SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mahony* [2019] QCA 131
PARTIES:	**R** **v** **MAHONY, Louis James** (appellant)
FILE NO/S:	CA No 289 of 2017 SC No 13 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Toowoomba – Date of Conviction: 13 November 2017 (Douglas J)
DELIVERED ON:	28 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2019
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	EVIDENCE – ADMISSIBILITY – OPINION EVIDENCE – EXPERT OPINION – BASIS OF OPINION – where the appellant was convicted of murder – where the deceased sustained a depressed fracture to the back of her head – where the deceased had no other injuries – where the defence case was that the deceased sustained the injury by falling several metres out of a tree – where three expert pathologists gave opinions that they would expect someone who had fallen from a height to have suffered multiple injuries – where defence counsel did not challenge the expertise or qualifications of the three pathologists at trial – where the appellant submits that the experts' opinions were unsupported by a statement of reasoning, such as reference to datasets or a review of the literature, demonstrating how their opinions were based on their expertise – whether the absence of such reasoning indicates a lack of sufficient connection between their expert knowledge and the opinion provided – whether the evidence of the three pathologists was inadmissible and its admission caused a miscarriage of justice APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – SURPRISE – where the appellant was convicted of murder – where the deceased sustained a depressed fracture to the back of her head – where the deceased had no other injuries – where the defence case

was that the deceased sustained the injury by falling several metres out of a tree – where expert pathologists gave oral evidence that the absence of injuries to the neck, spine and internal organs made it unlikely that the deceased had fallen from a tree – where the opinions were not specifically referred to in the expert pathologists' pre-trial reports – whether the evidence of the expert pathologists was given without notice to the defence – whether the admission of the evidence caused a miscarriage of justice

EVIDENCE – ADMISSIBILITY – OPINION EVIDENCE – where the appellant was convicted of murder – where the deceased's only injury was a depressed fracture to the back of her head – where the defence case was that the deceased sustained the injury by falling several metres out of a tree – where photographs of the scene showed what appeared to be blood on rocks and an antique iron near where the deceased lay – where an expert pathologist gave evidence about blood spatter patterns on the rocks and antique iron – where the nurse and paramedic who treated the deceased gave evidence that it was unusual for someone to fall from a height and only sustain the one injury to the head – whether the opinions were based on their professional training or experience – whether the opinions were inadmissible because they were outside the witnesses' expertise – whether the admission of these opinions resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted of murder – where the prosecution led evidence of statements the appellant gave to police and insurance investigators – where the defence led expert biomechanical evidence to support the appellant's claim that the deceased sustained the fatal depressed skull fracture by falling out of a tree – where the learned trial judge directed the jury that if they find the defence evidence and the appellant's statements unconvincing, they must still be satisfied beyond reasonable doubt that the prosecution proved each element of the offence – whether the learned trial judge gave two *Liberato* directions in respect of the defence evidence and the appellant's statements – whether giving two *Liberato* directions risked the jury failing to consider both sources of evidence together – whether there was a misdirection resulting in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER JURY WOULD HAVE RETURNED SAME VERDICT – where the grounds of appeal concerned the admission of evidence and a direction to the jury – where no objections were made at trial – where the appellant must establish that the evidence was actually inadmissible and that the direction

was wrong in law – where the appellant must also establish that the errors may have affected the verdict – whether the appellant addressed how the alleged errors resulted in a miscarriage of justice – whether the appellant was deprived of a chance of acquittal that was fairly open on the evidence

Criminal Code (Qld), s 668E

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588; [2011] HCA 21, cited
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
Liberato v The Queen (1985) 159 CLR 507; [1985] HCA 66, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Summers [1990] 1 Qd R 92; [1989] QSCCCA 182, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
Suresh v The Queen (1998) 72 ALJR 769; [1998] HCA 23, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: S C Holt QC, with M J Jackson, for the appellant
T A Fuller QC for the respondent

SOLICITORS: Dib & Associates Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** On 23 August 2009 paramedics found Lainie Coldwell unconscious and injured under a gum tree at her home in Walter Street, Charleville. She had been living there with Louis James Mahony, the appellant. The paramedics had arrived because the appellant had called 000. He told the operator that Lainie had fallen from the tree and that she was injured. Neil MacLachlan, one of the paramedics, saw the appellant's Ford F250 truck parked under the tree. There was a ladder in the bed of the truck leaning against the tree. The appellant said that he had been asleep in his house and had heard a thud. He had come out and had seen Lainie on the ground. The appellant said that Laine had fallen off the ladder. Mr MacLachlan could see that there were lights hanging in the tree's branches. Another paramedic, Daniel Ollis, arrived almost immediately afterwards. He had been told to respond to a report about a person who had fallen from a tree. He too saw the arrangement of truck and ladder and the hanging lights. The appellant appeared to him to be tearful and upset. The appellant told him that Lainie had been trying to get the lights out of the tree and had fallen. Both Mr MacLachlan and Mr Ollis saw near the body an arrangement of rocks and an old sharply pointed clothes iron of the kind that needs to be heated on a stove for use.

[2] As part of his usual procedure, Mr Ollis checked Lainie for injuries, both to ensure that all injuries were dealt with and also to ensure that in treating one injury he did not aggravate another one. The only injury that Lainie had suffered was one to the back of her head. Mr MacLachlan and Mr Ollis took Lainie to Charleville Hospital. One of the nurses who attended her there was Courtney Bylett. Nurse Bylett worked at the Charleville Hospital and for the Royal Flying Doctor Service. She had attended many people who had been injured by a fall. She said that in her

experience, although she has seen cases in which a person has suffered only a single injury in a fall from a height, it was usual for there to be several injuries. It was also common to see significant bruising. Nurse Bylett performed a full examination looking for all and any injuries that Lainie might have suffered when she fell. She found only the single injury to back of Lainie's head - although she saw some scratches on her arms. The head injury was a deep depression in the skull. Nurse Bylett said that she "could fit [her] fist in the back of her head". Lainie's wound had none of the expected foreign matter in it, and there were no grazes and no bruises.

[3] Lainie was to be flown to Brisbane and the appellant was to go with her. He returned home to collect some belongings for the trip. While he was at home packing he spoke to Constable Rebecca Jordin. He told her that he and Lainie had planned to take the lights down from the tree that afternoon. He had gone to sleep and, when he had awoken, he found her lying under the tree with her head on top of the rocks under the tree.

[4] Lainie was transferred by air to the Intensive Care Unit at the Royal Brisbane Women's hospital where Dr John Gowardman examined her. CT scans were undertaken to determine the extent of her injuries. These revealed no injuries to the spleen, liver, intestine or pelvis. Indeed, there were no injuries to her body at all except for the head injury. This was a 13 millimetre deep depressed fracture of the skull and this fracture had caused irreversible and fatal damage to Lainie's brain. In Dr Gowardman's opinion Lainie was brain-dead upon arrival at the hospital and there was nothing that could be done for her.

[5] Police finally attended at Walter Street on the afternoon of 23 August in the person of Constable Jordin. By then everybody had left for the hospital. Constable Jordin had only been a member of the Force for two years. She had no reason to suspect that anything unusual had happened. She took a look around the place. Nobody was there. She returned to the police station. A few hours later she returned to Walter Street with her immediate superior, Sergeant Wakeley. A scene of crimes officer arrived and examined the premises. Soon afterwards, the appellant returned home to get his things before flying to Brisbane with Lainie. Constable Jordin spoke to him briefly. He repeated his story and he also told her that, just two hours before finding her unconscious, he and Lainie had had sex together.

[6] Two days later the appellant phoned Constable Jordin and told her that doctors had told him that Lainie was brain dead and that they wished to take her off life support and harvest her organs. He asked Constable Jordin whether she would require a statement from him. He told her that the State Coroner had contacted him personally to tell him that there was no need for any investigation because the injuries were consistent with a fall.

