SUPREME COURT OF QUEENSLAND

CITATION:	*R v Patel; ex parte A-G (Qld)* [2011] QCA 81
PARTIES:	**R** **v** **PATEL, Jayant Mukundray** (appellant/applicant) **R** **v** **PATEL, Jayant Mukundray** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 169 of 2010 CA No 172 of 2010 SC No 387 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 April 2011
DELIVERED AT:	Brisbane
HEARING DATES:	2 March 2011; 3 March 2011; and 4 March 2011
JUDGES:	Margaret McMurdo P, Muir and Fraser JJA Judgment of the Court
ORDERS:	**1. Appeal against conviction dismissed.** **2. Attorney-General's appeal against sentence dismissed.** **3. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – OTHER MATTERS – where the prosecution sought to obtain convictions of manslaughter and grievous bodily harm by excluding the operation of s 282 of the *Criminal Code* 1899 (Qld) ("Code") – where the trial judge ruled that s 282 applied only where there had not been an effective consent such that the prosecution was obliged to prove a breach of the duty in s 288 of the Code – where the trial judge accepted that s 288 captures a case where it was wrong to undertake the surgery at all, as well as cases where surgery was done

poorly – where the appellant argued that s 288 only applies in relation to incompetence in the course of surgery – whether the trial judge erred in the construction of s 288

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where defence counsel applied for an order on day 10 of a 58 day trial that the jury be discharged for failure on the part of the prosecution to properly particularise its case – where the trial judge dismissed the application – where the appellant submitted that "new medical evidence" was being called by the prosecution during the trial – where defence counsel did not object to such evidence at trial – whether the evidence produced a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – where the trial judge dismissed the appellant's application for the jury to be discharged – where the appellant argued that the amendment of particulars at the effective end of the prosecution case denied the appellant a fair trial – whether there was an unfairness in the conduct of the trial – whether the trial judge erred in dismissing the application for discharge of the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the prosecution amended their particulars at trial – where the appellant submitted that the narrowing of particulars resulted in a volume of evidence in the trial being rendered irrelevant – where the appellant submitted that the new particulars changed the prosecution case from one of the subject operations being performed incompetently to one concerned with gross negligence in performing the surgery at all – where a pre-trial ruling that certain evidence should not be excluded was made before any particulars had been provided by the prosecution – whether such evidence ought to have been excluded – whether the revised particulars gave rise to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to seven year concurrent terms of imprisonment for each of the three manslaughter convictions and a three year concurrent term of imprisonment for the grievous bodily harm conviction – where the appellant argued the sentencing judge placed too much weight on denunciation and gave

insufficient weight to other purposes of sentencing – where the appellant argued the sentencing judge gave insufficient weight to the circumstances in which the appellant was living in the period between his extradition and conviction and his public shaming – where limited comparable cases – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – EXERCISE OF DISCRETION – GENERALLY – where the Attorney-General argued the sentence failed to adequately reflect the gravity of the offending and failed to sufficiently take into account general deterrence – where the Attorney-General argued the sentencing judge gave too much weight to factors going to mitigation and failed to exercise his discretion to declare the appellant to be convicted of a serious violent offence – where limited comparable cases – whether the sentence was manifestly inadequate

Criminal Code 1899 (Qld), s 23, s 282, s 288, s 289, s 298, s 590AA(3), s 669A(1)
Penalties and Sentences Act 1992 (Qld), s 9(1), s 161A

Attorney-General's Reference (No 6 of 1980) [1981] 1 QB 715, cited
Department of Health & Community Services v JWB & SMB (1992) 175 CLR 218; [1992] HCA 15, cited
Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, cited
Lacey v Attorney-General of Queensland [2011] HCA 10, applied
Moyse v The Queen (1988) 38 A Crim R 169, cited
Nudd v The Queen (2006) 225 ALR 161; [2006] HCA 9, considered
R v Bateman [1925] 19 Cr App R 8, considered
R v Brown [1994] 1 AC 212, cited
R v Hodgetts and Jackson [1990] 1 Qd R 456, considered
R v Lewis [1994] 1 Qd R 613; 1992 QCA 223, cited
R v Patel [2010] QSC 68, affirmed
R v Patel [2010] QSC 198, overruled
R v Patel [2010] QSC 199, approved
R v Pearce, unreported, Queensland Supreme Court, Indictment No 96 of 2000, 15 November 2000, considered
R v Pesnak & Anor (2000) 112 A Crim R 410; [2000] QCA 245, considered
R v Ramstead, unreported, New Zealand Court of Appeal, CA No 428 of 1996, 12 May 1997, distinguished
R v Thomas Sam; R v Manju Sam (No. 18) [2011] NSWCCA 36, distinguished
R v Scarth [1945] St R Qd 38, cited
R v Stott and Van Embden [2002] 2 Qd R 313; [2001] QCA 313, considered
R v Watson; ex parte A-G (Qld) [2009] QCA 279, considered

Royston Cook (1979) 2 A Crim R 151, considered
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, considered

COUNSEL: K C Fleming QC, with P Mylne, A W Collins, K A M Greenwood, L Willson, and W J Kilian for the appellant/applicant in Appeal No 169 of 2010 and the respondent in Appeal No 172 of 2010
R G Martin SC and D L Meredith for the respondent in Appeal No 169 of 2010 and the appellant in Appeal No 172 of 2010

SOLICITORS: Douglas Law for the appellant/applicant in Appeal No 169 of 2010 and the respondent in Appeal No 172 of 2010
Director of Public Prosecutions (Queensland) for the respondent in Appeal No 169 of 2010 and the appellant in Appeal No 172 of 2010

[1] **THE COURT:** On 29 June 2010, after a 58 day trial in the Supreme Court at Brisbane, a jury found the appellant Jayant Patel guilty of the manslaughter of Mervyn Morris, James Phillips and Gerardus Kemps and of unlawfully doing grievous bodily harm to Ian Vowles. The charges arose out of surgical operations which the appellant conducted upon those men whilst the appellant was employed as a surgeon at the Bundaberg Hospital between May 2003 and December 2004. On 1 July 2010, the trial judge sentenced the appellant to concurrent terms of seven years imprisonment for each of the manslaughter offences and three years imprisonment for the grievous bodily harm offence.

[2] The appellant has appealed against his convictions and he has applied for leave to appeal against sentence. The Attorney-General has also appealed against the sentence. Another issue was initially raised as a question of law reserved by the trial judge and referred to this Court by way of a case stated pursuant to s 668B of the *Criminal Code* 1899 (Qld) ("the Code"). The appellant filed an application seeking that the case stated be heard and determined prior to the hearing of his

appeal against conviction and application for leave to appeal against sentence, but at the hearing of the appeal the appellant abandoned the case stated.

THE APPEAL AGAINST CONVICTIONS

[3] It will be necessary in due course to refer to the manner in which the prosecution cases were narrowed during the course of the trial, but at this stage it is sufficient to identify the broad nature of the cases as they were put to the jury.

[4] In summing up to the jury, the trial judge summarised the allegations about the operations performed by the appellant as follows:[1]

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

[5] The prosecution case, as put to the jury, was not that lack of skill or failure to use reasonable care in the course of the operations caused the death of Mr Morris, Mr Phillips or Mr Kemps, or the grievous bodily harm suffered by Mr Vowles. The trial judge directed the jury that the trial was "not about botched surgery" but was instead "about surgery performed competently enough";[2] that it was "not how the Accused performed surgery that matters in these four cases" and that what mattered was "his judgment in deciding to commend the surgery to a patient and, having obtained [the] patient's consent, in taking the patient to theatre to perform it."[3] In that respect, the case put to the jury in relation to each patient was that the appellant should not have embarked upon the surgery notwithstanding that each patient had consented to it.

[6] The prosecution alleged that the appellant breached the duty imposed upon him by s 288 of the Code by proceeding to operate upon the patient. Section 288 of the Code provides:

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

[7] Section 300 of the Code provides that a person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the

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1 Transcript – Day 52, p 60.
2 Transcript – Day 52, p 59.
3 Transcript – Day 52, p 60.

circumstances of the case. The charges of manslaughter were brought under s 303 of the Code, which provides that any person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter. Section 291 provides that it is unlawful to kill any person unless such killing is authorised or justified or excused by law. In each case the prosecution alleged that the application of s 288 in combination with s 291 rendered the appellant guilty of unlawful killing. The charge of unlawfully doing grievous bodily harm was brought under s 320, which provides that any person who unlawfully does grievous bodily harm to another is guilty of a crime. The prosecution case was that the application of s 288 in combination with s 320 rendered the appellant guilty of that offence.

[8] During the trial the prosecutor sought to advance cases of manslaughter and grievous bodily harm without reference to s 288. The effect of the prosecutor's argument was that each case could be established by proof that (1) the performance of the operation caused the patient's death, or grievous bodily harm, (2) that was not an event that occurred "by accident" within the meaning of s 23 of the Code and (3) it was not reasonable to perform the operation, so that the excuse from criminal responsibility in s 282 was excluded. Section 282 provided at the relevant times:[4]

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

The prosecutor contended that proof beyond reasonable doubt of (2) and (3) would establish the unlawfulness of each killing and of the grievous bodily harm. No other possible authority, justification, or excuse was available.

[9] In Ruling No 3[5] the trial judge rejected that argument. For present purposes it is necessary only to summarise the trial judge's conclusions, which were derived from textual, contextual, and historical considerations. The trial judge held that s 288 applied only where the patient had consented to the surgical treatment and s 282 applied only where there had not been an effective consent: "one concerns outcomes where there has been consent to the procedure; the other, where there has not" and it is "a necessary implication, to be derived from s 288 in context, that surgery with consent is lawful, with the surgeon's criminal responsibility in such circumstances to be determined by enquiring whether there has been a breach of the duty the section imposes."[6] Each of the four patients was a mentally competent adult who consented to the operation with knowledge of its nature and the attendant risks. The trial judge accepted defence counsel's argument that in those circumstances the appellant's criminal responsibility depended upon proof of a contravention of the duty imposed upon him by s 288. The prosecution cases were put to the jury on that basis.

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4 See Reprint 7A. Section 282 was in this form when the Code was enacted. It was amended after the events the subject of these proceedings, by the *Criminal Code (Medical Treatment) Amendment Act* 2009 (Qld), which commenced operation on 5 September 2009. The amendments are not relevant in this appeal.

5 *R v Patel* [2010] QSC 198.

6 *R v Patel* [2010] QSC 198 at p 10-11.

1. Abandoned grounds of appeal

[10] Ground 1 of the appellant's notice of appeal contended that the verdicts of the jury were unreasonable and not open on the evidence, but at the hearing of the appeal the appellant disavowed reliance upon ground 1 as a separate ground of appeal. The appellant by his counsel confirmed, as had been foreshadowed in the appellant's written outline of argument, that ground 1 was pursued only to the extent that it was supported by the other grounds of appeal.[7] The appellant by his counsel also confirmed, as the appellant's outline had foreshadowed, that the appellant abandoned ground 2, which contended for errors in law in a ruling that the relevant counts on the indictment could be heard together and that separate trials were not required.

[11] That leaves for consideration grounds 1A and 3-10.

2. Ground 1A: The proper construction of s 288 of the Code

[12] Ground 1A contends:

> "1A (a) That the learned trial Judge was wrong in law in his interpretation of Criminal Code s288 in Ruling No 4;
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> (b) That, consequently, the summing up and directions to the jury on s288 were in error;
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> (c) That, consequently, the trial miscarried;
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> (d) That, consequently, the appellant's conviction be quashed and he be acquitted."

[13] This ground of appeal was added by leave granted during the hearing of the appeal when the appellant abandoned the case stated by the trial judge under s 668B of the Code. The case stated had raised the same issue about the trial judge's construction of s 288 in Ruling No 4.[8]

[14] Under this ground the appellant contended that he was entitled to be acquitted because the prosecution cases were not within s 288. The appellant contended that upon the proper construction of s 288 it applies only in relation to the absence of skill or the failure to use reasonable care in the course of surgery and it does not apply in relation to a surgeon's decision to operate or to commend surgery to a patient.

Ruling No 4

[15] In Ruling No 4, the trial judge accepted the prosecutor's contention that s 288 was capable of application in both cases. The trial judge posed the question whether s 288 of the Code "made surgeons criminally responsible for misadventures where surgery is competently performed but the decision to embark on the operation is reprehensible?"[9] The trial judge acknowledged that because s 288 was a penal provision "any real ambiguity persisting after the application of the ordinary rules of construction is to be resolved in favour of the most lenient construction".[10] The

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7 Transcript (appeal) – 2 March 2011, pp 28-30.

8 *R v Patel* [2010] QSC 199.

9 *R v Patel* [2010] QSC 199 at p 12.

