Things were said to have dramatically changed once Scown came into the house. These were allusions to accidents, particularly the accident with the toy box lid and the fall up the stairs, coupled with the fall in the shower. I acknowledge that in a circumstantial case a series of apparently accidental events may arouse suspicions and the conclusion that not all of the events could have been accidental, based upon the opinion that no-one could be so unlucky. Whilst taking account of that type of reasoning, I am satisfied that the toy box incident, the fall up the stairs and the fall in the shower were accidents.
- [289] As to the general point about matters changing after Scown came on the scene, he came on the scene in around December 2008. He was a regular visitor to Strbak's unit at Runaway Bay and moved into the Biggera Waters unit in May 2008. There was an incident when he was yelling while trying to find his phone in the car. Neighbours at both places do not report Scown yelling at Tyrell or at anyone else. They did not observe acts of aggression directed by him towards Tyrell or Strbak. Strbak was told about the kick in the backside. She did not report to police that incident or any other when she spoke to police in May 2009. Even after her falling-out with Scown when she provided a more critical account of Scown, she did not accuse him of physical violence towards Tyrell.

The timing of the second blunt force trauma injury to the abdomen

- [290] In arguing that it is possible for Scown to have inflicted the fatal abdominal injuries, the defence points to parts of the medical evidence which leave open the possibility that the second blunt force trauma occurred on the Sunday night when Scown was alone with the child and that such an assault led to Tyrell's very rapid decline. Whilst some of the medical witnesses left open the possibility that the second blunt force trauma may have occurred during this period, other evidence, including evidence about haemoglobin levels, made it more likely that the second injury and the extensive bleeding occurred at some stage in the hours before death.
- [291] To the extent that the defence argument relies upon evidence from Strbak, Danial Allan and Diane Strbak to the effect that Tyrell was not very unwell on the Sunday night, I have found their evidence unreliable.
- [292] On the medical evidence, the second injury could have occurred at any time over a period of hours. Therefore, it is possible that it occurred in the 25 minute window of opportunity pointed to by the defence. It is more probable that the second injury occurred at some stage in the preceding hours, possibly at around 3:30 pm when Ms Dyball heard a scream from a child and then silence. Strbak was present in the apartment at that time. Whilst I have regard to the possibility that the second blunt force trauma occurred after 9:10 pm and when Tyrell was alone with Scown, this possibility is not sufficient to establish, in conjunction with other evidence, a compelling case against Scown.
- [293] In addition to considering the possible timing of the second application of blunt force trauma, consideration is required about when the first blunt force trauma was inflicted,

namely a day or so before Tyrell's death, being an injury which caused him to begin to vomit on the Saturday and to continue to vomit throughout the Sunday.

- [294] I will return to the question of possibilities, including whether the possibility that Scown inflicted the second blunt force trauma injury is sufficient to not be satisfied that the prosecution case on the ultimate issue has been proven on the balance of probabilities.

The argument that men are more aggressive than women

- [295] As part of the argument that the circumstantial case against Scown is stronger than the circumstantial case against Strbak, defence counsel submitted that, unlike a slap prompted by frustration, to punch somebody in the stomach is an unusual thing to do. The rhetorical question was asked: "Is it more likely for a male to do that than a female?" This is an interesting question and, for the purpose of argument, I am prepared to assume that, generally speaking, males are more physically aggressive than females. However, the issues I have to decide are not resolved by generalisations of that kind, or by guesses, unaided by evidence, of the incidence of injuries caused to children by physical abuse and neglect at the hands of female parents, male parents and partners of biological parents. No questions were asked of the highly-qualified experts who gave evidence in this case about those matters. However, I suspect that any evidence which they may have been able to offer would only be useful if the type of injury (a slap or a punch), the circumstances under which it came to be inflicted and other matters were analysed. Even if a reliable evidentiary base existed and yielded a reliable figure that X per cent of stomach punches to children of about Tyrell's age were delivered by men, that would simply be an actuarial figure. Any such figure, drawn from thousands of cases, would be of limited assistance in deciding the probability that Strbak inflicted the blunt force trauma in this case. However, I do not have any such evidence and no attempt was made to elicit it from the experts.

Conclusion on the relative strength of the circumstantial cases

- [296] Having assessed the circumstantial case in respect of Scown, both in respect of its component parts and by way of an overall assessment when those parts are considered together, I conclude that there is no compelling case that Scown inflicted the fatal injuries.
- [297] By contrast, the circumstantial case against Strbak is a strong one.

Has the prosecution proven the ultimate issue, on the balance of probabilities, and to the high degree of satisfaction required?