[7] At 9.47 am on 25 August 2009, Lainie Coldwell died from her single injury. Despite what the appellant had said, Constable Jordin received an instruction from the Coroner to take a statement from the appellant. In that statement the appellant said that on Saturday 22 August, his and Lainie's little daughter had said that she wanted to see the lights turned on in the gum tree. There were, in fact, two sets of lights in the tree, one higher than the other. He said that Lainie had said to the child that she would see if the lights were working and, if they were not, she would take them down. He said that on the day before she had fallen, he had seen Lainie put a

ladder against the gum tree, "climb up to the first fork in the tree" and had seen that she "then climbed through the branches and untied the lights from the tree" and climbed back down the ladder. This was the lower of the two sets. The higher set of lights, he said, was "approximately 7 metres off the ground". He said that he had overheard Lainie telling her father on the phone that she also intended to retrieve the higher set of lights and would do so on the next day. He said that her "dad had told her not to do it as it was too high" but that Lainie had "then joked about it and that was it".

[8] The appellant told Constable Jordin that on the following morning, he, Lainie and their daughter had visited Lainie's parents. They returned home at about 10.00 am. He and their daughter had a nap after lunch. He awoke and went outside. He had "noticed [his] 250 Ute back right up to the tree with a double extension ladder in the back of the Ute leaning into the tree". He added that "[t]his was obviously so Lainie could get to the higher point in the tree". He found Lainie lying unconscious and bleeding under the tree. He said that there were cars driving past the house and that he "was screaming at them to stop and help". One of these cars, he said, was driven by a "close friend of ours, Bill Bryant" but that he "obviously didn't see Lainie from the angle he was at however he saw me and waved but kept on driving". The appellant said that he then ran into the house and rang 000.

[9] Lainie and the appellant had lived together as husband and wife for about 18 years and they were both 36 years old when Lainie died. For a time they had lived in the Northern Territory where, for five years, the appellant had been a police officer. After they returned to Charleville, they both worked at the local meatworks where the appellant was a foreman and Lainie worked in several positions. Although the appellant might have given the impression to Constable Jordin that he and Lainie had a strong and healthy relationship, that was not so. As early as February 2009 Lainie's mother, Patricia Coldwell, had noticed that the relationship had become strained. They were "starting to pick on each other". Lainie had confided to her mother that the appellant had been sleeping with other women. She told her mother that she, Lainie, had never had sex with any man other than the appellant but that she had, nevertheless, recently contracted a sexually transmitted disease. She said that she couldn't take it anymore. She had confronted the appellant with his infidelities, which included affairs with co-workers with whom Lainie also worked, and he had "kicked her out of the house". Some days later he had asked her to come back.

[10] There was little doubt that the appellant had been unfaithful. A director of the company that employed him, Neil Duncan, said that the appellant had asked him to cause the company to pay for his airfare to Sydney where he intended to meet with a woman. He would, he told Mr Duncan, repay the amount by working overtime. This device would ensure that Lainie would not discover that he had paid for the airfare himself. Mr Duncan was a friend of the appellant's. He and the appellant had attended a State of Origin match together and they had frequently been invited to the same barbecues. Mr Duncan agreed to help the appellant to deceive Lainie. The expenditure that was hidden from her by them in this way amounted to about $2,000. The appellant also told Mr Duncan later that Lainie had uncovered his infidelity and that Lainie was intending to leave him.

[11] On her birthday, 23 June 2009, Lainie had dropped her daughter at her mother's place at 2.15 pm because she had to work. Her mother particularly remembered that

occasion. She had wished her daughter a happy birthday and Lainie had replied, "Some fucking birthday, Mum" and had gone to work.

[12] Lainie and the appellant owned a house at Dundee Beach in the Northern Territory. Between 25 July and 11 August 2009 Patricia, Lainie and her daughter spent two weeks there. While they were at Dundee Beach, Lainie told her mother that she had had enough and was going to leave the appellant. She said that she had taken out a policy on her own life for $750,000. She asked whether her mother and father would be prepared to live with her and her child at Dundee Beach for six months while she "sorted herself out". Patricia said that they would do better than that. They would sell their own house, "pay Louis out" and move up to Dundee Beach with them.

[13] After the three of them had returned to Charleville, Patricia received a phone call from the appellant. He told her that his own mother, Delly, was going to come to Charleville and, indeed, she did arrive in the week before Lainie's death. On the Wednesday of that week, Lainie told her mother that "Delly wants those bloody lights out of that tree". Patricia dismissed this as "just a whim".

[14] On the following Sunday, 23 August 2009, the appellant, Lainie and their daughter visited Patricia, as they did every Sunday morning. The appellant mowed Patricia's lawn. Patricia's sister-in-law was present. She said to the appellant, "You done a good job of the lawns". He replied, "Yes, I mow lawns. She climbs trees". Lainie, the appellant and their child left to go home soon afterwards. That afternoon the appellant phoned Patricia and told her that Lainie had fallen out of a tree and was seriously injured. He told her that they had just had sex two hours ago. He said that he had picked up her body twice and had dropped her twice and that she had hit her head on rocks each time. He said that he had been unable to give her CPR because she had dirt, mud and leaves all over her.

[15] Patricia rushed to the hospital. At one point she overheard the appellant speaking to somebody on his mobile phone. She heard him say, "She wanted those [fucking][1] lights out of that tree, and now he's fucking blaming me". Patricia did not know to whom the appellant was speaking. Late that night, after Lainie had been flown to Brisbane and placed on a life support system, the appellant rang Patricia from Brisbane and told her, "She's dead, you know."

[16] On the day Lainie died, the appellant called Mr Duncan and told him that Lainie had died and added, "I've been cleared by the police."

[17] Lainie had been cremated in Toowoomba on Monday, 31 August but there was a service on Wednesday, 9 September, in Charleville. The appellant had returned home by then. He asked Lainie's father, Trevor, whether Lainie had a will. Then, on Sunday, 6 September, he called on Patricia and Trevor at their home. The three of them sat at the kitchen table. The appellant told them that he and Lainie had taken out a life insurance policy that insured Lainie's life for $1.5 million. Patricia said that the appellant's demeanour was "straight out business about insurance". Relations then became very strained. Some weeks later the appellant returned to Patricia's and Trevor's home. The appellant threw onto the table a copy of the

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[1] In her oral evidence, Patricia Coldwell used the term "effing" acknowledging, in response to a query from the prosecutor, that she was, indeed, "being polite for our purposes".

statement that he had given to Constable Jordin. He said, "I believe you wanted to read this".

[18] Patricia read it straight away and saw that the appellant had stated that he had told Lainie not to climb the tree unless he was present. She read that he had said that Lainie had climbed the tree because her daughter had asked for the lights to be turned on. She said to the appellant, "You're lying. You're bloody lying, Louie." The appellant turned to his child and said, "You wanted the lights on, didn't you, darling?"

[19] Patricia said in her evidence that on another occasion the appellant had said that Lainie was putting the lights *back into* the tree when she fell.

[20] Lainie had left a will dated 2 October 1997 and it was tendered at the trial. Relevantly, she had left the appellant her car and any money she had at her death. She had given the rest and residue of her estate in equal shares to her brother, Darren, and to her parents. This would include the proceeds of the $750,000 life policy that Lainie had taken out.

[21] In October 2009 the appellant called on Patricia and Trevor once again. He told them that if they signed over to him the proceeds of the $750,000 policy, then he would pay out their mortgage. He repeated the offer to Lainie's brother, Darren shortly after the memorial service in Charleville.