10 Quoting *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145. The trial judge referred also to *Chew v The Queen* (1992) 173 CLR 626 at 632, 642, and *Kelsey v Hill* [1995] 1 Qd R 182 at 185: "a strict construction is required of a penal statute ..., at least if the enactment is ambiguous".

trial judge considered that there were two textual indications that the duty s 288 imposed was not directed to the decision to perform surgery (the expression "in doing" in s 288 and the fact that s 282 referred both to the decision to operate and the performance of an operation), but held that the interpretation of s 288 propounded by the prosecution was preferable.

[16] In so holding, the trial judge referred to bizarre consequences which would result from the construction advanced by defence counsel and to the antecedent common law, but ultimately based his construction of s 288 upon the text. The trial judge held that: under s 288 the relevant "act" was not the performance of surgery, but rather the administration of surgical treatment; whilst "surgical treatment" will typically be surgery, that expression may extend to diagnosis of a condition and advice about it; and the duty imposed by s 288 might oblige the surgeon not to commend surgery to a patient or not to perform it even with the consent of the patient.

[17] The trial judge found support for that meaning of "surgical treatment" in *Royston Cook*,[11] in which the issue concerned the meaning of "surgical or medical treatment" in s 298 of the Code. Section 298 provided:

> "When a person does grievous bodily harm to another, and such other person has recourse to surgical or medical treatment, and death results either from the injury or the treatment, he is deemed to have killed that other person, although the immediate cause of death was the surgical or medical treatment, provided that the treatment was reasonably proper under the circumstances, and was applied in good faith."

[18] In *Royston Cook* the court held that the word "treatment" in s 298 comprehended the non-administration of anti-coagulant drugs by a surgeon who performed an operation upon a patient who had been stabbed by the accused. The patient died after a blood clot blocked an artery. In a passage quoted by the trial judge, Lucas J, with whom Kelly and Sheahan JJ agreed, said:[12]

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

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11 (1979) 2 A Crim R 151.

12 *Royston Cook* (1979) 2 A Crim R 151 at 154.

[19] The trial judge acknowledged that the reference to "treatment" in s 298 was found in a context which differed from s 288, but concluded that there was no factor, textual, historical or practical, which required a different content to be given to "surgical…treatment" in s 288. Accordingly, the trial judge accepted the prosecutor's contention that s 288 "captures a case where it was wrong to undertake the surgery at all, as well as cases where the surgery was done poorly"[13] and ruled that the appellant was "not absolved from criminal responsibility for the adverse outcomes for his patients merely because he had their consent to the procedures and (if it be the fact) performed them with reasonable skill and care".[14]

[20] That ruling was reflected in the trial judge's directions to the jury that s 288 imposed a duty upon a surgeon, not merely to carry out a surgical procedure competently, but that:[15]

> "He must also have reasonable skill and exercise reasonable care in deciding to commend the surgery to his patient and, where the patient [consents] to the procedure, in deciding to act on the patient's wishes to proceed to carry out the procedure.
>
> Administering 'surgical…treatment' encompasses the surgeon's judgment that the procedure should be commended to the patient and, should the patient consent, whether the surgeon should carry it out."

[21] Similarly, the trial judge directed the jury that it must be satisfied beyond reasonable doubt that the appellant's "*decision to perform the surgery in question* involved such a great falling short of the standard to have been expected, and showed such serious disregard for the patient's welfare, that he should be punished as a criminal: in other words, that *his decision to operate* was so thoroughly reprehensible, involving such grave moral guilt, that it should be treated as a crime deserving of punishment."[16] Only the emphasised parts of those directions are in issue. The other directions concerned the nature and degree of the lack of skill or carelessness which might justify a finding of guilt (which, for ease of reference, we will call "criminal negligence"). There is no issue about the appropriateness of the trial judge's directions about criminal negligence.

"In doing such act"

[22] The appellant contended that it was central to the trial judge's interpretation of s 288 that the word "act" includes a decision. In that respect the appellant referred to the question posed by the trial judge in Ruling No 4 and the directions to the jury which are set out in [15], [20] and **[**21] of these reasons. The appellant repeated the contention rejected by the trial judge that the expression "in doing such act" in s 288 does not comprehend a decision to commend or to embark upon surgery. The appellant highlighted the appreciable periods of time that elapsed in each case between the date upon which the appellant recommended surgery to the patients and the date upon which the appellant performed the surgery. In a related argument, the appellant contended that since, according to Ruling No 3, consent formed the critical difference between s 282 and s 288, it was only a matter to which consent

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13 *R v Patel* [2010] QSC 199 at p 12.
14 *R v Patel* [2010] QSC 199 at p 15.
15 Transcript – Day 52, p 62.
16 Transcript – Day 52, pp 67-68 (emphasis added).

could be given that could create a breach of the duty set out in s 288. It followed, so the appellant contended, that because there could be no consent to advice, which must be either followed or rejected, s 288 could not be applicable in the present case.

[23] Those arguments were originally advanced in support of the stated case concerning Ruling No 4. Perhaps for that reason, they did not take into account the trial judge's subsequent, repeated directions to the jury that it could not convict unless the prosecution proved beyond reasonable doubt that the appellant was guilty of criminal negligence in administering surgical treatment "by proceeding to perform" the relevant operation. In relation to count 9 in the indictment, which charged the appellant with having unlawfully killed Mr Morris, the trial judge directed the jury in the following terms:[17]

> "Before you may convict the Accused of the manslaughter of Mervyn Morris, the prosecution must satisfy you, beyond reasonable doubt, and on the evidence pertinent to this charge, of these three things, namely, that:
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> 1. *By proceeding to perform the sigmoid colectomy*, the Accused did not have reasonable skill, or else did not use reasonable care, in administering surgical treatment; and
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> 2. The operation resulted in - that is, caused - the death, which, among other things, means that the connection between the operation and death is so substantial that, on a charge as serious as manslaughter, responsibility for the death should be attributed to the Accused; and
>
> 3. *His proceeding to perform the operation* involved such a great falling short of the standard to have been expected, and showed such serious disregard for his patient's welfare, that the Accused should be punished as a criminal. In other words, that his decision to operate was so thoroughly reprehensible, involving such grave moral guilt, that it should be treated as a crime deserving of punishment."

[24] The trial judge used the same expression in the directions concerning counts 10 and 11, which charged the appellant with having unlawfully killed Mr Phillips and Mr Kemps.[18] In relation to the charge of grievous bodily harm to Mr Vowles in count 14, the trial judge similarly directed the jury:[19]

> "If so, you may convict the Accused of unlawfully doing Mr Vowles grievous bodily harm if, but only if, you are Satisfied, beyond reasonable doubt, both that:
>
> > *by proceeding to perform* the proctocolectomy, the Accused did not have reasonable skill, or else did not exercise reasonable care, in administering surgical treatment to that patient; and
> >
> > *his proceeding to perform* the operation involved such a great falling short of the standard to have been expected,

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17 Transcript – Day 52, pp 71-72 (emphasis added).

18 Transcript – Day 52, pp 98, 133. In the case of Kemps, the prosecution also alleged criminal negligence in relation to a second operation made necessary by the first.

19 Transcript – Day 52, p 150 (emphasis added).

> and showed such serious disregard for his patient's welfare that the Accused should be punished as a criminal: in other words, that his decision to operate was so thoroughly reprehensible, involving such grave moral guilt, that it should be treated as a crime deserving of punishment."

[25] The "decision to operate" can not be divorced from the appellant's conduct in proceeding to operate. That decision continued in effect up to the point at which the appellant embarked upon the operation. For the purpose of considering whether the nature and degree of the departure from the requisite standard of skill or care was such as to amount to a crime (that is, whether the appellant was guilty of what we have called "criminal negligence"), the jury was required to consider the quality of the appellant's decision to operate, but the trial judge's directions made it clear that what was alleged against the appellant in each case was criminal negligence in proceeding to perform the operation.

[26] The dictionary definition of "act"[20] and the decision cited for the appellant[21] supported the appellant's contention that a mere decision is not an "act", but the conduct of surgery necessarily involves an "act". The distinction drawn in the appellant's arguments between the performance of surgery on the one hand, and a decision to commend surgery, a decision to perform surgery, or the patient's consent to surgery on the other hand, raised a false issue. The real issue about the meaning of s 288 is whether it applies only in relation to a criminally negligent act in the course of performing surgery or whether it also applies in relation to a criminally negligent act in performing surgery at all.

Offences of omission

[27] The appellant contended for a different approach to s 288 in an argument which focussed upon its concluding clause, "and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty". The appellant contended that because s 288 did nothing but impose a duty and create proof of causation by "omission", it could not apply in relation to an offence committed by an act. The appellant referred to the statement by McPherson JA in *R v Stott and Van Embden*[22] that it was "probable that, like its neighbouring provisions in ss 282 [sic][23] to 290 forming ch 27 of the Code, s 289 was originally designed to cater for questions of causation arising out of 'pure' omission or failure to act". The appellant sought support for this approach in Sir James Stephen's *History of the Criminal Law of England*:[24]

> "Whether the word 'killing' is applied or not to homicides by omission is to a great extent a question of words. For legal purposes a perfectly distinct line on the subject is drawn. By the law of this country killing by omission is in no case criminal, unless the thing omitted is one which it is a legal duty to do. Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place, to ascertain the duties which tend to the

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20 "*sb.* … 1. A thing done … a deed implying a state … *v.* …. 3. To carry out in action": Shorter Oxford English Dictionary (1944) (3rd ed), Clarendon Press, Oxford.

21 *R v Falconer* (1990) 171 CLR 30 at 38-39 per Mason CJ, Brennan and McHugh JJ.

22 [2002] 2 Qd R 313 at 319 [16].

23 Chapter 27 of the Code comprises s 285 to s 290.

24 Sir James Stephen, *A History of the Criminal Law of England*, Vol 3 (1883) Macmillan and Co, London, at pp 10-11.

> preservation of life. They are as follows:- A duty in certain cases to provide the necessaries of life; a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life. Illustrations of these duties are the duty of parents or guardians, and in some cases the duty of masters, to provide food, warmth, clothing, &c., for children; the duty of a surgeon to employ reasonable skill and care in performing an operation; the duty of the driver of a carriage to drive carefully; the duty of a person employed in a mine to keep the doors regulating the ventilation open or shut at proper times."

[28] The effect of the argument was that s 288 applied in relation to an offence committed by an omission to perform a duty imposed by that section but it did not apply in relation to an offence committed by the performance of a positive act.

[29] The argument should not be accepted. Section 2 of the Code provides:

> "**Definition of *offence***
>
> An act or omission which renders the person doing the act or making the omission liable to punishment is called an ***offence***."

Section 288 creates consequences for any omission to observe or perform a duty in administering surgical or medical treatment. The relevant "omission" is an omission to observe or perform a duty, not an omission to perform an act. The duty might require the person bound by it either to perform an act or to refrain from performing an act. It follows that s 288 may be invoked in a prosecution for unlawful killing, or doing grievous bodily harm, where the death or harm is alleged to result either from a positive act of the accused or an omission by the accused in administering surgical or medical treatment.

[30] That conclusion is consistent with authorities concerning s 289. Section 289 provides:

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

[31] In *R v Hodgetts and Jackson*[25] and *R v Stott and Van Embden*[26] it was held that where s 289 applies, responsibility depends upon proof of criminal negligence.

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[25] [1990] 1 Qd R 456 at 459-460 per Thomas J, with whose reasons in this respect Ambrose J agreed. Thomas J referred to *Evgeniou v The Queen* (1964) 37 ALJR 508 at 510 col. II per McTiernan and Menzies JJ, 511 col. I per Taylor J, 513 col. II per Owen J; *Callaghan v The Queen* (1952) 87 CLR 115 at 119 per Dixon CJ, Webb, Fullagar and Kitto JJ; *R v Young* [1969] Qd R 417; *R v Scarth* [1945] St R Qd 38.

[26] [2002] 2 Qd R 313 at 318 [14] – 319 [16] (referring to *Callaghan v The Queen* (1952) 87 CLR 115 at 119 and *R v Van Den Bemd* [1995] 1 Qd R 401 at 403 per McPherson JA, Muir J agreeing).

There is no room for the application of s 23, under which a person is not criminally responsible for an event that occurs by accident, since s 23(1) makes that provision "[s]ubject to the express provisions of this Code relating to negligent acts and omissions" and s 289 is such a provision. The respondent accepted that those decisions required the prosecution to prove criminal negligence under s 288. For present purposes though, the significance of the decisions is that in each case the alleged offence was committed by a positive act of the accused and s 289 was regarded as being applicable.