- [298] The defence argues that, even if the circumstantial case against Strbak is a strong one, and stronger than the competing circumstantial case against Scown, I should not be satisfied to the high degree required that Strbak inflicted the fatal injuries. The defence position in this regard is captured in the submission that, given the state of the evidence, we will never know who did what or when or how.
- [299] The prosecution is not required, however, to prove precisely when each fatal blow was landed or the reason for it. Its circumstantial case against Strbak is a strong one. Strbak had an opportunity to inflict blunt force trauma to her son at various times early on the weekend, and also to deliver the second blunt force trauma to his abdomen some time

on the Sunday. Ms Dyball's evidence is suggestive of such a blow being inflicted at around 3:00 or 3:30 pm on the Sunday but does not prove this on its own.

- [300] Strbak was frustrated by Tyrell that weekend and slapped him on the face in front of Scown. She was prone to aggression when not on cannabis and she did not have cannabis to use that weekend. Her request to Jason Cobb that weekend to come and get Tyrell indicated her frustration and an inability to cope with Tyrell. It also suggests her recognition of the fact that she had injured him so as to cause the bruising that was observed by Danial Allan early on Saturday afternoon.
- [301] On the Sunday Strbak concealed Tyrell's true condition from her mother and from the child's father, and refused, despite Scown's suggestions, to take Tyrell to obtain medical assistance.
- [302] The hypothesis or possibility that Scown inflicted the fatal injuries arises because he also had the opportunity to inflict the injuries, and some of the medical evidence leaves open the possibility that the second blow was inflicted late on the Sunday night when Scown was alone with the child. However, the existence of possibilities left open by the evidence is not enough to defeat a prosecution case, even a prosecution case which must be proven beyond reasonable doubt. Whether the standard of proof be beyond reasonable doubt or, as here, on the balance of probabilities, the judge or jury deciding the facts must be satisfied to the requisite standard of proof and if proof is on the balance of probabilities, have the degree of satisfaction required in the circumstances of the case. The existence of a circumstantial case against Scown and the matters relied upon by Strbak in support of a circumstantial case against him do not necessarily prevent the prosecution proving its case against her.
- [303] In summary, there is no compelling evidence that Scown inflicted the fatal injuries that weekend. The hypothesis that he did so is principally based upon his conduct in kicking Tyrell in the backside on an earlier occasion, the opportunity which he had to inflict the fatal blows that weekend and suspicions aroused by Tyrell's fall in the shower. The same hypothesis is weakened, however, by his early disclosure of having kicked Tyrell in the backside, his admission to police of having done so and acts of care for Tyrell. These include caring for the child's injured arm and making a sling for him, and requesting Strbak to take him to obtain medical treatment for the swollen arm when Strbak was more interested in seeing her drug dealer. It extends to Scown, rather than Strbak, being the person who called the locum medical service to get treatment for Tyrell's injured and infected finger. Also, it was Scown, not Strbak, who cooked the child's dinner and showered him on the Saturday night. I consider the possibility that these acts of care were accompanied by other discreditable acts of aggression which were not seen or observed by Strbak, her step-brother or neighbours. However, no-one reported Scown behave aggressively towards Tyrell, let alone see him inflict physical violence on the child. It was Scown who twice suggested on the Sunday that Strbak seek medical treatment for her ill and injured son. On both occasions Strbak declined to do so because she feared that taking her son to the hospital or to a doctor would enable them to see the bruises which she had inflicted and that she would be "done for neglect".
- [304] The circumstantial case against Scown is weakened by the compelling circumstantial case against Strbak. Scown denied inflicting the injuries, including the fatal injuries, which Tyrell sustained in the days immediately prior to his death. I accept his denials in

the light of my assessment of all the evidence. I have accepted Scown's evidence in relation to certain critical matters about what he observed, and what Strbak said to him. I have also generally accepted the evidence of Jason Cobb about what Strbak said to him that weekend.