[22] The appellant made claims on the two policies that insured Lainie's life. The writing of two large policies just a short time before the insured died in an accident that nobody had witnessed provoked the insurer, Medibank Insurance, to look into the matter. Roger Pearce was engaged to investigate the claims and he travelled from his office in Sydney to make inquiries in Charleville. He spoke to the appellant. He then spoke to Lainie's relatives and friends as well as to local police and he then interviewed the appellant once more. Mr Pearce recorded both of these interviews and the recordings were played for the jury at the trial. Cracks began to appear in the appellant's story.

[23] In his original record of interview with police the appellant had said that on Saturday, 22 August 2009, he had observed Lainie get the extendable ladder and place it on the gum tree and then climb the tree "up to the first fork" and then climb "through the branches" to remove the first set of lights. He had said nothing about taking part in this task himself. Now he told Mr Pearce that he himself had held the ladder for Lainie to climb.

[24] At the Charleville hospital, where Lainie had first been taken, he had told Lainie's niece, Rae-Anna Coldwell, that he had been unable to give Lainie mouth to mouth resuscitation because she "had stuff on her face, like branches and dirt and blood". He had said the same thing to Patricia. He did not explain why any of that was an obstacle to his performing CPR. He also told Rae-Anna that he could not perform CPR because Lainie was pregnant but he informed Mr Pearce that he put a towel under Lainie's head and then "commenced mouth to mouth resuscitation [and he] cleared Lainie's airways". He elaborated on this. He said that the 000 operator had asked him whether he was performing CPR and he had answered in the affirmative. This was, he told the operator, his "second attempt".

[25] He had told Lainie's mother that he had picked Lainie up and dropped her twice. He denied to Mr Pearce that he had said this or that it had happened.

[26] He had told Mr Pearce that he and Lainie had together taken out the policy for $1.5 million at home on their computer. It was formally admitted that the policy was taken out at 5.12 pm on 23 June 2009. That was Lainie's birthday. Employment records showed that she was at work at that time. One of her work colleagues, Shirlene Barton, recalled that Lainie was at work on that day, on the evening shift. Ms Barton remembered because it was Lainie's birthday. Two witnesses, work colleagues of the appellant's, said that the appellant had asked them to furnish him with false statements that they had both been present at the appellant's home when he and Lainie had applied for the $1.5 million policy.

[27] Mr Pearce asked the appellant to explain the incongruity of Lainie obtaining a policy for $750,000 so soon after purchasing one that insured her life for $1.5 million. The appellant said that the second policy had been taken out to enable the survivor of them to "sign over our property at Dundee Beach, which was the value of our property, in the area of that, to our daughter …, and financially the $750,000 was meant for that reason". In fact, the appellant and Lainie had bought the Dundee Beach property in 2004 for $115,000. The bank had valued it in 2006 at $190,000, and it was sold in 2011 for $285,000.

[28] He told Mr Pearce that his relationship with Lainie was "beautiful". Mr Pearce told the appellant that he had heard that Lainie was considering leaving him. The appellant said that he hadn't heard that. He said that they had "made love" on the morning that she fell and so he didn't "believe that to be true". He acknowledged that Lainie had a sexually transmitted disease but said that he did not know how she had contracted it. He denied that he was having an affair. He said that it had been "nineteen years, it would have been fifty if we were, if God let us have fifty, it would have been till death do us part".

[29] The appellant's interview with Mr Pearce took place on 26 October 2009. For the whole of that month the appellant had been exchanging emails with a young Korean woman who had been his co-worker. It is enough to quote a passage from two of them in order to appreciate the flavour of all of them. The first of these examples was sent by the appellant at 10.00 am on 3 October 2009, about five weeks after Lainie's death, (from the email called "Laine & Louis") and ran as follows:

> "I lay in bed last night and my thoughts were always with you, I looked at your beautiful photos for hours while [his daughter] lay sleeping beside me, I am entranced by you [*sic*] beauty and your sole [*sic*], I can not believe that god [*sic*] could create such a perfect person, but [name redacted] you have every quality and every gift that we all just dream of having, and you were born with these, you are the most perfect lady that has ever graced this world.
>
> I LOVE YOU [name redacted] and words can never describe my feeling and love I have for you, good bye my love, I will call you tonight, I hope you have a wonderful day, I know I will because my heart is so full of your love that nothing could ever make me sad."

[30] The second email was the woman's reply on the same day (which attached an intimate picture of herself):

> "it is first time take a picture without clothes ..
>
> i decided to have courage to do..just for you.
>
> don't show anybody..i trust you.
>
> it shows how much i love you. i never never had done this before.…"

[31] This email correspondence continued during October, November, December and then into the following year.

[32] Credit card records revealed that three weeks after Lainie's death the appellant spent $560 for a hot air balloon flight on the Gold Coast, $218 for a dinner at a Gold Coast restaurant, $2,450 at a jewellery shop at Pacific Fair on the Gold Coast and $2,733.03 at a place referred to on the credit card statement as "MARRI" but which was, it seems, the Marriott Hotel. In February of the following year the appellant spent $4,800 at Angus and Coote to buy a diamond ring.

[33] In 2009, before Lainie's fall and death, the appellant had asked a co-worker for advice about what he would need to poison someone. Examination of his computer also revealed that on 24 June 2009, on the day immediately after Lainie's life had been insured for $1.5 million, a search had been made on the computer for "accidental deaths per year" and "poisons". On 15 July 2009 the appellant phoned the insurer to inquire whether the policy for $1.5 million would cover "self-inflicted injury".

[34] None of this evidence was challenged. Some of it was formally admitted.

[35] It is in the context of this evidence that the grounds of appeal can now be considered.

[36] The appellant raises five grounds of appeal. First, he contends that certain evidence given by three pathologists, Professor Ellis, Professor Duflou and Dr Robertson, was inadmissible and the admission of that evidence occasioned a miscarriage of justice. Second, he contends that certain parts of the evidence of Professor Ellis and Professor Duflou was given without notice to the defence and this occasioned a miscarriage of justice. Third, he contends that the evidence given by Professor Duflou about blood spatter patterns was outside his expertise and was, for that reason, inadmissible and its admission resulted in a miscarriage of justice. Fourth, he contends that the evidence of Nurse Bylett and Mr Ollis about the significance of the absence of injuries other than the head injury was inadmissible because it was not based on their training or experience. Further, evidence given by Darren to the effect that, in his opinion, Lainie would not have risked climbing the tree, was inadmissible. The appellant contends that the admission of the evidence of Nurse Bylett, Mr Ollis and Darren resulted in a miscarriage of justice. Fifth, the appellant contends that the learned trial judge gave the jury "two distinct 'Liberato' directions and this occasioned a miscarriage of justice".

[37] Professor Peter Ellis is a specialist pathologist. His report dated 23 December 2014 was disclosed to the defence. Professor Ellis earned his degree in medicine from Cambridge University in 1974, he is a Fellow of the Royal College of Pathologists of Australasia, a Fellow of the Australian College of Legal Medicine, a Foundation

Fellow of the Faculty of Forensic and Legal Medicine of the Royal College of Physicians (UK), an adjunct professor of Forensic Medicine and Pathology at Griffith University and he holds other significant positions as well. As a pathologist he performs post-mortem examinations to establish the cause of death and also to prepare reports describing any injuries or other abnormalities that may be relevant to a proper investigation about cause of death. To that end, he said, a pathologist will take into account the observed injuries and also any history that has been provided. A pathologist will consider whether such information provides evidence as to the cause of death. Professor Ellis has had "extensive experience as a consultant forensic pathologist and [has] performed over 7500 full post mortem examinations and attended many scenes of death", many of them in suspicious or unusual circumstances. The defence did not challenge Professor Ellis's expertise or his qualifications to give the evidence that he gave.

[38] Professor Ellis said that the injury to the back of Lainie's head was a depressed fracture to the skull in which the skull surface had been pushed into the brain. It looked like "somebody has taken, like, the top of a pyramid shape, that sort of pointed top, and pushed it in the back of her head". There were some abrasions but there were no other serious injuries of any kind.