[32] It is not possible to reconcile the text of s 288 with the appellant's contention that it comprehends only offences of omission. The "omission" in s 288 which constitutes the offence under s 2 is "the omission to observe or perform [that] duty" imposed by s 288.

"do any other lawful act" and "in doing such act"

[33] The appellant contended that the contrast between the language of s 288 ("do any other lawful act" and "in doing such act") and the language of s 282 ("the performance of the operation is reasonable") indicated that s 288 applied only in relation to carelessly performed surgery rather than surgery that should not have been performed at all.

[34] It is relevant in this respect to refer to the structure of the Code. The provisions relevant to the manslaughter charges (s 291, s 293, s 300, and s 303) are in ch 28 of the Code. Section 320, under which the count of grievous bodily harm was brought, is in ch 29 of the Code. Section 288 is in ch 27 of the Code. As its heading indicates, ch 27 imposes "[d]uties relating to the preservation of human life". Each section in ch 27 adopts the pattern evident in s 288 of imposing a duty in specified circumstances and holding a person who breaches the duty responsible for the consequences to the life or health of the person in whose favour the duty is imposed. For example, a close analogy with s 288 is found in s 289, which is set out in [30] of these reasons.

[35] Section 282 is in ch 26 of the Code (the heading to which refers to "[a]ssaults and violence to the person generally - justification and excuse"). Section 282 and s 288 serve very different purposes. Section 288 imposes a duty and, in a case where the omission to observe or perform that duty results in death or adversely affects health, it makes the person responsible for that consequence for the purposes of other provisions, including s 291 and s 320. Section 282 fulfils the very different function of excusing criminal responsibility which otherwise would be imposed by a different provision. In this respect, we respectfully disagree with the trial judge's conclusion, expressed in his reasons for Ruling No 3, that s 282 applies only where there is no effective consent to the surgical operation.[27] In our respectful opinion s 282 is capable of application both where consent is present and where it is absent. Consent is not expressed to be a criterion of the application of s 282. The fact that in a particular case, as in this case, proof beyond reasonable doubt of an omission to observe or perform the duty imposed under s 288 will exclude any application of s 282 is an insufficient justification for an implication to that effect, particularly because s 282 may apply in other cases. The Code itself creates some offences,

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[27] See [9] of these reasons. The ruling itself, that the prosecution was required to prove a breach of duty under s 288, is consistent with the decisions cited in [31] of these reasons and is not in issue in this appeal.

unrelated to any application of s 288, which might be committed by the performance of a surgical operation: for example, in certain circumstances, it is an offence against s 224 to use force with intent to procure a miscarriage and it is an offence against s 313 to prevent a child from being born alive. It could not reasonably be implied that the excuse from criminal responsibility in s 282 in relation to offences of that character, though potentially applicable where the patient does not consent to the surgical operation, is inapplicable where the patient consents to the same surgical operation. Such an implication would be illogical and inconsistent with authority.[28]

[36] The fact that these sections are in different chapters of the Code and serve such different purposes reduces the significance of the contrast between s 282 and s 288 upon which the appellant relied. Bearing in mind also that s 282 applies in a much narrower range of circumstances ("a surgical operation") than s 288 ("surgical or medical treatment"), that contrast is an insufficient ground for reading down the ordinary meaning of s 288.

[37] The appellant's construction treats the words "in doing such act" as meaning "in the course of doing such act" but in a context in which "surgical or medical treatment" is treated as an "act", the words also comprehend the meaning "in doing such act at all". The expression "such act" refers back to "any other lawful act", and "surgical or medical treatment" is treated as an example of a "lawful act". Section 288 therefore implies that "to administer surgical or medical treatment" is "doing such act", that is, an act of a kind which attracts the specified duty and the specified consequence for breach of that duty. Although the section considered in *Royston Cook*, s 298, performed a very different function, the construction of the expression "surgical or medical treatment" in that case should be adopted here, as the trial judge concluded. That construction was not influenced by the particular context in which the expression was used; rather, it reflected the ordinary meaning of the expression. It comprehends "the whole management of the patient, to everything that is done in accordance with that management, and also to things which are not done as a result of a decision which is deliberately taken with regard to the management of the patient."[29] The breadth of the expression is an indication that s 288 is not confined to acts which occur after the commencement of surgery. The appellant's conduct in proceeding to perform an operation amounted to the administration of surgical treatment to each patient.

[38] We would respectfully endorse the trial judge's conclusion that the text of s 288 conveys that it applies both in relation to surgery performed in a criminally negligent manner and in relation to surgery that should not have been performed at all so that undertaking to perform it was, in itself, criminally negligent.

[39] It may also be noted that this view is consistent with the reference in s 288 to a contravention of the duty it imposes as an omission to "observe or perform" the duty. That phrase recalls covenants in leases, in relation to which it was said that "observe" conventionally refers to an obligation not to disobey negative covenants whereas "perform" refers to an obligation to act in accordance with positive covenants.[30] That approach was not uniform and the cases show that much depends

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28 See *Veivers v Connolly* [1995] 2 Qd R 326 at 329 per de Jersey J (as the Chief Justice then was), and the decisions there cited.

29 *Royston Cook* (1979) 2 A Crim 151 at 154.

30 *Evans v Davis* (1878) 10 Ch D 747 at 757, 761 per Fry J; *Hyde v Warden* (1877) 3 Ex D 72 at 82 per Brett LJ (delivering the judgment of himself and Cockburn CJ; the judgment was prepared by Amphlett LJ, who resigned before it was delivered).

upon context. It was held, for example, that "non-performance" and "to be performed" might apply to the non-observance of negative covenants.[31] More recently, the word "observe" has been found not to be a purely negative word but to have a positive and a negative connotation.[32] It follows that in some contexts either word might refer to non-compliance with both positive and negative obligations, but the fact that both words are present in s 288 nevertheless emphasises that the statutory duty has negative aspects as well as positive aspects. It may therefore comprehend a duty to refrain from performing a particular act in the course of administering surgical or medical treatment.

Consequences of the appellant's construction

[40] The contrary construction propounded by the appellant would produce surprising results. The respondent contended that upon the appellant's construction s 288 would not apply, for example, in relation to a surgeon who conducted a technically competent operation to remove a patient's lung but the surgeon had, by criminal negligence, misdiagnosed the patient's cold as lung cancer. It seems that s 288 would also not apply where a surgeon proceeded with a technically competent operation to which the patient consented after having formed the opinion during the operation that it was unnecessary or useless. The first example might be explained away by the contention that the patient's consent had not been obtained to the operation actually performed, but the second example is not so readily explicable.

[41] Putting those examples to one side, the result that a surgeon may be punished for criminal negligence in the course of performing an operation to which a patient had consented but not for criminal negligence in embarking upon the same operation at all is itself surprising. The patient's consent to undergoing an operation commended by the surgeon could not explain that difference. Such consent could not be construed as consent to death[33] or injury occasioned by the surgeon's criminal negligence, whether in proceeding with the operation or in the course of the operation. The result of the appellant's construction is so odd as to suggest that it should be rejected in favour of a different construction if, as is the case here, one is reasonably open on the text.[34]

[42] The appellant argued that this consideration fell away when regard was had to the potential operation of s 282 in the prosecution of a surgeon for manslaughter or grievous bodily harm. The appellant argued that in a case where, on the appellant's construction, s 288 has no application, "[a] surgeon is able to be made criminally responsible in circumstances in which the prosecution is able to [prove] beyond a reasonable doubt that, relevantly, the operation was not reasonable having regard to all of the circumstances of the case."

[43] If that were so, the question whether s 288 or s 282 is potentially applicable would turn upon the question whether the surgeon had been careless in the course of

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31 *Croft v Lumley* (1858) 6 HL Cas 672, particularly per Martin B at 719; *Harman v Ainslie* [1904] 1 KB 698 at 704-709 per Collins MR (where the cases are analysed in detail), 710 per Romer LJ (Mathew LJ agreeing).

32 *Ayling v Wade* [1961] 2 QB 228 at 235-236 per Danckwerts LJ (Ormerod and Willmer LJJ agreeing).

33 Under s 284 of the Code, a person's consent to his or her death is irrelevant to the criminal responsibility of a person by whom the death was caused.

34 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321 per Mason and Wilson JJ.

performing an appropriate surgical operation, in which case the prosecution would be required to prove criminal negligence under s 288, or whether the surgeon had carelessly proceeded to perform a surgical operation which ought not to have been performed at all, in which case the prosecution would instead be required to exclude accident under s 23 and any application of s 282. The latter task must commonly be easier for the prosecution, as was indicated in this case by defence counsel's opposition to that construction. There is no apparent policy justification for such a result. Although it is not so extreme as that discussed in [41], it is still so surprising as to suggest that it does not reflect the proper construction of the provision.

[44] It will also be apparent that the appellant's argument largely adopted the contention advanced by the prosecutor but rejected by the trial judge in Ruling No 3. The appellant's senior counsel assured the Court, however, that neither party challenged that ruling.[35] The absence of such a challenge by the appellant is understandable. As we have indicated, the prosecution faced an easier task in excluding s 282 than it did in proving the breach of duty under s 288. If the appellant's contention were accepted the appeal against conviction should be dismissed because, having regard to the trial judge's directions to the jury quoted in [20], [21], [23], and [24] of these reasons, the guilty verdicts necessarily established that the appellant's conduct in performing each operation was unreasonable having regard to all of the circumstances of each case. The appellant did not contest the proposition that proof of breach of the duty necessarily excluded the application of s 282 in this case.

The antecedent common law and the historical development of the Code

[45] As the trial judge observed in Ruling No 3, whilst the text of the Code primarily supplies its meaning there are circumstances in which reference to the antecedent common law is justifiable.[36] One such circumstance is where the Code contains provisions which are ambiguous or of doubtful import.[37]

[46] The trial judge referred to the common law, and to the historical development of the provisions which became s 282 and s 288 of the Code, in the following passage in Ruling No 4:[38]

> "At common law, the general rule was that serious bodily injury intentionally inflicted on another was unlawful despite a victim's consent.
>
> 'Reasonable surgical interference' was an exception, being 'needed in the public interest': *Attorney-General's Reference (No. 6 of 1980)* [1981] 1 QB 715, 719; cf. *R v Brown* [1994] 1 AC 212, 231-232; 242; 245; 266.
>
> A competent patient's consent rendered surgical intervention lawful.
>
> As was said in *Department of Health & Community Services v JWB & SMB ('Marion's Case')* (1992) 175 CLR 218, at p. 234:
>
> > 'The factor necessary to render such treatment lawful when it would otherwise be an assault is … consent.'

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35 See footnote 27 above.

36 *R v Patel* [2010] QSC 198 at pp 6-7.

37 *Stuart v The Queen* (1974) 134 CLR 426 at 437 per Gibbs J, quoted with approval by McHugh J in *The Queen v Barlow* (1997) 188 CLR 1 at 19.

38 *R v Patel* [2010] QSC 199 at pp 7-12.

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

> 'Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself … but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.'

His footnote said:

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

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

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

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

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

The proposal was influential in Queensland.

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

> 'In 1878 Lord Blackburn, Mr Justice Barry (of Ireland), Mr Justice Lush, and Sir James Fitzjames Stephen, were appointed by Royal Commission to be Commissioners to report on the provisions of a Draft Code of Criminal Law which had then lately been prepared in England. They submitted as an Appendix to their Report a Draft Code settled by them, which,

> with some modifications, was introduced into the House of Commons as a Bill in the session of 1880, but did not become law. I have freely drawn upon the labours of these distinguished lawyers, especially with respect to the statement of rules of the Common Law and the definition of Common Law offences.'

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

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

Stephen's choice of words had been modified slightly: '…duty to have and to use reasonable knowledge skill and care in doing any such act…' became '…to have reasonable skill and to use reasonable care in doing such act…'.

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

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

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

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

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

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

> 'Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit: Provided that performing the operation was reasonable, having regard to the

> patient's state at the time, and to all the circumstances of the case.'
>
> Griffith altered it by adding a reference to an operation 'upon an unborn child for the preservation of the mother's life'. Last year, that exemption from criminal responsibility was extended to encompass 'medical treatment': see *Criminal Code (Medical Treatment) Amendment Act 2009*. These changes have no present significance.
>
> s 282 conditions exemption from criminal responsibility on the performance of the operation being reasonable because it was intended to cope with surgery performed without consent. More is said on this topic in the reasons for my Ruling on Wednesday, 2 June 2010. See also Queensland Law Reform Commission, *Consent to Health Care of Young People*, Report No. 5 (December 1996) pp. 28, 40.
>
> Whether by oversight or design, Stephen's Code did not, expressly at any rate, envisage that harm resulting from competently conducted surgery to which the patient had consented, influenced by misdiagnosis or a surgeon's poor judgment, would attract criminal responsibility.
>
> Historical considerations, however, cannot prevail over the text if its meaning is plain: *R v Barlow* (1997) 188 CLR 1, 18-19. See also *R v LK; R v RK* (2010) 266 ALR 399 at [96]-[97]."