- [305] In deciding the ultimate issue of whether I am satisfied that Strbak caused serious non-accidental injuries, including the fatal injuries, I avoid reasoning that because Strbak inflicted a scar on her son's leg with her hot cigarette lighter, frogmarched him so as to cause bruises to his arms and hand and slapped him on the face the night before Tyrell died, she therefore must have inflicted the fatal injuries and the other injuries that were inflicted that weekend. Those facts, however, illuminate the true nature of the relationship between Strbak and her son. Strbak was prone to aggressive behaviour towards Tyrell, as observed or overheard by neighbours. She was prone to be aggressive when not using cannabis and was likely to become exasperated with Tyrell that weekend, following a series of accidents which had befallen him. Just as I avoid reasoning that Strbak inflicted the fatal injuries because she had earlier inflicted less serious injuries, I avoid reasoning that because Scown kicked Tyrell in the backside he therefore must have inflicted the fatal injuries and other injuries which Tyrell sustained on the weekend of 23 and 24 May 2009. The act of kicking the boy in the backside supports the hypothesis that he may have inflicted the fatal injuries. However, that hypothesis lacks much support from other reliable evidence.
- [306] The circumstantial case against Strbak, and the circumstantial case against Scown, have certain common features, including at least one episode of physical aggression towards the child and the opportunity to inflict the fatal injuries. Despite these common features there are important differences. Scown's act of kicking Tyrell in the backside was admitted by him at the time, and reported by Tyrell to both his mother and to his grandmother. It was reported by Scown to police at a very early stage. By contrast, Strbak's acts of scarring and slapping her child were not admitted. They were not reported by Tyrell to others, it would seem. Strbak concealed the truth about her son's injuries and illness from even her mother. She lied to the police and was prepared to lie to the CCC.
- [307] The sworn evidence given about Strbak slapping her son's face on the night before he died, and of previously frogmarching him into his room, was not contradicted by sworn evidence from her. Her request to Jason Cobb that weekend to come and get Tyrell remains unexplained by her to this day. For example, it is not suggested that she made this request because she apprehended that Tyrell was at risk from Scown. The obvious inference is that she was not coping, and that the bruises which were observed on Tyrell on the Saturday were inflicted by her. The proposition that she was not coping is supported by direct evidence of the frogmarching and slapping incidents, as well as circumstantially by the stresses associated with Tyrell's recent hospitalisation arising from accidents. When asked by police about the bruise to Tyrell's ear, Strbak lied and suggested that the bruise was caused by the fall from the playground fort which had occurred about 13 days earlier. Associate Professor Sullivan explained why it was very unlikely that the ear bruise was caused by such a fall. Even if it had been, it would not have been apparent some 13 days later, having been overlooked by doctors, nurses and pre-school staff. Strbak falsely attributed to the pre-school an injury to Tyrell's ear which she inflicted much closer to the time of his death.

- [308] Strbak's failure and refusal to take Tyrell to hospital on Sunday, 24 May 2009, when any reasonable person would have done so, given the state the child was in, has not been satisfactorily explained by her. Scown suggested such a course but she refused to take Tyrell to the hospital or to a doctor because she feared what an investigation into his bruises, injuries and illness would reveal. She explained her reluctance to Scown on the basis that doctors or nurses would notice the bruise on Tyrell's cheek, which Scown had observed and which he attributed to the slap which he had seen the night before.
- [309] Strbak had more to fear from a child protection investigation being initiated by medical staff than the revelation that she had slapped her child once on the face in an act of frustration. Any investigation would have been required to assess the variety of bruises and injuries on Tyrell's face, head and body, and the improbability that all of them were due to accidents. Strbak's conduct in not seeking treatment for her son is explained, particularly in the absence of any sworn evidence from her, by her appreciation that investigations into his condition and his injuries would implicate her. Her conduct in requesting Jason Cobb to collect the child, like her conduct in not allowing the child to go to hospital, is explained by her knowledge of the injuries which she had inflicted.
- [310] I am conscious of the seriousness of concluding that Strbak inflicted injuries to her son in the days prior to his death, including the fatal abdominal injuries. There is, however, a compelling circumstantial case that she did so, and I am satisfied to the degree required that the prosecution has proven its case on the balance of probabilities.
- [311] In addition to the other contested facts which I have found proven, I am satisfied to the required standard that Strbak applied the blunt forces that were a substantial cause of her son's fatal abdominal injuries.

ANNEXURE**Schedule of Agreed and Contested Facts**

- Agreed facts
- Contested facts

Introduction

1. The deceased child Tyrell Cobb was 4 years and 3 months old at the time of his death.
2. At 9:37pm on 24 May 2009 Matthew Scown, then in a relationship with Tyrell's mother the defendant Heidi Strbak, made a 000 call in which he stated Tyrell was vomiting and it was coming out of his nose. Scown stated Tyrell had "gone all limp and it's like he's just not there" and "looks like he's gonna die on me. He's just woken up he had spew coming out of his nose and his mouth." He later reported Tyrell had no pulse and he was doing mouth to mouth on him. An ambulance was dispatched to the address.
3. During the call Tyrell's mother, Strbak arrived at the address. Neighbours also attended the unit and assisted in rendering first aid to the child. Tyrell was observed to be wet and only clothed in shorts.
4. At approximately 9:45pm the ambulance arrived at the address. Scown waved them down in the street and indicated "he's not breathing, he's not breathing" and "hurry up, hurry up, he's turning blue, he's not breathing". Paramedics told Scown to bring Tyrell down. Scown left and returned with Tyrell in his arms. Scown indicated to paramedics that Tyrell had been "vomiting green stuff."
5. Paramedics examined Tyrell and noted the following:
 - a. He was wet;
 - b. He was limp;
 - c. His eyes were open and non-responsive;
 - d. His facial skin was pale and cyanosed;
 - e. He had marks on forehead and arms;
 - f. He had dark rings around eyes;
 - g. There was no blueness around mouth; and
 - h. He had no heart rhythm.
6. Paramedics started CPR. At that time Strbak approached and the paramedics asked her what had happened. Strbak responded that the child "had a fall in the shower Saturday night that she kept him awake all night so he wouldn't suffer from concussion and that he had been vomiting all day." Scown reported that Tyrell had been vomiting and "just become unconscious."
7. Tyrell was transported to Gold Coast Hospital by ambulance with Strbak. The child was examined at the hospital and found to have no pulse. At 10:25pm the child was declared deceased. Doctors noted numerous bruises on the child all over his body.