[39] Professor Ellis described the kind of injuries that Lainie would probably have suffered if she had fallen from the tree a distance of some metres. That depended, he said, upon the part of her body that struck the ground first. He had, "in the course of [his] career seen a number of people who've suffered injury after a fall from various heights, some very great, some not so great and a spinal or neck injury is actually quite common, and that's due to the fact, of course, that the head, in particular, is quite mobile on the top of the neck … [s]o to get a neck injury would be quite common in a fall like that". No matter what part of her body hit the ground first, Professor Ellis was of the opinion that, having regard to the "total lack of injury that we see on the rest of her body or even in her bones, on the X-Rays that were done through CT scanning", he "can't see how she can fall that distance and not have these injuries".

[40] In his opinion, the particular injury suffered by Lainie to the back of her head was consistent with a fall from a tree although he thought that that was unlikely. He had "been around long enough to know that you never say never, so I'm not going to say that's impossible". The injury, he said, was also consistent with her having been hit on the back of the head with the antique iron found near her head.

[41] Cross-examination proceeded upon the basis that the evidence of Professor Ellis, so far as it went, was not challenged. The point of it was, rather, to ensure that the jury appreciated that the evidence was not capable of excluding the possibility that Lainie had fallen to her death.

[42] The second pathologist who gave evidence was Professor Johan Duflou. He has a bachelor's degree in medicine and a master's degree in forensic pathology. Like Professor Ellis, he is both Fellow of the Royal College of Pathologists of Australasia and a Fellow of the Faculty of Forensic and Legal Medicine of the Royal College of Physicians (UK). He is the Chief Forensic Pathologist of the Department of Forensic Medicine in Sydney. He is also a Clinical Professor in the Central Clinical School of the University of Sydney and a consulting forensic pathologist. He had been investigating injuries and the causes of injuries for over

25 years. He said that it was "routine practice" for pathologists to perform autopsies and examinations of people who had fallen from heights.

[43] In his evidence, after observing that the head injury in isolation might have been caused by the alleged fall, Professor Duflou said:

> "The problem, though, is that, effectively, there is no other significant injury to the body that you would typically expect from a fall from a height, and specifically the type of injuries that you would expect are – would be potentially significant laceration or tearing of skin and abrasion in other parts of the body, whatever comes into contact with the surface at some velocity, fractures of bones, and specifically I would be concerned about fractures of wrist bones. Typically, as you fall, you try and put out your hand, and you break your wrist. I would worry about rib fractures, and these would typically be multiple rib fractures or typically be along the sides or back. Sometimes they can be in the front as well, but that's relatively uncommon. You may or may not get a spinal injury in the form of fractures of the spine. You may or may not get pelvic bone injury. Then additional to that, typically, what you would see is damage to internal organs of the body, and probably the most common abnormality that you see there is bruising of lungs, with or without laceration of lung tissue as well. The aspect that makes me very concerned about this case in terms of the severity of the fall is that simply none of these were present. The deceased was x-rayed and CT scanned on a number of occasions. There was a fracture of the first rib that was identified only at post-mortem, but prior to that absolutely no other fractures were identified, and that – that would be really quite uncommon in a person who has fallen from a height like that."

[44] As the trial progressed, the likelihood that there would be additional serious injuries suffered by a person who had fallen in the way alleged by the appellant became common ground. What was important to the defence was not to deny that this was so. Rather, the cross-examination sought to show that no expert could absolutely exclude the possibility that Lainie had died from a fall:

> "Now, no doubt, in your position, you've come across in your experiences many times when people have been in accidents or falling from heights, that they generally indicate that – or exhibit other injuries, don't they?---Yes.
>
> But it's not impossible, is it, for someone to fall and not have any other injury?---It's extremely unlikely, but not impossible."

[45] Professor Duflou referred to the photographs of the rocks and the antique iron. Those photos showed numerous bloodstains on the rocks and on the iron:

> "So the large round rock closest to the light and with the ornamental iron that has a number of droplets of blood on it in the vicinity of the iron itself and behind the larger smears, that there indicates that there's been a dripping of blood from a height, from some distance. Whether that's a number of centimetres above the rock or potentially

> even a couple of metres above the rock, that I can't say, but there's been some dripping of blood there. There's also then the – what I call next to it the triangular shaped rock, which similarly probably shows some dripping from a height. And then potentially on the rock next to that, which is the smaller angled rock – similarly shows some blood which I suspect has probably come from a height.
>
> …
>
> If I can now turn to photograph number 23, exhibit 23, I think. Thank you. This shows the faceplate of the iron. Now, what's noticeable there is that there is a significant quantity of blood near the tip of the faceplate, which may or may not have passed downwards towards the back on the right-hand side of the photograph. Now, additional to that, droplets of blood, quite separately – there are a number of small-ish droplets of, well, what appears to be blood on the faceplate of the eye. And I can see what appear to be small – or lengths of hair within the bloodstain. Now, my concern about this is that assuming that the iron has been in that position all along – that is, against the back surface of the large rock – I really struggle to concede [sic] how blood in that pattern could have appeared on the faceplate of the iron. I just don't think it's possible. And, of course, it wouldn't explain any hairs as well. On the other hand, if the iron had been used to strike the head, then it would reasonably explain the appearances on the iron. It would explain the hair for the faceplate. And it could quite reasonably explain – all the blood on the other rocks could reasonably be explained on that basis as well."

[46] A physical model of Lainie's skull was made based upon data from the CT scan. It was common ground that the model was a faithful replica of the state of the skull after the injury. The antique iron that had been photographed at the scene had inexplicably disappeared. But the prosecution tendered a replica which was accepted to be relevantly the same. Professor Duflou described the relationship between the shape of the fracture of the skull represented on the model and the shape of the antique iron:

> "Well, I was shown an iron which had been painted with black [indistinct] paint. There was no handle on this iron. I've measured about 43 millimetres in thickness, 160 millimetres in length and maximally a width of 112 millimetres. The front end had around it – the back corners were sharp but very similar to what is seen there. The basis for that – and the entire object weighed 2.667 kilograms. Now, what I found very striking in this case was that when I placed the front tip of the iron into the skull [indistinct] and where the fracturing was – that it really formed a very good fit. And in my view, it became entirely reasonably possible that that object, or one very similar to that, had caused the fracturing. Now, of course, the exact iron that I had did not cause that fracturing. It was a very similar appearing iron. And there were no absolutely specific features which indicated it had to be an iron and nothing else. But certainly I think it's fair to say that I had what I like calling a CSI moment when it really was quite surprising how well it fitted to me."

[47] In cross-examination Professor Duflou said that the blood on the iron that can be seen in the photograph showed that the iron had probably not been in the position shown in the photographs when the blood had been deposited onto it. He was cross-examined in some detail about his opinions concerning the significance of particular droplets of blood in the photographs that had been tendered. By reference to this blood, Professor Duflou explained why "he had a problem" with the theory that Lainie had fallen onto the iron and thereby suffered the fracture of her skull. He said that, having regard to the injury, Lainie could not have moved to any appreciable extent after falling and, consequently, the absence of large amounts of her blood in the immediate vicinity of the iron was inconsistent with her having fallen onto the iron. Had she lain there after falling onto the tip of the iron he would have expected much more blood. The blood would have been "extensive".

[48] The third pathologist called to give evidence was also highly qualified. Dr Shelley Robertson has been the senior pathologist at the Victorian Institute of Forensic Medicine for about the last 25 years. She too regarded the absence of other injuries as anomalous. In her opinion, the "pattern of injury was not consistent with the story as given" and that "it is more likely that the head injury was the result of blunt trauma in the form of a direct blow to the back of the head from … a heavy object." Consistently with the fact that it was common ground between the parties that a fall from a height is very likely to produce multiple injuries, defence counsel put to Dr Robertson that she had "come across in [her] experiences many times when people have been in accidents or falling from heights, that they generally … exhibit other injuries". He was not concerned to suggest the contrary but was concerned to have the witness agree that it was "not impossible … for someone to fall and not have any other injury". Like Professor Ellis and Professor Duflou, Dr Robertson did acknowledge that this was a possibility. Nor, unsurprisingly, was it controversial between the parties that people who fall tend to put out their limbs to protect themselves, with the result that those limbs are fractured.