[47] In our respectful opinion the historical considerations identified in that passage do not favour the construction advocated for the appellant.

[48] The decisions in *Attorney-General's Reference (No 6 of 1980)* and *R v Brown* to which the trial judge referred are consistent with the view that a surgeon might be held responsible for criminal negligence in embarking upon surgery where the patient had consented to the surgery. That was not in issue in either case, but it is consistent with the description of the permissible conduct as "reasonable surgical interference",[39] "necessary surgery" or "reasonable surgery",[40] and "proper medical treatment, for which actual or deemed consent is a prerequisite".[41] More directly, in *R v Bateman,*[42] Lord Hewart CJ said:

> "As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man. As regards cases of alleged recklessness, juries are likely to distinguish between the qualified and the unqualified man. *There may be recklessness in undertaking the treatment and recklessness in the conduct of it*. It is, no doubt, conceivable that a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers, or for making his patient the subject of reckless experiment. Such cases are likely to be

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39 *Attorney-General's Reference (No 6 of 1980)* [1981] 1 QB 715 at 719 per Lord Lang CJ, Phillips and Drake JJ.

40 *R v Brown* [1994] 1 AC 212 at 242, 245 per Lord Jauncey.

41 *R v Brown* [1994] 1 AC 212 at 266 per Lord Mustill.

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

> rare. In the case of the quack, where the treatment has been proved to be incompetent and to have caused the patient's death, juries are not likely to hesitate in finding liability on the ground *that the defendant undertook, and continued to treat, a case involving the gravest risk to his patient*, when he knew he was not competent to deal with it, or would have known if he had paid any proper regard to the life and safety of his patient.
>
> The foregoing observations deal with civil liability. To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

The emphasised passages are consistent with the trial judge's construction of s 288.

[49] The common law was expressed in similarly broad terms in the first edition of *Halsbury*:[43]

> "Any person, whether a registered medical practitioner or not, who deals with life or health, is bound to have competent skill, and, if a patient under his charge dies for want of such skill, he is guilty of manslaughter. Similarly, a person, whether he has received a medical education or not, who is guilty of gross carelessness in the application of a remedy, is liable to be convicted of manslaughter if death ensues in consequence of his act; but he can only be convicted if he has been guilty of the grossest ignorance or of criminal inattention."[44]

[50] The extract from *Department of Health & Community Services v JWB & SMB* quoted by the trial judge does not support a contrary view. Immediately following that passage, Mason CJ, Dawson, Toohey and Gaudron JJ observed:[45]

> "The Code [*Criminal Code Act* 1983 (NT)] impliedly treats non-consensual medical treatment as an assault by making it a form of 'grievous harm' which may be consented to (s. 26(3))."

There is no similar provision in the Queensland Code. In any event, the fact that consent renders medical or surgical treatment lawful when it otherwise would be unlawful provides no support for the appellant's construction of s 288. The expression "lawful act" in s 288 indicates that the administration of the surgical or medical treatment to which that section refers is otherwise lawful treatment, but s 288 nevertheless renders the person administering the treatment responsible for those consequences to the life or health of the recipient which result from any omission to observe or perform the statutory duty to have reasonable skill and to use reasonable care in administering the treatment.

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43 Halsbury, *The Laws of England* (Vol XX) (1911) (1st ed) Butterworth & Co, London, at p 335, para 821 (citations omitted).

44 A passage in the same or similar terms appears in all subsequent editions of *Halsbury* as follows: Halsbury, *The Laws of England* (Vol XXII) (1936) (2nd ed) Butterworth & Co, London, at p 323, para 613; Halsbury, *The Laws of England* (Vol 26) (1959) (3rd ed) Butterworth & Co, London, at p 21, para 29; Halsbury, *The Laws of England* (Vol 30) (1980) (4th ed) Butterworth & Co, London, at p 37, para 42; and Halsbury, *The Laws of England* (Vol 30(1)) (2005) (5th ed) Butterworth & Co, London, at p 223, footnote to para 206.

45 (1992) 175 CLR 218 at 234.

[51] The reference in article 217 of Stephen's *Digest* to a surgeon's duty "to employ in doing it [administering surgical treatment] a common amount of such knowledge, skill, attention and caution"[46] comprehends a duty both in proceeding with the treatment and in the course of it, for much the same reasons that such a duty is comprehended by the text of s 288. That article, like the later versions of it discussed by the trial judge, was intended to incorporate the common law duty to use skill and care in administering treatment. In none of the material to which the trial judge referred was there any indication of a legislative policy to exclude from the scope of s 288 criminal negligence in embarking upon treatment. The Court was not referred to any evidence to that effect.

[52] Accordingly, reference to the antecedent common law provides further support for the trial judge's construction of s 288.

Conclusion: the proper construction of s 288

[53] The rule that statutes creating offences are to be strictly construed applies only where the statute remains doubtful or ambiguous after applying the ordinary rules of construction.[47] There is no such residual ambiguity in s 288. It applies both in relation to criminally negligent acts or omissions in the course of performing surgery and criminally negligent acts or omissions in performing surgery at all. The trial judge's construction of s 288 should be affirmed.

3. Ground 3 - The evidence relating to the appellant's treatment of the patient Grave should have been excluded.

Ground 5 - The evidence of the appellant's conduct relating to the securing of a ventilator for the patient Kemps should have been excluded.

Ground 7 - The trial judge erred in law in dismissing the appellant's application for the jury to be discharged on 6 April 2010 (the tenth day of the trial) on the basis that the appellant was being denied a fair trial as a result of new medical evidence being called by the Crown during the trial.

Ground 8 - The trial judge erred in law in dismissing the appellant's application for the jury to be discharged on 8 June 2010, at the effective end of the prosecution case, on the basis that the change in the prosecution particulars at that stage denied the appellant a fair trial.

Ground 9 – A miscarriage of justice was produced by the amendment of the particulars of the prosecution case at the effective end of the prosecution case, which resulted in a volume of evidence in the trial being rendered irrelevant.

[54] As grounds 3, 5, 7, 8 and 9 are interlinked, it is convenient to deal with them together insofar as they are discrete grounds of appeal.

The appellant's submissions

[55] The further arguments advanced by counsel for the appellant in respect of these grounds may be summarised as follows. The thrust of the appellant's case was that

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46 Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1883) (3rd ed) Macmillan and Co, London, at p 150.

47 *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145; *Chew v The Queen* (1992) 173 CLR 626 at 632, 642.

the change in "direction to an entirely new case after [the prosecution's] case had closed" necessarily resulted in unfairness. The change was identified as abandoning the case that the surgery was performed negligently, and adopting a new case based on a negligent decision to perform surgery. Much of the evidence which had been led related to proof of the prosecution's negligent performance case. Consequently, when that case was abandoned, a large body of evidence became irrelevant. Much of that evidence was graphic, inflammatory and highly prejudicial to the accused. No direction by the trial judge served, or could have served, to remove that prejudice.

[56] Another consequence of that body of evidence having been admitted was that the defence was deprived of the possibility of having the evidence excluded by means of *Christie* applications[48] as the trial progressed. The defence's difficulties were compounded by the lack of "clarity or definition" in the particulars provided in the course of the trial.

[57] The evidence irrelevant to the new case was listed in a schedule to an outline of submissions provided by defence counsel to the trial judge in support of an application for the discharge of the jury on day 44 of the trial. Reference was made to the trial judge's criticism of the old particulars on day 44 and to his reference to defence counsel's failure to object to the admission of evidence and the inadequacy of the particulars.[49]

[58] Although the trial judge rightly acknowledged the change in direction of the prosecution case from negligent performance of the surgery to a negligent decision to perform surgery, he appeared to be of the view that the prosecution was entitled "to rely upon every little thing that … happened … in whatever circumstances, on the basis that it tends logically to prove that he knew that he was not up to performing these procedures and persisted with them nonetheless, which is said to be, and it must be right in principle, relevant to the question whether if there has been negligence in conducting these procedures, it rises to the level of criminal negligence."

[59] The observations "ignore(s) the new particulars that it was the recommending of the surgery that would be the basis of the charge."

[60] Despite the general principle that a party is bound by the way in which his case is conducted by his counsel, the matters set out below show a "failure of process" amounting to a miscarriage of justice:

(a) the pre-trial rulings were made on the basis of a case that intended to show that the operations in each of the four cases was done negligently and caused the death or grievous bodily harm;

(b) those rulings were made in the absence of any particulars;

(c) the provision of particulars at the beginning of the trial, and as the trial proceeded, lacked any clarity or definition;

(d) the trial proceeded purely upon the basis of the "botched" surgery case;

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48 *R v Christie* [1914] AC 545. Applications for prosecution evidence to be excluded in criminal trials on the basis that the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant.

49 Transcript – Day 44, pp 7-8.

(e) defence counsel argued from time to time in respect of particulars, but made no application pursuant to s 573 of the Code;

(f) defence counsel did not re-agitate the admissibility of evidence, prior to Ruling 4, upon a *Christie* basis;

(g) there was no request by either counsel for any redirections, after the trial Judge summed up to the jury.

[61] In order to determine the merits of these submissions it is necessary to examine the course of the trial and, in particular, the manner in which the prosecution case was particularised.

The course of the trial up to day 10

[62] The prosecution opening and some relatively brief argument took up the first day and some of the morning of the second day of the trial. Apart from some evidence which was generally applicable to all four patients, the evidence in relation to Mr Morris was then led. It concluded on the eighth day of the trial.

[63] On 6 April 2010, the tenth day of the trial, defence counsel applied for an order under s 60 of the *Jury Act* 1995 (Qld) that the jury be discharged without giving a verdict. There were two bases for the application: one was the unfairness alleged to flow from the prosecution's failure to particularise its case. Senior defence counsel complained that the particulars provided in respect of the case concerning Mr Morris were more "convoluted" than anticipated and that no particulars at all had been provided in respect of the prosecution cases concerning the other three patients.

[64] The other ground was that a prosecution witness, Dr Collopy, had given evidence which dealt with matters which were not touched on in his evidence at the committal hearing or in his various reports. The principal complaints in relation to Dr Collopy's oral evidence were that: the new matter had not been tested at the committal hearing; the defence case in relation to the Morris allegations had been conducted by reference to previously disclosed materials; and there were new matters raised in Dr Collopy's oral evidence which had not been put to other expert witnesses. Defence counsel identified 23 such matters.

[65] The trial judge concluded that many of the 23 matters were not, and were unlikely to become, controversial. He was of the opinion, in any event, that many of them "were sufficiently hinted at by earlier material". To the extent, if any, that matters did not fall into either of these categories, the trial judge considered that any difficulty experienced or prejudice suffered by the defence could be obviated by defence counsel conferring with witnesses or by particular witnesses being recalled. The trial judge noted that not one of the 23 matters relied on was the subject of an objection to its admission into evidence. Nor, he pointed out, was there an attempt to have any of the evidence excluded on discretionary grounds.[50]

[66] The trial judge dismissed the lack of particularisation ground on the basis that particulars had not been sought "until a very late stage". He concluded, not unreasonably, that this was the result of a "considered tactical decision."[51] The

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50 Transcript – Day 10, pp 46-47.

51 Transcript – Day 10, p 46.

primary judge traced the history of the particularisation of the prosecution case in a letter to the Court of Appeal registry dated 13 August 2010 pursuant to r 94 of the *Criminal Practice Rules* 1999 (Qld) and s 671A of the Code. The letter disclosed the following matters which were not controversial on appeal.

[67] In a hearing two days before the commencement of the trial the primary judge enquired whether there were particulars of the charges. He was informed by prosecution counsel that there were not and that "the defence [were] content for [him] to open the case and provide particulars in the course of that". At the conclusion of the first day of the trial, the trial judge raised a concern about the absence of particulars.[52] Nevertheless, the trial proceeded without the defence complaining about the lack of particulars. Draft particulars in relation to the Morris charge were delivered on the fifth day. The trial judge expressed concern to counsel about the inadequacies of the draft and "also the stance taken by the defence".[53] Particulars of the Morris charge were given on the sixth day of the trial. The trial judge again raised concerns about the particulars[54] but defence counsel made no complaint. On that day, however, defence counsel requested particulars in relation to the Phillips charge.[55]

[68] The trial judge's rulings on the tenth day of trial in relation to the prosecution's failure to particularise were not challenged on appeal. However, that ruling and the events which led to it, need to be understood in order to evaluate properly grounds 8 and 9. The ruling in relation to the consequences of Dr Collopy's allegedly new evidence was the subject of ground 7, and it is thus convenient to address that ground now.