8. Tyrell was born on 25 February 2005 and was the biological son of Heidi Strbak and Jason Cobb. Tyrell was born in the Gold Coast Hospital, Southport. After Tyrell's birth his parents returned to Lightning Ridge with their child. Strbak and Cobb separated in 2008 and Strbak moved to the Gold Coast.
9. Whilst Strbak and Cobb lived together in Lightning Ridge, Strbak would take Tyrell to the family doctor when ill and his vaccinations were maintained.
10. Tyrell did not suffer from any known allergies.
11. Whilst Strbak and Cobb lived together in Lightning Ridge, both parents would on occasion discipline Tyrell with an open hand smack to the buttock. No other physical discipline was implemented by either parent upon their child.

Relationship between Scown and Strbak

12. Scown met Strbak through her brother Danial Allan whom Scown had known for about 10 years. Their relationship commenced around November 2008. At that time Strbak had Tyrell who was 4 years of age. Scown also had son Haydyn, who was also 5 years old, from a previous relationship. His son resided with his ex-partner.
13. When their relationship commenced Strbak was residing at 5/76 Brighton Street, Biggera Waters. Scown would at times visit or stay with Strbak at the unit. Scown was not residing there with her and Tyrell during that first period she lived at that residence nor when she later lived at 6/45 Bayview Street, Runaway Bay.
14. Prior to Tyrell's death both Strbak and Scown had been residing together at 5/76 Brighton Street, Biggera Waters. Strbak had moved back into that unit on 16 May 2009 and the unit was owned by Strbak's parents.

Timeline of Events

15. In December 2008 Strbak moved into 5/76 Brighton Street, Biggera Waters with Tyrell. Tyrell commenced attending Kindyland at Harbour Town on Monday, Tuesday and Fridays.
16. On or about 17 February 2009 Strbak moved into 6/45 Bayview Street, Runaway Bay.
17. During the time Strbak was residing at Bayview Street, other residents observed her to act abusively and aggressively towards Tyrell. They would hear her yell at the child and also observe her grab his arm and drag him. They also heard Tyrell screaming and crying and the sounds of smacking or hitting coming from inside their unit.
18. On 11 May 2009, Tyrell was attending the Kindyland centre and told staff he had a sore arm and indicated to the fort area of the playground. This was reported to Strbak who collected him from the centre shortly after 4.00pm.
19. Scown attended Strbak's unit at Bayview Street. Scown manufactured a sling for Tyrell using a pillow case. Scown encouraged Strbak to take Tyrell to the hospital. Strbak told him she would do it later as she wanted time to obtain cannabis from Brett Archer.