[49] The appellant invoked the following principles as relevant to this appeal:

1. The scope and limits of an expert's "specialised knowledge" must be determined with precision so that it can be seen whether the opinion evidence offered by the expert is wholly or substantially based upon such knowledge.[2]

2. An opinion not based upon such knowledge is inadmissible.[3]

3. The expert must furnish the tribunal of fact with the necessary scientific criteria to test the accuracy of the opinion so that, by the application of those criteria, the tribunal of fact may form its own independent judgment about the validity of the expert's conclusions.[4]

[50] The appellant submitted that the opinions of the three pathologists about their expectation that a person who had fallen from a height would have suffered injuries in addition to a single skull fracture were "unsupported by a statement of reasoning capable of revealing that the opinion was based on their expertise" or that "good

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2 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [32] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. The dictum concerned s 79(1) of the *Evidence Act* 1995 (NSW), but the common law is no different in this respect.

3 *Dasreef*, *supra*, at [42].

4 *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* [1953] SC 34 at 39-40, cited with approval in *R v Lentini* [2018] QCA 299 at [55].

grounds actually existed" for the formation of those opinions. The appellant submitted that none of these experts "described the data set from which that opinion flowed" and that "the absence of reasoning pointed to a lack of sufficient connection between relevant specialised knowledge and the conclusions". The appellant submitted that it "was not explained how each conclusion was grounded in [the experts'] 'training, study or experience' or how it applied to the facts assumed or observed so as to produce the opinion propounded" and it "was not even made clear in this case that the opinion was ground[ed] in their experience from having conducted the same task in previous cases other than in the loosest and most unscientific of ways". There was no reference by the experts, it was said, to any review of relevant literature.

[51] These submissions cannot be accepted. The expertise of the three witnesses was established with unimpeachable clarity and was not challenged. Each of them was a practising forensic pathologist and it had been their daily task for many years, and indeed for decades, to examine the bodies of people who had died. The evidence of Professor Ellis elicited in cross-examination was that it was "routine practice" for pathologists to perform autopsies and examinations of people who had fallen from heights. Defence counsel's cross-examination of Dr Robertson proceeded upon the *express* basis that she possessed the relevant expertise and that, in the course of examining the bodies of people who had died by falling, she had "come across in [her] experience many times when people have been in accidents and falling from heights, that they generally … exhibit other injuries".

[52] There was no need for any of these highly qualified and highly experienced pathologists to undertake a "review of the literature" or to refer to "data sets" in order to be in a position to offer their opinion that when a person falls to the ground from a height of about six metres it is to be expected that that person would suffer multiple injuries. They were eminently qualified, by their experience of actual observations that they had personally made over many years, to say that it was unlikely that Lainie could have fallen the distance claimed and, yet, have suffered only the single observed injury to her skull.

[53] As was observed by one of the member of the Court during oral argument, there was an element of unreality in the appellant's case. The names of the experts, their respective qualifications and the substance of the evidence that they would give was known to defence counsel in good time. Having regard to those matters, he chose not to challenge the pathologists' expertise or qualifications. He was concerned instead to elicit from them only that they could not exclude categorically the possibility that Lainie might well have fallen such a distance without suffering the usual injuries. This is hardly surprising because, even without the expert opinions, the experts' conclusions accorded with common sense and experience. The unreality stems from the attempt to conduct an appeal as though there had been no preceding trial at which counsel chose the issues to litigate. This is an unacceptable approach.[5]

[54] The second ground of appeal concerns an alleged failure to foreshadow to the defence the evidence of Professor Ellis to the effect that, while he could not, on the basis of the injuries alone, exclude the possibility that Lainie had fallen, he thought that it was unlikely. In his oral evidence, he mentioned the absence, in particular, of

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5 *R v Baden-Clay* (2016) 258 CLR 308 at [47].

neck and spinal injuries. These were matters that had not been specifically referred to in his report furnished before trial. In his oral evidence, but not in his report, he said that such injuries were common because the head is mobile on top of the neck and, as a consequence, hitting the ground with the head would place pressure on the neck with the result being, usually, a neck or a spinal injury. In the case of Professor Duflou, it was submitted that his oral evidence about the absence of specific kinds of injuries, namely damage to internal organs, had also not been disclosed in his pre-trial report.

[55] There is no substance in these points. The evidence was no more than the description of particular instances of injuries that might be expected to be caused. The evidence was incapable of surprising defence counsel and, what is more, the transcript betrays no indications that he was surprised.

[56] This ground fails.

[57] The third ground raises the question whether the evidence given by Professor Duflou about bloodstains was inadmissible as being outside his field of expertise. That evidence can be summarised as follows:

1. When an object hits a person's head and fractures the skull, there may be an immediate transfer of material to the object.
2. Bleeding occurs within a very short period of time. Such bleeding would be in the form of blood flowing or dripping onto a surface.
3. One would not expect a blow to result in small droplets of blood departing the head unless there is already blood on the surface of the head, in which case one may very well see blood spatter.
4. The photographs of the scene showed what appeared to be blood on a group of rocks and on an antique iron near where Lainie lay.
5. The photos showed what appeared to be droplets of blood on the iron and on the rocks.
6. The photos showed what appeared to be blood and hair on the faceplate of the iron.
7. It was difficult to imagine how that blood and hair could have been deposited there if Lainie had fallen.
8. The presence of that blood and hair was consistent with the iron having been used as a weapon to strike Lainie's head.

[58] The first three matters referred to above are facts about the behaviour of flesh and blood when the head is struck a hard blow. They are matters that are plainly within Professor Duflou's expertise as a pathologist.

[59] The next three matters are observations about what the jury could see for itself in the photographs. It has not been suggested that these observations were inaccurate in any respect.

[60] The final two matters are inferences that Professor Duflou drew from two things. First, there is the content of the photographs, to which he referred and which the jury could examine for themselves. Second, Professor Duflou had experience in the transfer of blood when a body has been struck a blow. He gave evidence, upon the basis of his experience, when he explained the resultant bloodletting when a

person's head is struck. He explained, in some detail, that "you can have transfer of material immediately on that strike" and "bleeding occurs within, generally, a very short period of time in the form of blood flowing or dripping onto a surface". If the head is struck "you would not expect to see fine or small blood droplets departing from the head" but if "there was already blood on that surface and it was struck then you may very well see blood spatter".

[61] These descriptions and explanations emanate from Professor Duflou's unchallenged experience as a pathologist and were not treated by defence counsel as controversial. It is not necessary for a witness to explain repeatedly, in the course of giving evidence about discrete matters, each of which is apparently within the witness's expertise, how the witness's expertise bears upon the witness's capacity to give such evidence.

[62] Not only was no objection taken to this evidence being given, but defence counsel actually sought to capitalise upon Professor Duflou's qualification to give evidence about bloodstains. He did so by cross-examining extensively about how the observed bloodstains served to support the appellant's case. So, for example, defence counsel invited Professor Duflou to agree that "there are no blood spatter stains that would be consistent with an assaultive impact to a – or impact to a wet blood source observed on the rock surface adjacent to the primary areas of blood staining". The questioning continued by inquiring about Professor Duflou's understanding of "satellite bloodstains", a term with which he was familiar. Professor Duflou was asked his opinion about certain bloodstains in the photographs and whether, in his opinion, they were satellite bloodstains and he gave an opinion.