Consideration of ground 7

[69] Ground 7 was used by counsel for the appellant, not as a ground in its own right which would warrant the verdicts being set aside, but as an aspect of the contention under ground 10 that a miscarriage of justice was produced by the aggregation of faults complained of in grounds 3, 4, 5, 6, 7, 8 and 9.

[70] In the written submissions of counsel for the appellant it was fairly conceded that there was "some equivocation about what was sought" by defence counsel in the course of argument before the trial judge. It was mentioned that in the course of argument it was requested "that the trial should be halted at this stage and that there be put in place a tightly controlled Court managed schedule to achieve and ensure fairness by having orders or directions such that particulars, final particulars could be supplied."[56] Another submission about the giving of "appropriate directions to manage [the] matter" so that the prosecution and defence would know precisely what was alleged on a resumed trial was made late in defence counsel's oral submissions.[57] Ultimately, however, defence counsel's submission was that the jury should be discharged.

[71] Counsel for the appellant, in their outline of argument, made reference to the trial judge's reliance on the fact that the subject evidence had not been objected to by

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52 Transcript – Day 1, p 53.
53 Transcript – Day 5, pp 25-31.
54 Transcript – Day 6, p 5.
55 Transcript – Day 6, p 8.
56 Transcript – Day 10, p 4.
57 Transcript – Day 10, p 33.

defence counsel or sought to be excluded on discretionary grounds. It was then submitted that the trial judge erred in failing to ask whether defence counsel's failure to object, coupled with the other findings of the trial judge which led to his ultimate conclusion, "would lead to a miscarriage of justice, or the failure to obtain a fair trial."

[72] We are not entirely confident that we understand the point being made. Counsels' reference to *R v Lewis* [1994] 1 Qd R 613 and *Nudd v The Queen* (2006) 225 ALR 161 in this part of the written submissions suggests that the argument is that the correct approach in a case such as this, in which it was stated expressly that there was no suggestion that defence counsel were lacking in competence, nevertheless corresponds to the approach in a case where a miscarriage of justice is alleged to have arisen through defence counsel's incompetence. The emphasised words in the following passage from the joint reasons of Gummow and Hayne JJ in *Nudd* were quoted:[58]

> "As four members of this court explained in *TKWJ v R*, describing trial counsel's conduct of a trial as 'incompetent' (with or without some emphatic term like 'flagrantly') must not be permitted to distract attention from the question presented by the relevant criminal appeal statute, here s 668E of the Code. *'Miscarriage of justice', as a ground on which a court of appeal is required by the common form of criminal appeal statute to allow an appeal against conviction, may encompass any of a very wide variety of departures from the proper conduct of a trial. Alleging that trial counsel was incompetent does not reveal what is said to be the miscarriage of justice. That requires consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial and whether there was a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial.*" (emphasis added) (citations omitted)

[73] The submissions also referred to an observation of Gleeson CJ in *Nudd* that where a miscarriage of justice is alleged to have arisen from the failure of process, " … it is the process itself that is judged, not the individual performance of the participants in the process."[59]

[74] The appellant's argument is misguided. The observation in *Nudd*, directed at the consequence of defence counsel's incompetence, has little bearing on the consequences of indisputably competent defence counsel having made rational and reasonable choices for tactical purposes. As Gleeson CJ explained in *Nudd*:[60]

> "Sometimes, however, a decision as to whether something that happened at, or in connection with, a criminal trial involved a miscarriage of justice requires an understanding of the circumstances, and such an understanding might involve knowledge of why it happened. A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to

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58 (2006) 225 ALR 161 at 170 [24].

59 (2006) 225 ALR 161 at 164 [8].

60 (2006) 225 ALR 161 at 164-165 [9].

> seek to have excluded, and what lines of argument to pursue. The law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions. Nevertheless, the nature of adversarial litigation, with its principles concerning the role of counsel, sets the context in which these issues arise. Considerations of fairness often turn upon the choices made by counsel at a trial. In *TKWJ*, the appellant complained that evidence of his good character was not led. This, it was said, was unfair. In rejecting that argument, this court said that the failure to call the evidence was the result of a decision by counsel, and that, viewed objectively, it was a rational decision. That, in the circumstances of the case, was conclusive. It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct." (citation omitted)

[75] In *TKWJ v The Queen*, Gleeson CJ said:[61]

> "Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts … The appellate court will rarely be in as good a position as counsel to assess the relevant considerations. And, most importantly, the adversarial system proceeds upon the assumption that parties are bound by the conduct of their legal representatives."

[76] These remarks are also relevant to other decisions made by counsel such as a decision not to press for particulars, a decision not to object to evidence and a decision not to seek a particular direction or re-direction by the trial judge. Later in his reasons Gleeson CJ gave a further explanation of why a tactical decision considered by an appellate court with the advantage of hindsight to have worked to the disadvantage of the accused would not result, necessarily, in unfairness to the accused:[62]

> "It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the

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61 (2002) 212 CLR 124 at 128 [8].

62 (2002) 212 CLR 124 at 130-131 [16].

> conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks."

[77] In the same case McHugh J also discussed the bearing of the role of an accused's counsel on the question of whether a miscarriage of justice arose from the manner in which counsel conducted the case:[63]

> "The critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred. However, 'whether counsel has been negligent or otherwise remiss ... remains relevant as an intermediate or subsidiary issue'. That is because the issue of miscarriage of justice in such cases ordinarily subsumes two issues. First, did counsel's conduct result in a material irregularity in the trial? Second, is there a significant possibility that the irregularity affected the outcome? Whether a material irregularity occurred must be considered in light of the wide discretion that counsel has to conduct the trial as he or she thinks best and the fact that ordinarily the client is bound by the decisions of counsel. Accordingly, 'it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence'. The appellant must show that the failing or error of counsel was a material irregularity and that there is a significant possibility that it affected the outcome of the trial.
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> … Where the appellant can show that counsel has conducted the trial with flagrant incompetence, it is likely that the appellant will have established a material irregularity in the conduct of the trial that will provide the stepping stone to a finding of a miscarriage of justice. …
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> But as *R v Ignjatic*[64] shows, an accused will find it difficult to establish a miscarriage of justice when the alleged errors of counsel concerned forensic choices upon which competent counsel could have differing views as to their suitability … In *Ignjatic*, the appellant's case was not made easier by reason of the defence having been conducted on the advice of senior counsel, experienced in the criminal law, after a 'substantial' conference and on instructions from the accused.
>
> It will be even harder for the appellant to succeed where counsel has made the choice because of a perceived 'forensic advantage'…" (some citations omitted)

[78] The decision of defence counsel not to object to the "new medical evidence" is readily explicable as a reasonable tactical decision. That is particularly so as many of the 23 matters complained of, as the trial judge found, were not and were unlikely to become, controversial. There was then every reason why counsel would

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63 (2002) 212 CLR 124 at 149 [79]-150 [82].

64 (1993) 68 A Crim R 333.

not wish to have been seen taking objections which may have been viewed as pedantic or trivial in nature. No issue was taken by counsel for the appellant with the trial judge's conclusion that if any of defence counsel's 23 matters had substance any prejudice could be obviated by defence counsel conferring with witnesses and them being recalled if necessary. It was not suggested that any application was made by defence counsel to pursue any such course. Nor did defence counsel claim at any subsequent time during the trial that prejudice of any kind had flowed from the alleged new evidence. Counsel for the appellant did not refer the Court to any particular evidence within the 23 matters which was said to have resulted in prejudice, irretrievable or otherwise.

[79] It is plain from the foregoing discussion that there is no substance in ground 7 and that if ground 10 is to succeed it must do so without assistance from ground 7.

Matters relevant to the particularisation of the prosecution case between days 10 and 44

[80] It is necessary now to resume the narrative of events at the trial so far as it concerns grounds 8 and 9. Particulars in respect of the Phillips case were provided on day 12. The original Kemps particulars were provided on or about day 30 and the original Vowles particulars on day 38. In each case the particulars were provided before the prosecution commenced to lead evidence which related specifically to the particularised case. The defence made no complaint about the particulars throughout this period. On day 38 the trial judge informed counsel in the course of discussion about the management of the case that he remained concerned about the state of the particulars. He then said that he had borne in mind the prosecutor's optimism "that by the time the case is left it will be considerably narrowed."[65]

[81] On day 39, the trial judge again raised the state of the particulars. He queried whether the particulars in the Vowles case were intended to be more than another pro forma document. The prosecutor responded by intimating that there was "every prospect of a reduction in that material". The trial judge then made specific criticisms of the particulars. He referred to paragraph 6[66] which made general allegations of injury to the patient in terms of the definition of "grievous bodily harm" in s 1 of the Code. His Honour stated that "some definition" would need to be given to the allegations.

[82] The trial judge then referred to paragraph 7 which provided:

> "The accused knew that the surgical procedure referred to in 3 above was unnecessary and dangerous as alleged in 4 above."

[83] The trial judge expressed concern that the allegation went beyond an allegation of incompetence and involved "an imputation on character." Reference was made to an allegation in paragraph 11 that the surgical procedure was not performed in good faith. A brief debate took place in the course of which the trial judge said that he was hoping "that on reflection, these imputations will go".

[84] Particular 12, which was that "[t]he surgical procedure was not for the patient's benefit", was then discussed as was particular 9. The basis of the criticism of particular 12 was a perceived lack of legal and evidentiary support. Particular 9 was

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65 Transcript – Day 38, p 47.

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said by the trial judge, in effect, to embody a non sequitur. He said that if it had been "a civil pleading, it would [have been] struck out as not disclosing a reasonable cause of action, at least in the absence of an assertion that no particulars could be provided of it."

[85] Revised particulars of all four charges ("final particulars") were provided on day 43. The trial judge observed that they were a "vast improvement". Defence counsel said that they had not been able to analyse the new particulars in the time available but offered some criticisms as did the primary judge. The debate progressed into a discussion of how the jury should be directed in the summing up in relation to the evidence to which they should or should not have regard. There was an assumption on the part of defence counsel, seemingly shared initially by the trial judge, that the new particulars would render a substantial part of the evidence irrelevant. The prosecutor rejected that view.[67]

[86] In response to the question by the trial judge:[68]

> "What should I - what should I tell them, Mr Martin, that all the evidence is admissible in respect of all the charges and then leave you to sustain it in the Court of Appeal if there is a conviction?"

The prosecutor said:

> "Your Honour asks the wrong person. We have been at cross-purposes for much of the trial, largely because my friend hasn't actually been making any objections, for good reasons, and hasn't actually put forward any criticisms, and so we have been speaking in the abstract. So it is now my friend's turn to articulate what he says are the pieces of evidence that have limited probative value and so forth."

[87] After further brief discussion the matter was adjourned until 10.00 am the following morning when an application was made by the defence for the discharge of the jury on the grounds that the appellant could not secure a fair trial.

The application on day 44 to discharge the jury

[88] Defence counsel supported their application for the discharge of the jury with a brief written outline of submissions. It complained that evidence had been led in the course of the trial "based upon very wide particulars which were supplied, piecemeal, throughout the trial." It was asserted that the new particulars for each charge which had just been provided were substantially different from those previously provided and that a "great deal of evidence" admitted whilst the previous particulars applied was not relevant to the prosecution case under the final particulars. It was submitted that once particulars had been given the issues in a proceeding were limited to those within the particulars.[69] Reliance was placed on the following observations of Evatt J in *Johnson v Miller*:[70]

> "It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of

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67 Transcript – Day 43, pp 21-22.

68 Transcript – Day 43, pp 22-23.

69 *McClintock v Noffke*; *ex parte Noffke* [1936] St R Qd 73 at 79.

70 (1937) 59 CLR 467 at 497-498.

> irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularize the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged."

Counsel also relied on the reasons of Dixon J in that case:[71]

> "In my opinion [the prosecutor] clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge."

[89] Accompanying the written outline was a schedule of the evidence said to have been rendered irrelevant by the substitution of the particulars. In the course of argument the prosecutor stated, in effect, that if the consequence of the withdrawing of the old particulars and the narrowing of the prosecution case was that the jury would be discharged, the prosecution would restore the old particulars. The primary judge invited submissions from defence counsel in relation to the prosecution stance. In the course of so doing, he observed that he would be surprised if the final particulars were not "all embraced by the old in one way or another" so as to permit the prosecution to propound the case to the jury on the new particulars without formally relying on them.[72] The point was not addressed by defence counsel beyond stating that the defence declined to "argue in the theoretical" and that it was a question for the trial judge, given the volume of the evidence which had become irrelevant, whether appropriate directions could be given and whether the admissible evidence in respect of each charge would need to be identified in the summing up.