20. Scown contacted Jason Cobb and advised him of Tyrell's incident at childcare.
21. Strbak attended Chevron After Hours Medical Service at Nerang Street, Southport with Tyrell at 7:28pm. There was swelling and pain to his right elbow and forearm, with a reduced range of movement. A fracture was suspected and referral made to the Gold Coast Hospital.
22. Strbak then took the child to the Emergency Department of the Gold Coast Hospital at 7:36pm. Tyrell had pain at his right elbow and was unable to extend his arm. He was diagnosed with a possible fracture to his right arm and a long arm cast was applied. He was discharged with instructions to attend the fracture clinic on 15 May 2009.
23. Strbak spoke to Tyrell's teacher, Timothy Smith on 12 May 2009 and advised that Tyrell would not be back at the centre until the following Monday, 18 May 2009.
24. On 14 May 2009, Scown and Strbak were packing up her belongings at her unit in preparation of her move back to 5/76 Brighton Street, Biggera Waters.
25. That afternoon Scown had propped open Tyrell's toy box with a toy so that Tyrell could reach in to take toys. Tyrell jammed his hand in the toy box. Scown assisted Tyrell and he reported to his mother that he had hurt his hand in the toy box.
26. Strbak attended the Biggera Waters Medical Centre with Tyrell on 15 May 2009 at 3:09pm. Tyrell was noted to have a "skin injury" to his left hand and the area was "swollen". It was reported that the child's finger was caught in the lid of a toy box. He was prescribed the same antibiotics he had been provided on earlier occasions at the medical centre in April 2009.
27. On that same day, 15 May 2009, Strbak and Tyrell failed to attend the appointment at the fracture clinic at the Gold Coast Hospital.
28. On 16 May 2009 Strbak moved into 5/76 Brighton Street, Biggera Waters. Scown was staying with her at the address.
29. At 6:19pm that night a call was placed by Scown to the Medcall (a locum medical service) about Tyrell's finger injury. A doctor responded and attended the unit and noted the left hand of Tyrell was swollen with ring finger "highly inflamed – weeping and blistery". They were referred to the hospital.
30. At 8:45pm that night Strbak, Scown and Tyrell went to the Emergency Department of the Gold Coast Hospital. A radiograph taken indicated that Tyrell had an undisplaced fracture at the base of his finger (the fourth digit of his left hand). During his overall initial examination his abdomen was noted to be soft and non-tender and his bowel sounds normal. Tyrell was admitted to hospital and given intravenous antibiotics. The long arm plaster on Tyrell's right arm was removed after an x-ray excluded a fracture.
31. Tyrell vomited food at 7:20pm on 19 May 2009. It was the only recorded time he vomited during his stay at the hospital. It was recorded as an isolated episode.

32. At midday on Wednesday, 20 May 2009 Tyrell was discharged from hospital. Tyrell was observed to be well by physicians at the hospital. There was a follow up appointment booked for Orthopaedic clinic on 22 May 2009.
33. On 22 May 2009, Tyrell attended Kindyland. Strbak reported Tyrell's hand injury to staff. Staff noted no other injuries to Tyrell through the day of his attendance.
34. Strbak collected Tyrell from the centre at around 4:00pm that afternoon.
35. There was no attendance to the scheduled Orthopaedic hospital appointment on 22 May 2009. Strbak did not take Tyrell to the appointment as she had been informed that there was no fracture by the Hospital Staff.
36. Tyrell remained at the unit at Brighton Street until his death in the evening of 24 May 2009. During his last days in the unit he was in the care of Strbak and Scown.
37. Over that weekend, Strbak contacted Jason Cobb and requested that Cobb take Tyrell from her.
38. On the Friday or Saturday night, Tyrell was slapped in his face by his mother, leaving a bruise to his face.
39. On the same weekend, when Tyrell had vomited, Strbak grabbed his wrist and struck Tyrell to the back side of his rib cage as she walked him to his room.
40. Over the weekend Scown had told Strbak to take Tyrell to the hospital or to a doctor. Strbak refused to do so as she would be blamed for the bruise to her son's face.
41. Strbak told Scown that others would think she was neglectful in the care of her child.
42. That morning, Saturday, 23 May 2009, Tyrell was downstairs from the unit with Scown. Strbak was inside of the home. As Tyrell made his way back up the stairs to the unit he fell forwards on the stairs over his stomach. Scown was following Tyrell up the stairs. Tyrell told his mother that he had fallen and hurt his legs and belly.
43. At around lunch time on 23 May 2009, Strbak's brother Danial Allan attended and observed Tyrell to lack energy and not be his "usual happy self." He noted Tyrell to have bruising on his head, ear and arms. Strbak indicated to him that the bruises were from Kindy. Tyrell and Allan watched a movie in the lounge room and then Allan left at about 5.30pm.
44. That evening Strbak left the home to obtain cannabis from Brett Archer.
45. Scown took Tyrell to have a shower that evening whilst Strbak was out. Scown left Tyrell alone in the shower and heard a bang. Tyrell was on the floor of the shower.
46. When Strbak returned to the home, Scown told her that Tyrell had hurt himself in the shower.