[63] There was good reason why no objection was taken to this evidence. First, Professor Duflou was eminently qualified to give it. Second, some of the evidence concerned matters that the jury could decide for themselves and it would have been idle and forensically damaging for counsel to object. Third, defence counsel sought to take advantage of this very expertise in order to support aspects of the defence case.

[64] In such circumstances it is hopeless to contend that the admission of this evidence was in error or that it occasioned a miscarriage of justice.

[65] The third ground therefore fails.

[66] The fourth ground of appeal concerns two sets of evidence. The first set of evidence is that given by Nurse Bylett and by the paramedic, Mr Ollis. Their evidence was that, in their experience, one would expect victims of falls to exhibit multiple injuries. Each of them had had occasion, as part of their respective occupations, to encounter such victims and to observe the presence of such injuries. This evidence of relevant experience was actually emphasised by defence counsel in cross-examination of Mr Ollis:

> "All right. Now, how long have you been in the Ambulance Service?---That was 2009. So I'd been in the service at that time about 7 years.
>
> Okay. And you'd had quite a deal of experience with falling incidents?---Yes, that's correct.
>
> And you have come across people that have fallen a great distance?---Yes, I have.

On other occasions?---Yes, I have.

Yes. And with suffering head injuries?---Yes.

Yes?---Yes, I have.

And would it be correct to say that in your experience, that some of those people you've come across have fallen great distances and, yet, have no injuries?---Um---

Other than maybe the head injury?---To the best of my recollection, I've always noticed that there are other sort of bruisings or other factors or some sort of involvement with that ---

I see?--- I – with an injury of that significance, I would assume there's something else.

You'd think there's – should be something else?---Yeah, potentially.

Okay. Well, you expected there would have been more injuries to the limbs or something. Is that about it?---Yeah, I would."

[67] Nurse Bylett, who treated Lainie at Charleville examined Lainie's body thoroughly to determine the presence of injuries.

"Okay. And why was that significant in the assessment of her?--- Well, normally in any kind of injury where they've had a fall, it's pretty standard for anyone to fall to put a limb out, to put an arm out, to put a leg out and to do further breakages. So we would normally, when doing a head to toe, kind of go, okay, that limb's good. That limb's good. Hips are good. That's all fine. So it was a little bit abnormal that there wasn't further injuries to her body."

…

"What about the rest of the back of her body?---I don't recall there being anything.

Okay. And what do you mean by that? Did you ---?---So we would often see significant bruising and we would've made note of that. So in all of my memory of this, all I remember is just a head injury---

Yep. Okay?--- ---and why didn't we have any more bruising or damages from her falling from a great height."

[68] Nurse Bylett had been informed that Lainie had fallen to the ground from a height.

"Well, let's start with the injury to the back of her head?---Yeah.

And bearing in mind, as I say, by reference to the history that came with her---?---Yeah.

---was there anything about the nature of the injury and the appearance of the injury to the back of her head---?---Yeah.

---that you particularly noted?---So one of the things that we – I have noted and have read in the notes that I have written in my statement

> is that there was a lack of any other debris in her hair. So am I allowed to make reference to what I do as well?
>
> Yeah. Yeah?---So in my role, I work as an emergency nurse for RFDS. So we quite regularly go to accidents and these kind of things from, you know, all kind of falling things, and normally, there's often a lot of other stuff in their hair. So even if you fall from a height, you normally have just bits of twigs or dirt or leaves or something kind of there, whereas I remember very clearly that it was just the back of her head, it was boggy and there was blood. So it was just unusual there wasn't other stuff there.
>
> What about on the rest of her body---?---Yeah---
>
> ---in terms of that---?---So I don't remember there being any other, like, dirt or things like that that you would get from – like even – you know when you fall over and you graze yourself or you bruise yourself, you just get those dirt marks. I don't recall any of that being there."

[69] For the same reasons that the similar evidence of the pathologists was admissible, so too was this evidence. The evidence about an expectation of more than a single injury was based expressly upon the witnesses' experience. It was, in truth, evidence of fact, namely past observations and present observations coupled with the unremarkable opinion that, having regard to that past experience, the present observations were unusual.

[70] The second category of evidence complained of under this ground is the evidence given by Lainie's brother, Darren. He said that, knowing that his sister was active and adventurous, it was his opinion that she would not have attempted to scale the ladder, positioned as it was, in order to reach the lights in the tree. In his view she would have regarded it as too dangerous. It is said that this was inadmissible opinion evidence.

[71] This evidence was led in re-examination by the prosecutor but not before he and defence counsel had conferred about it at the bar table. Having conferred, defence counsel was prepared to let the prosecutor elicit this evidence. The reasons for his decision not to object are apparent. First, in defence counsel's very brief cross-examination of Darren he established that when Darren first heard that his sister had fallen from a tree to her death, it did not surprise him that "she'd been up a tree" or that "it was a fairly high tree". It was a theme of the defence case that Lainie had all her life been a tomboy and so it was not remarkable that she might have tried to climb the tree.

[72] Having opened up the issue of Lainie's adventurous disposition in cross-examination of Darren, it was only fair for the prosecutor to attempt to qualify the effect of that evidence, if he could, by investigating whether the adventurous propensity that had been revealed knew any limit. Darren's evidence was that his sister's readiness to engage in acts that more prudent people might regard as too risky was tempered by the fact that the risks she took were calculated. Having told defence counsel that, in his judgment, she took risks, he told the prosecution that she would have seen this particular risk as too great. He gave his reasons for this opinion.

[73] In my view, the cross-examination made a live issue of Lainie's proneness to take risks and the evidence elicited in re-examination was no more than a legitimate pursuit of a line opened up by the defence.

[74] This ground fails.

[75] The final ground raises a complaint about the learned trial judge's direction to the jury about the defence evidence. The complaint is a difficult one to understand.

[76] The learned trial judge directed the jury, in the conventional way by telling the jury that the fact that the defendant did not himself give evidence should not be taken to add to the case against him. The judge also directed the jury that the fact that the defendant led evidence from his own expert did not mean that he had assumed any burden to prove his own innocence.

[77] Having given those standard directions, about which no complaint is now made, his Honour then directed the jury as follows:

> "As I have said, the Prosecution has the burden of proving each of the elements of the offence beyond reasonable doubt and it is upon the whole of the evidence that you must be satisfied beyond reasonable doubt that the Prosecution has proved the case before the defendant may be convicted. Often enough, cases are described as ones of word against word. You should understand that in a criminal trial, it is not a question of your making a choice between the evidence of the Prosecution's principal witness or witnesses and the evidence of the defendant's witness.
>
> The proper approach is to understand that the Prosecution case depends upon you, the jury, accepting that the evidence of the Prosecution's principal witnesses was true and accurate beyond reasonable doubt despite the evidence by the defendant's witness. So you do not have to believe that the defendant is telling the truth before he is entitled to be found not guilty or that the defendant's witness is telling the truth before he is entitled to be found not guilty.
>
> Where, as here, there is Defence evidence, usually one of three possible results will follow. First, you may think the Defence evidence is credible and reliable and that it provides a satisfying answer to the Prosecution's case. If so, your verdict would be not guilty. Or, secondly, you may think that although the Defence evidence was not convincing, it leaves you in a state of reasonable doubt as to what the true position was. If so, your verdict will again be not guilty. Or, thirdly, you may think that the Defence evidence should not be accepted. However, if that is your view, be careful not to jump from that view to an automatic conclusion of guilt. If you find the Defence evidence unconvincing, set it to one side, go back to the rest of the evidence and ask yourself whether, on a consideration of such evidence as you do accept, you are satisfied beyond reasonable doubt that the Prosecution has proved each of the elements of the offence in question.
>
> In this case, the defendant has given extensive interviews to the police and also to Roger Pearce, the insurance investigator. In spite

> of those interviews, the burden of proof has not shifted to the defendant. The defendant's statements, including his admissions, are part of the evidence called for the Prosecution. One of a number of possible results will follow. You may think the defendant's statements are credible and reliable and that they provide a satisfying answer to the Prosecution's charges. If so, your verdict would be not guilty. Or, secondly, you may think that although the defendant's statements were not convincing, they leave you in a state of reasonable doubt as to what the true position was in respect of the charges. If you are not satisfied that the Prosecution have proved some or all of the charges beyond reasonable doubt, your verdict will be not guilty of the charges about which you are not satisfied.
>
> Or, thirdly, you may think that the defendant's statements should not be accepted. Again, be careful not to jump from that view to an automatic conclusion of guilt. If you find the defendant's statements unconvincing, set them to one side, go back to the rest of the evidence and ask yourself whether, on a consideration of such evidence as you do accept, you are satisfied beyond reasonable doubt that the Prosecution has proved each of the elements of the offence in question."