[90] The prosecutor argued that the evidence concerning the way in which the operations were performed, in cases involving death, was relevant to proof of the cause of death. In other cases, such evidence was said to be relevant to the assessment of whether the operation should have been performed, whether the appellant knew it should not have been performed and his degree of moral culpability. He submitted that, with the exception of the Grave procedures, there was widespread evidence of lack of skill on the part of the appellant. He submitted also that what transpired in the earlier operations was relevant to the later because the appellant should have become aware of his inadequacies having performed the earlier operations. Another submission was that the change in the particulars was "a consequence of historical decisions which lead us here, which would move [the trial judge] against exercising [his] discretion."[73]

[91] The trial judge held that the case intended to be propounded by the prosecution on the final particulars was embraced by the old particulars. He observed that the old "particulars largely lacked legal coherence" and that in contrast, "the new are

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71 (1937) 59 CLR 467 at 489.

72 Transcript – Day 44, p 15.

73 Transcript – Day 44, p 28.

sensible enough." The trial judge accepted the prosecutor's submissions that the evidence as to the way in which the operations were conducted had the potential to bear on whether the appellant knew facts which should have caused him not to operate on the subject patients and that evidence of mistakes in operations on other patients, at least where those mistakes known to the appellant, had potential probative value in connection with "such issues as whether embarking on surgery as major as an oesophagectomy was so reprehensible as to constitute criminal negligence".

[92] The trial judge considered whether some of such evidence may have had a potential prejudicial effect which far outweighed its probative value. In that regard, his Honour said:[74]

> "These kinds of risks might be thought to arise here. But the fact of the matter is that the evidence which is now said to be inadmissible in the light of the particulars was, with very limited exception, not objected to. There are one or two instances of evidence which has been admitted in accordance with pretrial rulings that invoked the Christie discretion, but there has been no attempt to re-agitate them in the light of the way in which the evidence has emerged at the trial.
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> Given the way in which the trial has been conducted, a discharge of the jury would present as an extraordinary outcome. In any event, however that may be, it is not, I think, needed to secure a fair trial. If some evidence is only admissible in respect of a particular charge or charges, or may only be used for a limited purpose, that ought to be able to be addressed by suitable directions in the summing-up - at least, if counsel can be persuaded or, if need be, prevailed upon to assist me by identifying the items of the evidence which should be subject to such a direction."

The superseded particulars

[93] It is necessary to describe the old particulars and to compare them with the new in order to determine whether the appellant's complaints referable to the particulars are justified.

[94] The particulars given in relation to the Morris charge on day six contained 29 generally short paragraphs. Paragraph three alleged:

> "On 14 June 2003 the patient died as a consequence of the surgical procedure [a sigmoid colectomy and colostomy] because the accused did not have reasonable skills and did not use reasonable care."

[95] The particulars alleged that a surgeon having reasonable skill and using reasonable care:

(a) would have taken steps to know the prior health and medical history of the patient before performing the procedure (para 5);

(b) would not have performed the procedure by reason of the matters in paragraph 4 (para 6);

(c) would not have performed the procedure if he did not know of the prior health and medical history of the patient (para 8);

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74 Transcript – Day 44, p 29.

(d) would have known the available treatment options listed in paragraph 9 (para 10);

(e) would not perform the procedure if he did not know of the available treatment options listed in paragraph 9 (para 12);

(f) would have known that it was dangerous to the life and health of the patient to perform the procedure at the hospital because of the patient's specified co-morbidities and general health (paras 13 and 14);

(g) would have known that it was dangerous to the life and health of the patient to perform the procedure without performing further tests to confirm a diagnosis or cause for rectal blood loss where the results would have indicated that the procedure was unnecessary (paras 17 and 18).

Alternatively, it was alleged that in performing the procedure not knowing of the matters in paragraph 17, the appellant failed to exercise due skill and care (para 20).

[96] Paragraph 21 alleged that the procedure was performed without reasonable skill or care in that:

"(i) It was performed or supervised in such a way as to give rise to wound dehiscence which required surgical correction.

(ii) It was performed in such a way as to result in the creation of an inadequate stoma.

(iii) The inadequate stoma was a cause of a partial bowel obstruction during the post-operative period."

[97] Paragraph 22 alleged:

"The post-operative care of the patient undertaken by the accused was performed without reasonable skill or reasonable care

Particulars

(i) Inadequate attention was paid to the patient's nutrition.
(ii) Inadequate attention was paid to the patient's blood proteins.
(iii) Inadequate attention was paid to the fact that the patient developed a bowel obstruction.
(iv) Inadequate attention was paid to the placement of a naso-gastric tube
(v) A consequence of the bowel obstruction and/or the inadequate placement of the naso-gastric feeding tube was that the patient vomited and aspirated the vomitus."

[98] Paragraph 23 particularised the ways in which the death of the patient was said to have been caused by the appellant.

[99] Other paragraphs alleged that:

(a) the appellant lacked reasonable skills to perform the procedure and did not use reasonable care in performing it (para 24);

(b) the procedure was not performed in good faith having regard to the matters alleged in paragraphs 7, 8, 11, 12, 15, 16, 19 and 20 and because the appellant was aware of the Oregon Order and did not comply with its terms (para 26);

(c) the procedure was not for the patient's benefit by reason of the matters alleged in paragraphs 3, 4, 9, 13 and 17 (para 27); and

(d) the procedure was not performed by the accused with reasonable care and skill and was not reasonable having regard to the patient's state and the relevant circumstances because of the matters in paragraphs 3 to 24 inclusive (paras 28 and 29).

[100] The superseded particulars provided in respect of the other three patients each followed the same format as the Morris particulars. The same general allegations were made but the further particulars of the general allegations, for example, a surgeon having reasonable skill and using reasonable care ("a competent surgeon") would have known that the procedure would be dangerous to the life and health of the patient and that there were treatment options available which were less dangerous to the patients' life or health, differed in order to meet the circumstances of the case.

[101] In the Phillips particulars it was alleged that the oesophagectomy procedure was performed without any prior consultation with Dr Miach (para 19). This was a matter relied on to support the allegations that:

(a) the appellant's conduct caused the death of the deceased (para 23);

(b) performance of the procedure was not reasonable (para 29); and

(c) that the procedure was not performed with reasonable care and skill (para 28).

[102] Paragraph 22 alleged that the procedure was performed without reasonable care or skill "in that the performance of the operation caused the patient to bleed internally at the end of [the] operation or shortly afterwards." This was the sole allegation of negligent conduct by act or omission in the operating theatre. There was no allegation of negligent post-operative care.

[103] The Kemps charge related to an oesophagectomy and to a second procedure conducted with a view to locating the source of and stemming "uncontrolled internal bleeding". The greater length of these particulars (45 paragraphs as opposed to 29 in the case of Mr Morris and Mr Phillips and 14 in the case of Mr Vowles) is largely attributable to the inclusion of allegations in relation to the second procedure in respect of which it was alleged that:

(a) At the conclusion of the first procedure the appellant knew or should have known that the patient was suffering from uncontrolled bleeding;

(b) The source of the bleeding should have been detected and the bleeding stopped;

(c) The appellant delayed too long in commencing the second procedure;

(d) The appellant failed in the second procedure to identify the source of the bleeding and stop it;

(e) The appellant sought no advice or assistance in relation to the bleeding during either procedure; and

(f) In all the above respects the appellant's conduct was not that of a competent surgeon.

[104] The Vowles procedure was the ileostomy and removal of the large bowel and rectum. Mr Vowles survived. The central allegations in the particulars were that: it was unnecessary to perform the procedure; the procedure was dangerous to life and health; the result of the colonoscopy which preceded the procedure did not indicate that the procedure was warranted; further investigations should have been performed and other less dangerous procedures were available.

[105] The sole allegation of negligent conduct by act or omission in the operating theatre was that the procedure "resulted in the patient having an inadequate stoma that needed to be rectified" (para 9).

Procedures and particulars concerning Mr Grave

[106] The prosecution also relied on evidence concerning an oesophagectomy conducted on 6 June 2003 by the appellant on a patient, James Grave, for an invasive carcinoma of the oesophagus.

[107] The Morris, Phillips, Vowles and Kemps procedures were performed on 23 May 2003, 19 May 2003, 4 October 2004 and 20 December 2004 respectively.

[108] Mr Grave's post-operative treatment was eventful, and we will digress briefly to summarise the evidence relating to it. He had respiratory problems and the day after the procedure the appellant performed a thoracostomy on him. After the patient had been in the intensive care unit for about a week the appellant had him transferred to a surgical ward in which the patient suffered severe respiratory distress. He was returned to intensive care two days later, on 15 June. That evening the appellant conducted a procedure on the patient to deal with wound dehiscence. On 17 June a junior house officer, Dr Kennedy, after consulting with an anaesthetist attempted to find a bed for the patient in an intensive care unit in Brisbane. The appellant opposed any such transfer, threatening to resign if the patient was transferred.

[109] The dispute over the transfer was referred to Dr Keating, the Director of Medical Services. He had little medical experience outside of administration. He asked Dr Younis, an anaesthetist, to make the decision. Dr Younis consulted with the appellant who assured him that the patient's condition would rapidly improve. Dr Younis then agreed that the patient could remain another 24 hours. On 18 June there was a leak from the tube which was used to feed the patient. That was rectified in the operating theatre.

[110] The patient's condition did not improve and he was transferred on 20 June to the Mater Hospital intensive care unit where he remained until 30 June 2003.

[111] Although the appellant was not charged in respect of Mr Grave's treatment, the prosecution relied on aspects of it in support *inter alia* of its allegation that the appellant ought to have known that the hospital lacked the facilities to provide appropriate post-operative care to patients who had undergone an oesophagectomy.

[112] The Grave particulars alleged in the course of 14 paragraphs that:

(a) The appellant should not have performed the procedure before first performing further tests or examinations to confirm specified co-morbidities and assess the risk posed by them;

(b) The appellant should have known that he lacked reasonable skill in the "appropriate staging of patients who may have oesophageal cancer";

(c) It should have been apparent to the appellant from the need to conduct procedures to deal with dehiscence that he "lacked reasonable skill to perform an oesophagectomy";

(d) It should have been apparent to the appellant from the patient's "long and difficult post-operative period at the hospital" that he lacked reasonable skill in patient selection, care and post-operative management; and

(e) It should have been apparent to the appellant that oesophagectomies should not be performed at the hospital.

The final particulars

[113] The final Phillips and Vowles particulars each consisted of 5 paragraphs and the final Morris and Kemps particulars each contained 6 paragraphs. It is, we think, sufficient to show the way the final particulars were structured and their content by referring to the final Phillips and Vowles particulars.

[114] In the case of Phillips it was alleged that:

- The patient died as a result of the procedure because the appellant "did not have reasonable skills and did not use reasonable care the details of which are set out below" (para 2);
- "It was grossly negligent to perform the surgical treatment for the reasons set out in 3 and 4 above" (para 5);
- The procedure should not have been performed as "the patient was suffering from severe co-morbidities making it too dangerous to do so and the surgical procedure was not appropriate for the condition … " (para 3); and
- The surgical treatment was "wrongly undertaken for any or all of the following reasons":

  "(a) the oesophageal cancer which was inside the oesophagus was of such a nature it did not justify the surgical procedure

  (b) the accused misread the CT scan and as result failed to investigate what might have been metastatic spread (which would have made the operation pointless)

  (c) the patient had a medical history and severe co-morbidities making such an operation extremely dangerous

  …

  (d) there were treatment options available to the patient other than the surgical [sic] that were less dangerous to the patient's health

  …

  (e) the accused performed the surgical procedure at a hospital which he knew or should have known would

have difficulties dealing with the post-operative problems that could be anticipated for this type of surgery

(f) the accused performed the surgical procedure without consulting the patient's renal physician

(g) the accused caused the patient to bleed internally at the end of the operation or shortly afterwards

(h) the accused was subject to and consented to an order of the Oregon Board of Medical Examiners which required him to obtain a second opinion from a surgeon before performing this type of surgical procedure and the accused did not do so" (para 4).

[115] It was alleged in paragraph 2 of the final Vowles particulars that the patient suffered grievous bodily harm. The balance of the particulars is:

"3. The surgical procedure was negligent because it was unnecessary in that the patient was not suffering from bowel cancer.

4. In addition the surgical treatment was wrongly undertaken for any or all of the following reasons:-

(a) the [appellant] performed a colonoscopy upon the bowel of the patient and discovered a polyp which was non-malignant but proceeded to perform the surgical procedure

(b) there were further investigations that should have been performed before any decision to operate

…

5. It was grossly negligent to perform the surgical treatment for the reasons set out in 3 and 4 above."

The differences between the superseded and final particulars

[116] The principal substantive differences between the superseded and final Phillips particulars are the abandonment in the latter of the allegations: of absence of good faith; that the procedure was not for the patient's benefit; and that the appellant did not know the prior health and medical history, or alternatively, that he knew and nevertheless performed the procedure.