47. Strbak noticed that Tyrell was still vomiting, as he had been earlier that day. Tyrell continued to vomit through the night.
48. After showering Tyrell on Sunday morning, 24 May 2009, Strbak showed Scown a large bruise above Tyrell's groin.
49. Tyrell told Scown that "it was OK for Mr Timmy to touch him".
50. Strbak applied bruise cream to her son.
51. Tyrell repeatedly vomited through the day of Sunday, 24 May 2009. His vomit was green/dark green in colour. Tyrell could not sit up. Tyrell could not keep food or liquids down through the day.
52. At sunset on 24 May 2009, the evening of Tyrell's death, Allan attended the unit again.
53. Allan noticed that Tyrell was vomiting and throwing up "Teenage Mutant Ninja Turtle" green into a red bucket. Allan saw Tyrell do this three or four times. Strbak told Allan that Tyrell was sick from the antibiotics he was taking for his hand injury.
54. Allan observed further bruises to Tyrell than from the day before.
55. Scown drew Allan's attention to a large bruise that was above Tyrell's groin area. Tyrell told Allan that "it was OK for 'his teacher' to touch me". They watched another movie.
56. Allan heard Strbak and Scown arguing on the veranda. Allan heard Strbak say she was going to the phone box and she left the unit. A call was placed by Strbak to Jason Cobb from the payphone at 7.48pm.
57. At approximately 8:30pm Strbak asked Allan if he wanted to go for a drive to their brothers to get cigarettes. They then left the unit together. Tyrell was left sleeping in the bedroom and Scown was on the couch in the lounge room.
58. After Tyrell's death, Strbak later informed Jason Cobb that she and Allan had gone to Brad's to "score a fifty" of cannabis. Strbak had gone to her brother's to get cannabis leaving Scown home alone with Tyrell.
59. Scown was watching TV and heard a "gargling noise" coming from Tyrell's room. Scown checked on Tyrell and he was limp. Scown took Tyrell into the shower and turned the shower on. Tyrell was not responding. Scown placed Tyrell on the floor and tried to call Strbak. Scown contacted 000 and started administering CPR. Strbak arrived home with Allan whilst Scown was assisting Tyrell and on line with 000.
60. The day following Tyrell's death police conducted an examination at the unit. Green/black coloured vomit was located on the carpet in the hallway in front of the linen cupboard. A similar coloured stain was observed on the bottom area of the linen cupboard door.

61. A red bucket was located in the bedroom where Tyrell slept and there were numerous drying green/black stains on the inside bottom of the bucket. One of these stains tested presumptively positive for blood. A red coloured stain was located on the bottom of the bedroom door which tested presumptively positive for blood.
62. Subsequent DNA analysis confirmed samples taken from the above stains to match the DNA of the deceased child.
63. Police also located a tube of Lanosil ointment beside a handbag on a table near the dining room. Lanosil ointment can be used to reduce inflammation, relieve pain and aid in the healing of bruises.

Tyrell's injuries

64. An autopsy was performed on Tyrell. The injuries noted are detailed on an attached schedule.
65. Tyrell's cause of death was found to be a transected duodenum in the abdomen of the child with associated laceration of the mesentery. Those injuries caused leakage of the child's stomach contents and bleeding in the abdominal cavity.
66. The combination of both the haemorrhage (bleeding) and peritonitis (caused from the leaking stomach contents) resulted in shock and the eventual death of the child.
67. The cause of the abdominal injuries was blunt force trauma of at least a moderate degree of force from one or more impacts. Possible mechanisms include a blow from a fist, foot, or blunt object.
68. Another opinion indicated the internal injuries are consistent with a small perforation to the duodenum with an extension of that injury shortly (hours) prior to the death. (two episodes of trauma). The initial injury would require severe force but that a moderate force would only be required to exacerbate the injury.
69. There was a bruise near the belly button of the child noted to be directly in front of the abdominal injuries.
70. Strbak had applied blunt force trauma to her son causing the abdominal injuries substantially resulting in Tyrell's death.
71. Dr Roy Kimble, a Paediatric Surgeon, opined leading up to his death Tyrell would have been in extreme pain and have been very sick from the time of injury until death. Every movement including breathing and vomiting would have caused extreme pain. He would have been sore from the time of the injury and would have progressively got worse over the first 24 hours. He would not have taken any significant food or water after the first 12 hours. He may have felt thirsty due to dehydration and would have been lethargic. Vomiting would have been bile-stained (green) as his condition got progressively worse. He would have developed a fever at around 24 hours which would have persisted until his death. His symptoms would have been easily recognised as requiring urgent medical treatment by any lay period from around 12-24 hours post

injury. He would have difficulty moving around after 24 hours and would have stopped being able to communicate around 48 hours.

72. The injuries Tyrell sustained were treatable and he would have survived if he had received treatment when he first became symptomatic.
73. There were 53 bruises and 17 abrasions to the child (a total of 70) located on his head including ear, chest, stomach, back, bottom, groin and legs. Some bruising was consistent with fingertip pressure. Dr Sullivan opined that a significant number of injuries to the lower legs were consistent with those seen through normal childhood activities.
74. Strbak was the author of the identified injuries to Tyrell with the exclusion of those accepted by Dr Sullivan as potentially accidental.
75. In particular Tyrell had a scar to his ankle which was consistent with that left by applying the heated end of a cigarette lighter to his skin.
76. Strbak had caused this “smiley” injury to her son, Tyrell.