[78] The purpose of that direction was to ensure that the jury understood that it was not simply a matter of choosing between the Crown witnesses and defence witnesses, and that a verdict of guilty did not depend merely upon a failure to believe the accused's statements to police. Despite rejecting the defence witness and the defendant's statements, before finding the defendant guilty, the jury had to be satisfied that the Crown had proved the elements of the offence beyond reasonable doubt.[6]

[79] His Honour's direction was unremarkable and his directions served the purpose that they were intended to serve. The appellant does not submit to the contrary. Instead, he argues that his Honour's discussion, in this context, of the defence expert evidence followed by his reference to the appellant's statements created "a real risk that the jury was distracted from properly considering the appellant's hypothesis". This risk followed, it is said, because "by giving two distinct directions, the learned trial judge risked the jury failing to consider the combined force of two bodies of evidence".

[80] This submission is fanciful. His Honour did not give two distinct directions. His Honour gave the jury a single direction about being careful not to leap from a rejection of the defence evidence, or a rejection of the appellant's statements, to a conclusion of guilt.

[81] The jury could hardly have been confused or distracted on the subject of the relationship between the expert evidence called by the defence and the evidence of the appellant's statements. The appellant's out of court statements asserted facts that implied that Lainie's injury had been caused by a fall because the appellant did not say that he had seen her fall. The evidence of his expert, Dr Andrew Short, was led with the single purpose of supporting those claims by reference to certain biomechanical explanations. The one set of evidence was led to support the other. It would have been impossible, in the circumstances of this case, for any rational

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6 *Liberato v The Queen* (1985) 159 CLR 507 at 515, 519.

jury to fail to understand that they had to consider, as the appellant's written outline expressed it, "the combined force of two bodies of evidence". Nothing that his Honour said was capable of creating any doubt about that.

[82] Nor has the appellant sought to explain how such confusion might have been caused. The submissions do no more than point to the directions and then, without analysis, assert the desired conclusion. More is required than that and, in any case, for the reasons I have given, there was no possible risk of confusion of "distraction".

[83] The final ground fails.

[84] There is another matter that must be noticed. The subject-matter of the appellant's grounds of appeal concern the admission of evidence to which no objection was taken and concern a direction to the jury about which also no complaint was made at the trial. None of those things matter in the least unless the appellant can establish two things. First, that the evidence was actually inadmissible and that the direction was actually wrong in law. But that is not enough. He also had to establish that these errors "may have affected the verdict".[7]

[85] The appellant did not even attempt to make good this essential second point. The appellant's written submissions simply asserted the desired conclusion. Likewise the oral submissions did not confront this essential point.

[86] None of that is surprising. The case against the appellant was extremely strong. He had strong sexual, emotional and financial motives to murder Lainie. The facts from which those motives could be inferred were not challenged and, of course, they were not contradicted by any contrary evidence either.

[87] In the context of considering the effect of this evidence upon the trial, it is necessary to refer to an aspect of this case that has been ignored by the appellant. That is the evidence of the biomechanics experts led by the Crown and by the defence.

[88] The Crown led evidence from two biomechanical engineers. Dr Zachariah Couper is a formally qualified structural engineer and a marine engineer. He earned his doctorate by submitting a thesis about the biomechanics of head injuries. He has given evidence as an expert in previous cases about head injuries. His commission in this case was to consider the version of events offered by the appellant and to give an opinion about whether that version was supported by the known facts. It is not necessary to detail his elaborate work and reasoning because in this appeal there was no challenge either to the admissibility of his evidence or to the soundness of his reasoning. Dr Couper based his evidence upon tests and experiments carried out by others, and the results of which he has studied, and upon a "database of research", and upon his own computer modelling. None of these were the subject of any inquiry by the defence.

[89] Dr Couper considered the data he had been given relating to the alleged fall. He then created computer models of the possible ways in which Lainie might have fallen from the tree. He also considered the nature of the single injury that she suffered. He was able to exclude the possibility that her head injury was the result of striking either the rocks or the ground itself. He was also able to say that the iron

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7 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 49 per McHugh and Gummow JJ.

might have caused her injury as a result of a fall but only if it was fixed securely to the ground with the front of it pointing up so that it would engage with her head. However, he found that in every single one of the possible ways in which she might have fallen it was "very unlikely" that Lainie would not have suffered multiple injuries, differing in type depending upon how she landed.

[90] Dr Couper also considered the position of the ladder on the truck. In his opinion, it was "very unlikely that the ladder could have been used safely to ascend into the tree". Nor could it have been used to descend. As positioned, it was too unstable. So much can be seen from the photographs even by a layperson.

[91] In short, it was very unlikely that an ascent into the tree by means of the ladder was even possible, it was very unlikely that a fall from the tree produced the head injury, it was unlikely that the fall could have occurred without injuries to the remainder of the body, and it was unlikely that the actual injury sustained could have been generated by contact with either the flat ground or the rocks or even the iron if it was unsupported. There was no evidence that it had the necessary support.

[92] In cross-examination Dr Couper accepted that the iron could have caused the injury if Lainie's head had hit it when she fell but he emphasised that that was only if "it was supported sufficiently". That condition was never established by any evidence and so it was entirely hypothetical. Dr Couper accepted the possibility that the ladder might have moved into its unstable position *after* Lainie had climbed it. Otherwise, it was put to Dr Couper that, perhaps, Lainie had, in the course of falling and before she hit the ground, managed to "[put] herself in a position of a judo fall" and thereby escaped multiple injuries. Dr Couper did not know what counsel meant by the expression "judo fall" and the nature of the postulated "judo fall" position was never explained and so neither did the jury. This brief line of questioning went nowhere.

[93] The second expert in this field was Dr Thomas Gibson. He too has a doctorate in biomechanics, specifically concerning neck injuries. His conclusion, for reasons that he explained, was that it was "unlikely to highly unlikely" that Lainie's injury could have been caused by a fall.

[94] Both Dr Couper and Dr Gibson accepted the possibility that Lainie might have fallen and suffered only a single injury.

[95] The defence called a single witness, Dr Andrew Short, who was experienced in the biomechanics of falls and head injuries. He was given relevant data and he performed some computer simulations. His evidence in chief was not very helpful to the appellant's case:

> "… But either way, whether it be a stone or no stone, you could end up with a fairly severe head injury; is that what you're saying? --- Yes.
>
> Right. And were there occasions when in the simulation there was no … head injury?--- Not from six metres."

[96] He performed some tests by rolling raw eggs, "straight from the market", down a ramp so that they collided with a flat surface. The broken eggs exhibited a particular kind of fracture. The model skull was in evidence and the witness saw

fractures in it that he thought were similar to the fractures on the eggshells. He offered the opinion that the skull fracture might have been caused by a pointed object or a flat object. He said that he was unable to shed any light as to how the injury might in fact have been caused.[8]

[97] Dr Short confessed that he was not an expert in judo but said that he had "seen one of those falls before". He didn't think a "judo fall" would "make much difference though".