[117] The principal focus of the prosecution case concerning Mr Phillips, at least as particularised, remained, not on showing that the actual procedures were negligently performed but that they should not have been performed at all. The allegations which directly supported the latter contention were: the perilous state of the patient's pre-procedure health including the existence of specified co-morbidities; the nature and extent of the condition being treated; the existence of other less dangerous treatments; and the limitations on the post-operative care available at the hospital.

[118] The allegation that reasonable care was not used in the actual performance of the procedure remained. However, only the particular that the appellant caused the patient to bleed internally would appear to relate to that allegation. In the superseded particulars the matters in paragraphs 3 to 22 were alleged to show that

the procedure was not performed with reasonable care and skill but paragraph 22, which referred to internal bleeding, was the only allegation which directly concerned the actual conduct of the procedure. The foregoing discussion of the nature and effect of the changes brought about by the final particulars is generally applicable to the Morris and Kemps particulars.

[119] Much of the reduction in the length of the particulars was achieved by the avoidance of duplication and prolixity. That observation applies to all sets of particulars including the Vowles particulars. In the final Vowles particulars the allegations that the procedure was not for the patient's benefit and was not performed with reasonable care and skill were abandoned as was the related allegation that the provision of an inadequate stoma which needed to be rectified showed a lack of reasonable care and skill.

[120] The allegation in paragraph 4(d) of the final Vowles particulars that the appellant knew or ought to have known of his limitations as a result of earlier procedures on other patients is echoed in the final Kemps particulars which retained allegations of negligent acts or omissions in the actual performance of the relevant procedure.

Consideration of grounds 3, 5, 8 and 9

[121] The above analysis of the particulars provided in the course of the trial shows that much of the appellant's argument in respect of ground 9 was based on the false premise that the prosecution case before the final particulars was solely that the four subject operations were performed incompetently and that, after the final particulars, the prosecution case was confined to establishing that it was too grossly negligent to have performed the surgery at all.

[122] The superseded particulars particularised the cases on both of these bases. It was only the Vowles final particulars which contained no allegation of negligent acts or omissions in the actual conduct of the procedure or procedures. But even in that case, it was alleged that the appellant did not have reasonable skills and did not use reasonable care and that the appellant knew or ought to have known of his limitations as a result of his treatment of the patients, Messrs Phillips, Morris and Grave.

[123] The final particulars in the cases of Mr Morris and Mr Kemps (in the case of Mr Grave, there was only one set of particulars delivered) each alleged that the appellant lacked reasonable skills and knew or ought to have known of his limitations. The final Phillips particulars merely alleged lack of reasonable skills and failure to exercise reasonable care.

[124] Consequently, evidence of the way in which the procedures were actually carried out was relevant to the prosecution cases concerning Mr Morris and Mr Kemps that the appellant lacked reasonable skills and knew or ought to have known that. Such evidence was relevant also to the differently particularised Phillips allegations. The Kemps particulars made relevant the procedures performed on the patients, Messrs Phillips, Morris, Grave and Vowles. The Vowles particulars made reference to the treatment of Messrs Phillips, Morris and Grave.

[125] When pressed to identify specific parts of the evidence which were prejudicial to the appellant and either made irrelevant by the final particulars or which may have

warranted exclusion on the grounds that their probative value was outweighed by their prejudicial effect, senior counsel for the appellant referred to the schedule to defence counsel's submissions on day 44. The schedule identified a number of witnesses who had given evidence in the Kemps case whose evidence mentioned or related to a terminally ill patient on a ventilator. This evidence was the subject of ground 5. The thrust of some of that evidence was as follows.

[126] The appellant had to ensure that a ventilator was available for Mr Kemps before he could operate. There was no ventilator immediately available but there was a patient then on a ventilator who was not expected to survive. The appellant left instructions with a nurse in the intensive care unit on 19 December 2004 that the ventilator be turned off at about 10.00 pm that night. Protocols relating to the taking of that action had not been followed. A resident working in the unit that night consulted an anaesthetist who was not prepared to have the ventilator switched off. The following day the appellant demanded to know why the ventilator had not been switched off and was told that protocols had not been followed. The appellant said that he had to do the operation on Mr Kemps that day as he was due to go on holidays in a few days time. The evidence did not suggest that, apart from the failure to follow protocols, it was not appropriate for the patient to be taken off life support and that that course was not duly authorised by an anaesthetist.

[127] The prosecutor defended the admissibility of the evidence at first instance on the basis that it showed that Mr Kemps' operation was rushed and that normal pre-operation procedures were neglected. He submitted that these things spoke "powerfully to moral guilt".[75] It is possible that they may have but complaints of haste and neglect of pre-operative procedures were not within the case concerning Mr Kemps as particularised by the final particulars. The evidence was relevant and therefore admissible in the case as earlier particularised. It was then alleged that the first procedure was performed recklessly, indifferent to other specified treatment options and that the procedures were not performed in good faith or for the patient's benefit.

[128] Defence counsel had failed in an attempt to have the ventilator evidence excluded on discretionary grounds in a pre-trial hearing pursuant to s 590AA of the Code and did not apply to the trial judge for leave to re-open the ruling under s 590AA(3). It was well open to defence counsel to make an application to have the evidence excluded or confined on account of its potential prejudicial impact as the ruling had been made in the absence of particulars and without the benefit of the evidence which had been led and the discussion and debates concerning the prosecution case over the 29 or so days of the trial which preceded the leading of the subject evidence. Nor did defence counsel, having failed to object to the evidence, seek a direction in relation to it. The evidence was not mentioned in the summing up except when the trial judge, summarising counsels' addresses, said that senior defence counsel had "commented upon the circumstances surrounding Dr Carter's decision to turn off a ventilator for a person suffering irreversible brain damage."[76]

[129] The other evidence pointed to by counsel for the appellant was the evidence concerning the operation on Mr Grave (ground 3) discussed earlier in [107] to [113]. It was submitted that evidence to the effect that the appellant was being

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75 Transcript – Day 44, p 11.

76 Transcript – Day 53, p 69.

petulant and threatening to resign if he did not get his own way, and evidence concerning the patient's transfer to Brisbane, including the appellant's objection to the transfer, was particularly prejudicial.

[130] Dr Joiner's evidence in relation to the transfer incident was to this effect. He was a medical practitioner who worked as an anaesthetist in the hospital. He was concerned about the condition of Mr Grave after the relevant procedure and took steps to arrange an intensive care bed for him in Brisbane. He told the appellant that the patient should be transferred to Brisbane as he was going to require long term ventilation. The appellant was unhappy about that and said that if it happened, he would resign. The matter was then discussed with the Director of Medical Services and it was decided that the patient would be kept in Bundaberg for another 24 hours to see how things would develop. Dr Joiner did not agree with the compromise. In cross-examination, the doctor accepted that in the conversation he had with the appellant, the appellant may have said "without my permission" after being told by the doctor that he had arranged for the patient to be transferred. That concession provided an explanation for a reaction which, without the explanation, would have appeared somewhat extreme.

[131] The evidence concerning the retention of Mr Grave in Bundaberg and his transfer to Brisbane after his condition failed to improve was made relevant in the Kemps case by the allegation that the surgical treatment was wrongly undertaken by reason that "the Accused knew or ought to have known of his own limitations because of the outcomes of the surgical treatment of Phillips, Morris, Grave and Vowles and of the limitations of the hospital because of the outcomes of the surgical treatment of Phillips and Grave". The Vowles final particulars alleged that the surgical treatment was wrongly undertaken for reason that the appellant knew or ought to have known of his limitations as a result of the treatment of Messrs Phillips, Morris and Grave.

[132] The appellant thus failed to make good the contention that the evidence concerning Mr Grave of which he complained (ground 3) became irrelevant. Like the evidence in relation to the ventilator, there was no objection in the course of the trial to its admission into evidence and no request for a direction in relation to it. Any application to exclude the evidence on discretionary grounds would have been unlikely to succeed as it shed light on what the appellant knew and ought to have known about the suitability of the intensive care facilities at the hospital for the post-operative care of patients who had undergone major surgery. The detail of the discussions was relevant to proving that the appellant was aware of relevant medical opinion. Ground 3 is not made out.

Summary of conclusions on grounds 3, 5, 8 and 9

[133] As has been explained, these grounds are based on the false premise that the prosecution case changed from one concerned entirely with proving that the appellant had performed the actual surgery negligently, to one concerned only with proving that the appellant should not have operated.

[134] There was, in fact, little difference in the evidence admissible in each of the prosecution cases under the different sets of particulars.

[135] The principal way in which the prosecution cases were affected by the final particulars was the reduction in their scope by the abandonment of the allegations referred to in [116] and [120] hereof.

[136] The only evidence shown by counsel for the appellant to have been made irrelevant by the change in particulars was the evidence relating to the ventilator adduced in the Kemps case. Part of that evidence cast the appellant in an unfavourable light. But although it demonstrated that the appellant acted in relation to the Kemps operation with undue haste and ignored protocols concerning the turning off of ventilators, it would have been plain to the jury that there was no question of the appellant's wanting the ventilator switched off prematurely or misguidedly.

[137] The evidence in relation to the ventilator was a relatively small body of evidence led in a 58 day trial in which evidence was led over approximately 39 days. That piece of evidence was thus unlikely to have had prominence in the jury's deliberations, either in respect of the count concerning Mr Kemps or the other counts.

[138] Defence counsel did not consider the ventilator evidence of sufficient concern to justify an application that it be excluded on discretionary grounds or an application to the trial judge to deal with the evidence in a particular way in his summing up. A request by the primary judge on day 44 of the trial for submissions identifying evidence for the purposes of directions concerning the evidence relevant to the final particulars was met with the response that defence counsel did not "wish to make any submissions on this point."[77]

[139] There was no criticism of the summing up. It fairly summarised the evidence in relation to each of the counts informatively, with lucidity and precision. It is reasonable to conclude that the jury would have drawn heavily from it in their deliberations. It is relevant also that the trial judge was careful to draw to the attention of the jury evidence and considerations favourable to the accused. Indeed, the case left to the jury by the primary judge was narrower than that encompassed by the final particulars. The jury was informed:[78]

> "It is critical to appreciate that this trial is not about botched surgery.
>
> Instead, it is about surgery performed competently enough.
>
> There may have been an imperfection or two in some of the procedures. If so, the mistakes did not, it seems, adversely affect patients.
>
> It is not how the Accused performed surgery that matters in these four cases.
>
> What matters is his judgment in deciding to commend the surgery to a patient and, having obtained patient's consent, in taking the patient to theatre to perform it.
>
> The prosecution contends that the operations were unnecessary or inappropriate."

[140] As noted earlier, the appellant's counsel abandoned ground 1 as a discrete ground of appeal. They have not submitted to this Court that any of the four convictions, including that concerning Mr Kemps, was "unreasonable, or cannot be supported having regard to the evidence".[79]

[141] Defence counsel were content between day 10 and day 43 to proceed with the case as particularised by the prosecution. They were aware that the trial judge was not

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77 Transcript – Day 46, p 2.

78 Transcript – Day 52, pp 59-60.

79 Code, s 668E(1).

comfortable with the way the prosecution case had been particularised. Defence counsel also made no applications during this period for evidence to be excluded in the exercise of the trial judge's discretion. It is reasonable to conclude that defence counsel had no difficulty in understanding the case their client had to meet. That is understandable. The great bulk of the prosecution expert opinion evidence was in the form of reports and the defence had had ample time to consider it. When it was thought by defence counsel that the evidence-in-chief went beyond the written material, as in Dr Allsop's case, defence counsel protested vigorously.

[142] The failure to press for further particulars, viewed objectively, is readily explicable as a tactical decision. It is often not in the interests of the defence to have the prosecution case stripped of unnecessary distractions and fully focused. There is also good reason to suppose that, viewed objectively, defence counsel's failure to seek a particular direction in relation to the ventilator evidence was linked with the decision not to assist the trial judge in the identification of irrelevant evidence.

[143] By reference to the principles discussed earlier, there was no material irregularity or unfairness in the conduct of the trial. Grounds 3, 5, 8 and 9 have not been made out.

4. Ground 10 – The aggregate of faults complained of produced a miscarriage of justice.

[144] This ground relied on the complaints raised in grounds 8 and 9 and also on the complaints the subject of grounds 3, 4, 5, 6 and 7. Grounds 3, 4, 5 and 6 related to pre-trial hearings. Grounds 3, 5 and 7 have already been discussed. Ground 4 contended that the prosecution witness Dr Allsop was not properly qualified to give certain expert evidence in the trial. Ground 6 was that the trial judge erred in ruling on 20 March 2010 that the Oregon order should not be excluded.