Police Investigation

77. Police attended the hospital and spoke to both Scown and Strbak.
78. Both Scown and Strbak agreed to attend police station and both subsequently participated interviews.
79. Whilst at the police station, Strbak told Scown that she was “going to get done for neglect”.

Arrest history

80. Scown was charged with the murder of Tyrell on 25 May 2009.
81. That charge was struck out at the conclusion of a committal hearing on 3 February 2010.
82. On 13 August 2015 both Scown and Strbak were charged with the murder and torture of Tyrell.
83. A committal hearing was conducted in the Brisbane Magistrates Court on 2 November 2016 with the ODPP withdrawing the charge of torture prior to the hearing.
84. The charge of murder was withdrawn prior to a no case submission listed for 4 November 2016 at the conclusion of the hearing. Both Scown and Strbak were committed on the now indicted charge of manslaughter.

Schedule of Tyrell's injuries noted during pathologist examination

	Injury	Size	Location
1.	2 fine punctate abrasions	no more than 0.2 cm in greatest dimension	Top of the head between two ears slightly left of midline with underlying scalp bruising
2.	Subcutaneous red bruise (not visible externally)	3.5 x 2.5 cm	Right temple
3.	Abrasion	1 x 1 cm	Right forehead, 4cm right of midline and 4 cm above the area between the eyes (glabella)
4.	Faint red bruise	1 x 1.5 cm	Right forehead to the left of the previous abrasion (above), 2cm right of midline and 2.5cm above the area between the eyes with associated subcutaneous and subgaleal bruising beneath bruises extending above to upper frontal region of the scalp, to the right to underlie the abrasion noted on right forehead.
5.	Faint red bruise	0.5 x 2 cm	Left of midline and 1 cm above the area between eyes with associated subcutaneous and subgaleal bruising beneath bruises extending above to upper frontal region of the scalp, to the right to underlie the abrasion noted on right forehead.)
6.	Red bruise	1.5 x 1 cm	Left forehead, 1 cm left of midline and 4 cm above the area between the eyes
7.	Red bruise	1.5 x 1 cm	Left forehead, 2 cm left of midline and 2 cm above the area in between the eyes
8.	Triangular shaped red bruise	1 x 1 cm	Upper left cheek, between the eye and external ear
9.	Linear slightly diagonal (lower end to the left) scratch abrasion	3cm long	Upper left cheek between triangular red bruise and eye
10.	A red bruise	2 x 1 cm	Lower left cheek, between the outer angle of mouth and external ear
11.	Healed linear wound	1 cm	Back of left external ear
12.	Brown bruise	0.5 x 0.3 cm	Left chin
13.	Purple bruise	2 x 0.5 cm	Outer rim (helix) of right external ear

			with associated local swelling
14.	Faint abrasion	0.5 x 0.5 cm	On outer right cheek lateral to eye
15.	Small abrasions		Around the nostrils of the nose
16.	Small abrasions		Scatters upper and lower lips
17.	Subcutaneous red bruise	5 x 3 cm	Back of head (occipital region)
18.	Brown red bruise	0.5 cm diameter	Right underside of chin (submental region) immediately below the jaw
19.	6 faint fine linear parallel red bruises	1.5 to 3 cm long and 5.5 cm wide	Upper outer front of left chest and shoulder region (NB: weren't visible during examination on 25 May, but apparent on 26 May.)
20.	3 brown bruises	0.7, 0.5 and 0.3 cm (greatest dimension in descending order)	Vertically on the midline of the chest, lowest bruise immediately above the upper point of abdomen (epigastrium)
21.	Brown bruise	0.5 cm diameter	Right lower chest, 7cm right of midline
22.	Red bruise	1 x 1cm	Right lower chest, 5 cm right of midline
23.	4 faint brown bruises	0.5 cm diameter	Left mid to lower chest, 3.5 to 8cm left of midline
24.	Fading red bruise	1 x 1cm	Right of midline of upper abdomen
25.	Circular red bruise	0.4 cm diameter	Upper abdomen, 2 cm right of midline
26.	Faint greenish bruise with underlying red purple bruise 3 x 2 cm in the rectus muscle and visceral peritoneum		Left of the belly button (umbilicus)
27.	Greenish brown bruise	1.5 x 1.5 cm	Left lower abdomen