[98] He said that a fall of the kind in question had an 80 per cent chance of causing an associated neck injury. He offered no view about the likelihood of any other injuries being caused and in cross-examination he admitted that he had not considered the likelihood of any other injuries being caused. He said it would only take him about five minutes to perform the necessary calculations to allow him to give an opinion but he was not asked to do so by either side. He accepted that his rolling-egg experiment "tells us nothing about the mechanism by which the injury to Lainie Caldwell's skull was caused". He also volunteered something that had not been obvious at all from the way his evidence had been led. He said that he "wouldn't scale [the egg experiment] up to… a human head".

[99] The evidence of the Crown's biomechanics experts was that it was unlikely or highly unlikely that Lainie's skull fracture had been caused by a fall. There was no contrary evidence because the defence expert limited his opinion to conclusions he drew from looking at his broken eggs and which, he said, could not be "scaled up" to take account of skull fractures.

[100] In his closing address, defence counsel sought to meet the case about sexual and emotional motives by pointing out to the jury that in December of that year, four months after Lainie had died, the appellant sent an email to his Korean lover ending their relationship. That was the most that could be done on this score. He did not address the existence of the financial motive. The evidence of the pathologists was answered by emphasising that they had all left open the possibility that Lainie had fallen to her death. As to the evidence of the biomechanics experts, after making a brief and inconsequential reference to the acceptance by Dr Gibson that it may have been the side of the iron rather than its tip that had inflicted the injury, and after dealing briefly with the issue of the instability of the ladder, defence counsel said this to the jury:

> "Now, there's an interesting part I mentioned to you a little bit yesterday about the biomechanics. I'm not going to say anything more about them except to say this – remember the conclusion of the biomechanics to [*sic*] called by the Crown was that a [*sic*] angular piece of – like the end of the iron – could cause the damage to the back of the head. And, of course, you've heard equally if it was on the ground, providing it was supported by those rocks and she fell onto it, it could also cause that damage.
>
> But here's the thing, ladies and gentlemen – they were so sure that this iron fitted – it fitted into the skull that we have here – but you must have nearly fallen off your seats, ladies and gentlemen, when what Dr Gibson has got it in there and he said, "It could also happen

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8 "Nope".

> from hitting this part" and he went down the side of the iron. Well, come on. Which way do we want it? It could also happen by this part here down the side. So we've gone away from the point to down to the side. But what does that mean? How can you rely on the iron as being the trouble? How can you rely on the conclusion by the experts that that's what caused the damaged? My submission to you, ladies and gentlemen, is that you can't."

[101] This was the sum total of the defence criticism of the uncontroverted biomechanical evidence.

[102] The defence could not challenge either the facts proved by the Crown to raise motive to murder, or the other facts relied upon as circumstances pointing to murder. Nor could the defence controvert the expert opinions that falsified the appellant's story about a fall. So, the defence relied upon the customary response in such circumstances, which is that the counter-proposition urged by the defence cannot be excluded as a possibility.

[103] However, as an answer to affirmative prosecution evidence it is an argument that does not amount to much. The standard of proof is proof beyond a reasonable doubt and not proof beyond doubt. The Crown is not obliged to exclude every possibility consistent with innocence.[9] The existence of a mere possibility, even in the context of expert opinion evidence, is not sufficient to raise a reasonable doubt if the only inference open to a reasonable jury upon a consideration of all the evidence is that the accused is guilty.[10]

[104] This was a powerful Crown case that was simply unanswered by any contrary evidence and not much diminished by any of the cross-examination despite the cross-examiner's efforts. The thrust of this appeal has been to persuade this Court that there has been a miscarriage of justice because of the admission of the evidence of pathologists, the nurse and the paramedic about injuries, the evidence of Darren and because of the learned trial judge's direction. Yet to have succeeded on these grounds the appellant had to show not only error but also the consequences of error. This was because no objection had been raised at the trial. This second requirement meant that it was necessary for the appellant to invite the Court to consider the significance of the errors in the context of the Crown case as a whole in order for it to be able to reach the conclusion that the appellant has been deprived of a fair chance of acquittal.

[105] The path to such a conclusion by the Court contains potential obstacles. When defence counsel conducts a trial deliberately in a particular way an appellate court will be reluctant to intervene when asked to act upon a different basis. Moreover, as McHugh J said in *Suresh v The Queen*:[11]

> "It would undermine the system of adversarial criminal justice if the admission of technically inadmissible evidence, not objected to for rational forensic reasons, could result in the quashing of a conviction because the forensic tactics failed to bring about the accused's acquittal."

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9 *Peacock v The King* (1911) 13 CLR 619 at 661 per O'Connor J, cited with approval by Gibbs, Stephen and Mason JJ in *Barca v The Queen* (1975) 133 CLR 82 at 104 and by the Court in *R v Baden-Clay* (2016) 258 CLR 308 at [47].

10 *R v Summers* [1990] 1 Qd R 92 at 98-99 per McPherson J.

11 (1998) 72 ALJR 769 at [23].

[106] Such choices by the defence have consequences.[12]

[107] Even where the matter complained of on appeal was not evidently the result of a deliberate choice, in cases where no objection is taken below or no re-direction has been sought, an appellant who relies upon the fourth ground in s 668E of the *Criminal Code* (Qld) must demonstrate more than the existence of the error of law required to be shown by the third ground. The appellant must show that the matter complained of appeal, which I shall term the error, might have affected the jury's verdict.[13] Although bare and remote possibilities may be disregarded, if it is considered reasonably possible that the error may have affected the verdict and if the jury might reasonably have acquitted the appellant but for the error, there will have been a miscarriage of justice.[14] In considering this question, the appellate court must have regard to the gravity of the error as well as to the strength of the case against the appellant.[15] The principle is sometimes stated as one that requires an inquiry whether an error has deprived an accused of a chance of acquittal that was fairly open. In this context, the word "fairly" must not be overlooked.[16] A decision to take or to refrain from taking a particular course which is explicable on the basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open.[17] The reason why the matter complained of occurred may be relevant to the determination whether there has been a miscarriage of justice.[18]

[108] In a case in which it is said that evidence should not have been admitted because it was unsupported by "a statement of reasoning" or by "data sets" and was not supported by explanations about how the conclusions were grounded upon "training, study or experience", assuming that the evidence was open to those criticisms, the appellant has failed to address the significance of the other expert evidence led to prove the same conclusion and which was supported by "a statement of reasoning" by express reference to "data sets" and by explanations about how the conclusions were grounded upon "training, study or experience". He has also failed to address the significance of the rest of the Crown case and how it bore upon the submission that there has been a miscarriage of justice. No attempt was made to demonstrate how the errors might have prejudiced the appellant's legitimate chance of acquittal. Instead, the appellant has done no more than to assert that the real issue at the trial was the exclusion of the appellant's hypothesis and that the impugned evidence related to that issue. This is a mere statement that the evidence was relevant. It does not address the crucial issue of whether there has been a miscarriage of justice.

[109] This appeal is without merit and it should be dismissed.

[110] **MORRISON JA:** I have read the reasons of Sofronoff P and agree with those reasons and the order his Honour proposes.

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12 *R v Simpson* [2008] QCA 413 at [50] per White AJA; *R v Baden-Clay*, *supra*.

13 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

14 *Simic v The Queen* (1980) 144 CLR 319 at 332 per Gibbs, Stephen, Mason, Murphy and Wilson JJ; *TKWJ v The Queen* (2002) 212 CLR 124 at [65]-[73] per McHugh J.

15 *ibid*.

16 *per* Gaudron J in *TKWJ v The Queen*, *supra*, at [26].

17 *ibid.*

18 *ibid*. at [30].

[111] **McMURDO JA:** I agree with Sofronoff P.