28.	Greenish brown bruise	1.5 x 1.5 cm	Left lower abdomen
29.	Diffuse red bruise (fading margins)	4.5 x 3.5 cm	Lower mid abdomen (suprapubic region)
30.	Brown abrasion	0.5 x 0.5	Right lower abdomen/ groin
31.	Diagonal red abrasion (lower end to right)	3 x 0.5 cm	Left upper back of chest
32.	2 semi-circular bruises	2 x 2.5 cm	Mid upper back
33.	Brown bruise	1.5 x 1 cm	Right upper back over the shoulder blade
34.	Brown bruise	1 x 0.8 cm	Outer back of lower right chest
35.	Brown bruise	1.5 x 1 cm	Left loin region
36.	Fading brown bruise	0.5 cm diameter	Left loin region
37.	3 fading brownish green bruises	0.5, 0.5 and 1 cm in greatest dimension	Left buttock
38.	Fading brown bruise	0.5 x 0.3 cm	Back of right elbow
39.	Subcutaneous red bruise	3 x 1 cm	Back of right elbow, distal to elbow
40.	Red bruise	3.5 x 1 cm	Front of right forearm, distal to fold of elbow
41.	Brown bruise	0.5 cm diameter	Distal back of thumb side (radial aspect) of right forearm
42.	Red bruise	1.5 x 1 cm	Distal back of the little finger side (ulnar aspect) of right forearm,

			stippled in pattern following the corrugations of the skin
43.	Red bruise	2.5 x 2 cm	Front of right wrist
44.	Red bruise	2 x 1.5 cm	Front of palm of right hand
45.	Red bruise	1.2 x 0.5 cm	Back of right hand and wrist
46.	Small red abrasion		With red bruise on back of right hand and wrist
47.	Irregular red bruise	2.5 x 2 cm	Back of right hand proximal to base of middle and ring fingers.
48.	Small abrasion		With irregular red bruise on back of right hand proximal to base of middle and ring fingers.
49.	Faint red bruise	0.3 cm	Back of right hand near the base of the little finger
50.	Red bruise	0.7 x 0.8 cm	Mid-front of left upper arm
51.	Red bruise	1 x 0.8 cm	Mid-front of left upper arm, distal to the previous bruise
52.	Red bruise	0.7 x 0.8 cm	Mid-front of left upper arm
53.	Faint red bruise	1.5 x 1 cm	Back of left hand, distal to the previous bruise
54.	Grey brown bruise	1.5 x 1 cm	Back of left hand proximal to the ring finger
55.	Two brown abrasions	0.3 cm and 0.5 cm	Region of rectum
56.	Brown abrasion	0.5 cm diameter	Upper right thigh

57.	Brown abrasion	1 x 1 cm	Inner back of mid right thigh
58.	Indistinct brown bruise	1 x 1 cm	Inner back of mid right thigh
59.	Red bruise	1.2 x 1 cm	Front of right knee
60.	Small fading bruise	0.5 cm	With red bruise on front of right knee
61.	A horizontal green bruise	2 x 0.7 cm	Inner front of right leg
62.	Faint brown bruise	1 x 1.5 cm	On the back of right calf
63.	Greenish bruise with overlying abrasion	1 x 1.8 cm	Front of the right leg
64.	Greenish bruise	1.5 x 1 cm	On front of right leg
65.	Brown irregular bruise	1.5 x 0.6 cm	Left upper thigh
66.	Greenish bruise	2.5 x 1.5 cm	Outer left thigh, stippled following congregations of the skin
67.	Near horizontal butterfly shaped brown bruise	3 x 0.8 cm	Outer front of lower left thigh above knee
68.	Circular brown bruise	0.6 cm diameter	Outer upper front of left knee
69.	Brownish red bruise	1.5 x 1.8 cm	Front of left knee
70.	Fading brown bruise	1.5 x 0.8 cm	Inner front of left leg
71.	Brown bruise	1.5 x 0.8 cm	Inner front of left leg

72.	Rectangular shaped brown red bruise	1.8 x 2 cm	Inner front of left leg
73.	Abrasions with dried scab		On the rectangular shaped brown red bruise on inner front of left leg
74.	Brownish purple bruise, rabbit head shape	4 x 2 cm	Back of left calf
75.	Vague greenish bruise	0.5 x 0.8 cm	Inner aspect of left leg
76.	U shaped scar		Left ankle
77.	Near transection of the small intestine (only 1 cm of the 4 cm circumference attached)		About 8cm from the antrum of the stomach
78.	3 cm tear in mesentery of the small intestine		Near its attachment of the small intestine (lies directly above the rupture portion of the duodenum)
79.	Soft tissue haemorrhage on front of vertebrae L2 and L3		On front of vertebrae of L2 and L3 (area underlying where the intestines are perforated)
80.	Bruise in abdominal wall		Haemorrhage noted mainly in subcutaneous fat. There is associated mixed acute and chronic inflammatory infiltrate with presence of polymorphs, macrophages, lymphocytes and plasma cells. No hemosiderin pigment is noted.
81.	Raised intracranial pressure with cerebral swelling		Brain