[145] Although the error alleged in grounds 4, 5 and 6 was that the trial judge erred in ruling that the subject evidence should not be excluded, a different argument was advanced on the hearing of the appeal. The appellant's outline of argument explained:

> "These grounds relate to pre-trial hearings.
>
> Those hearings were held before any particulars had been provided by the Crown.[80]
>
> Second, those determinations were made when the case was formulated in respect of surgical procedures, and s288 was treated in that way.[81]
>
> They therefore constitute a further plank in respect of Ground 10."

[146] It was not contended on the appeal that the pre-trial rulings were erroneous when made. Nor was it contended that when the subject evidence was led and admitted without objection it was inadmissible. It emerged in the address of senior counsel for the appellant, at least inferentially, that the point being made about these matters was that the evidence, although admissible initially became inadmissible by virtue of the new particulars, or had the new particulars been provided at the outset, that, in some unexplained way, would have facilitated the success of an application to exclude the evidence on grounds that its prejudicial effect outweighed its probative value.

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80 Transcript – Day 44, p 15, L 38.

81 *R v Patel* [2010] QSC 68.

[147] As for ground 4, in a pre-trial hearing under s 590AA of the Code a judge was requested to rule that the whole of the evidence of Dr Allsop was inadmissible on the grounds that the doctor lacked relevant expertise. The judge noted in his reasons that "[t]he objection is a general objection to the evidence of Dr Allsop", and that he was not asked to rule "with respect to any specific question … [if] it was beyond Dr Allsop's expertise."[82] The judge declined to find that the whole of the doctor's evidence should be ruled inadmissible. The judge, with respect, was plainly right. As Gleeson CJ observed in *Festa v The Queen*:[83]

> "If evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from a jury's consideration. It is not enough to say that it is 'weak', and, as already mentioned, whether it is weak might depend on what use is made of it."

[148] Dr Allsop, as the judge found, was a general surgeon who had retired from clinical practice in 2002 but had continued some professional activity after that. It was found also that he had extensive experience in conducting surgery and had performed oesophagectomies with a thoracic surgeon on ten occasions in a period of three to four years from 1978. His surgical qualifications were substantial. In 1974 and 1975 he lectured in surgery at Oxford University. He was a clinical and research fellow in surgery at Harvard University in 1976 and 1977 and senior lecturer in surgery at the University of Melbourne between 1978 and 1981. He was, for the most part, in practice as a general surgeon from 1978 to 2002.

[149] The judge noted that on a number of occasions "in respect to rather specific questions, Dr Allsop expressed the view that those questions were better answered by a 'committed oesophageal surgeon'." The judge ruled that "as Dr Allsop plainly recognised, some of the questions asked of him may be at or beyond the boundaries of his expertise." Later in his reasons the judge referred to Dr Allsop's "expressed reluctance to deal with some topics which he recognised he was not qualified to express an opinion about".[84]

[150] Plainly, the ruling in respect of Dr Allsop's evidence was made on a limited basis and left open the possibility of challenging the doctor's expertise to give evidence on matters not within his expertise. It was therefore open to defence counsel when Dr Allsop gave his evidence on days 34 and 35 of the trial to object to parts of his evidence on the basis that he lacked expertise sufficient to enable him to give expert opinion evidence. There were no such objections.

[151] No attempt was made on appeal to identify any evidence given by Dr Allsop which was beyond the scope of his expertise and thus objectionable. Nor was any attempt made to identify any prejudice to the appellant which might have resulted from the admission into evidence of any part of Dr Allsop's evidence. There is no substance in this ground. It cannot assist ground 10.

[152] In the case of ground 6, the Oregon order was an order of the Board of Medical Examiners of the State of Oregon made on 7 September 2000 with the appellant's consent. Paragraphs 3 and 4 of the order provided:

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82 *R v Patel* [2010] QSC 68 at [36].

83 (2001) 208 CLR 593 at 599 [14].

84 *R v Patel* [2010] QSC 68 at [35], [36], [38].

"3. Licensee [the appellant] and the Board desire to settle this matter by the entry of this Stipulated Order. Licensee understands that he has the right to a contested case hearing under the Administrative Procedures Act (chapter 183), Oregon Revised Statutes and fully and finally waives the right to a contested case hearing and any appeal therefrom by the signing of and entry of this Order in the Board's records. Licensee stipulates that he engaged in the conduct described in paragraph 2 and that this conduct violates ORS 677.190(1)(a) unprofessional conduct, as defined in ORS 677.188(4)(a) and ORS 677.190(14).

4. Licensee [the appellant] and the Board agree to resolve this matter by the entry of this Stipulated Order. By signing this Order, Licensee agrees to the following:

4.1 Licensee's scope of practice will exclude surgeries involving the pancreas, any resections of the liver, and any constructions of ileoanal pouches.

4.2 Licensee will obtain a second opinion preoperatively on complicated surgical cases from surgeons approved by the Board's Investigative Committee. This second opinion will be documented in the patient charts. Complicated surgical cases are defined in Attachment A."

[153] The "surgical cases requiring second opinions" in Attachment A were:

"Major Surgeries are defined as:

- Abdominal-perineal resections, esophageal surgeries, and gastric surgeries.
- Soft tissue malignancies.

High-Risk Patients with:

- Severe co-morbidities, including uncompensated heart failure, severe chronic obstructive pulmonary disease, and renal failure, or
- Classification of 4 or 5 in accordance with the American Society of Anesthesiologists.

Post-operative Patients with:

- More than two-days stay in the Intensive Care Unit, or
- More than eight-days stay in the hospital, or
- Onset of clinical deterioration."

[154] In ruling the Oregon order admissible the trial judge observed:[85]

"The significance of the order for present purposes is at least that it demonstrates that the accused was aware, through the terms of the order to which he had consented, that there was a respectable medical opinion (entertained by himself as well as the Board of

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85 Transcript (pre-trial hearing) – 20 March 2010, p 3.

> Medical Examiners of Oregon) that his level of surgical competence was such as to require the restrictions stated in the order in the public interest."

[155] The Oregon order was plainly relevant under the prosecution case as finally particularised. The existence of the order was a further particular in the final particulars of the allegation that the surgery had been wrongly undertaken. Under the final particulars the appellant's limitations as a surgeon and his understanding of those limitations were relevant, and in each of the final particulars there is also an allegation that the appellant "did not have reasonable skills".

[156] As was the case in relation to grounds 4 and 5, it was not explained in respect of ground 6 why an application could not have been made to exclude the evidence on discretionary grounds during the trial. Nor was it explained why, if the evidence was so prejudicial as to warrant its exclusion on discretionary grounds, the primary judge was not asked to give any directions to the jury in relation to it.

[157] Also the Oregon order was relevant to the question of whether the conduct of the appellant as particularised involved "grave moral guilt"[86] or negligence which "… went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".[87]

[158] The appellant also benefited from the trial judge's favourable direction that the terms of the order could only be used by the jury:

> "(1) in considering the weight to be attached to a patient's choice to undergo a procedure; and
>
> (2) its requirements might be thought to suggest that the Accused had reason to reflect, before commending major surgery … on any pertinent deficiencies there may have been in his knowledge and aptitude."

[159] For the reasons we have given, the complaints outlined in grounds 3 to 9, either alone or in combination, have not caused a miscarriage of justice in this case. It follows that ground 10 has not been made out.

5. Appeal against convictions: conclusion

[160] None of the grounds of the appeal against convictions has merit. That appeal should be dismissed.

ATTORNEY-GENERAL'S APPEAL AGAINST SENTENCE AND THE APPELLANT'S APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

[161] The Attorney-General has appealed against the seven year concurrent terms of imprisonment imposed on each of the three manslaughter convictions and the three year concurrent term of imprisonment imposed on the grievous bodily harm conviction. The appellant has also applied for leave to appeal against his sentence.

[162] The Attorney-General contends in his grounds of appeal that the sentences failed to reflect adequately the gravity of the offences generally and, in this case in

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86 *Callaghan v The Queen* (1952) 87 CLR 115 at 124.

87 *R v Bateman* (1925) 19 Cr App R 8 at 11-12.

particular; the sentences failed to take sufficiently into account the aspect of general deterrence; the sentencing judge gave too much weight to factors going to mitigation; and the sentencing judge failed to exercise his discretion to declare the appellant to be convicted of a serious violent offence.

[163] The appellant contends in his proposed grounds of appeal that the sentences were manifestly excessive and that the sentencing judge gave insufficient weight to the circumstances in which the appellant was living in the period between his extradition and conviction.

[164] Before returning to deal with these competing grounds of appeal, it is necessary to comprehend the sentencing proceedings and, after a 58 day trial, the factual basis on which the appellant was sentenced.

The prosecutor's submissions at sentence

[165] Mr Martin SC made the following submissions at sentence on behalf of the prosecution. The appellant was aged between 53 and 54 at the time of his offending and 60 at sentence. He trained as a doctor, first in India and then in New York, where he became licensed to practise medicine in May 1980. He had no criminal convictions but he had a history of medical professional disciplinary orders.

[166] After working in hospitals in Rochester, New York, he was dealt with on four counts of professional misconduct including "gross negligence". His name was removed from the roll of New York medical practitioners for six months but that removal was suspended immediately. Additionally, he was fined $5,000 and placed on a probationary order for three years, effective from March 1984. He was next employed at a hospital in Buffalo, New York.

[167] He became qualified as a surgeon in November 1988. In 1989,[88] he obtained a licence to practise medicine in Oregon, where he then worked for some years for Northwest Permanente PC (later known as Kaiser Permanente). We will refer to this institution as "Permanente". When he applied for a position with Permanente, he wrongly informed them that he had not been subject to professional disciplinary action. Permanente placed limitations upon the type of surgery the appellant could perform and his method of undertaking it, because of the appellant's "trends in malpractice and quality concerns".[89] He failed to comply with these limitations and in July 1999 was placed on a probationary order which he successfully completed in August 2000.

[168] Meanwhile, the Oregon Board of Medical Examiners ("the Board") had commenced an independent disciplinary investigation of the appellant in 1998. Permanente provided the Board with a list of 79 patients whom they considered were detrimentally affected by the appellant's treatment. At the request of the Board, this was reduced to the nine most serious matters representative of the issues associated with the appellant's restricted scope of practice. The Board had an eminent surgeon investigate these nine complaints and the appellant's response to them. The

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88 Transcript – Day 60, p 4 states that the appellant obtained a licence to practise medicine and surgery in the state of Oregon in 1999. It is unclear whether this date was stated in error or was a transcription error.

89 Transcript – Day 60, p 4 states that these limitations were placed on the appellant in May of 1988. It is unclear whether this date was stated in error or was a transcription error.

surgeon's conclusions were mostly adverse to the appellant. The investigation ultimately resulted in the Oregon order in September 2000, relevantly set out in [152] to [153].[90] The practical effect of the Oregon order was to make the appellant's employment as a surgeon economically unviable. In June 2001, Permanente notified him of its intention to initiate involuntary termination of his employment. He resigned effective from 20 September 2001.

[169] The appellant admitted through his counsel at trial that as a result of the Oregon order he did not perform any major surgery from December 2000 to February 2001.

[170] New York disciplinary proceedings were also brought against him. In 2001, he agreed not to contest these proceedings and surrendered his New York licence to practise medicine. From that time, he had difficulty in finding professional employment until obtaining his position with Queensland Health in Bundaberg. His application for that position was supported by references from doctors, at least some of whom knew about the restrictions on his practice in Oregon but who made no mention of them.

[171] Although the appellant was obliged to tell the Board if he worked as a medical practitioner elsewhere, he did not tell them about his employment in Bundaberg. Proceedings against him for that failure remain outstanding in Oregon. In practical terms, he has no prospect of having his medical licence re-instated in Oregon.

[172] Mr Martin handed up victim impact statements from Mr Vowles, the complainant in the grievous bodily harm charge, who referred simply but eloquently to the debilitating effect of the appellant's unnecessary, radical and invasive surgery upon his quality of life. Other victim impact statements were provided by relatives of Mr Morris, Mr Phillips and Mr Kemps, the deceased in the three manslaughter charges. Understandably and unsurprisingly, they felt anger and distress at the appellant's conduct towards their deceased loved ones.

[173] The appellant was held in custody, from his arrest in the United States of America on 11 March 2008 until his release on bail in Australia on 21 July 2008, a period of 131 days. He was also in custody after his conviction on 29 June 2010 until his sentence on 1 July 2010. The earlier period was not able to be declared as time served under the sentence as it also related in part to other charges.

[174] The key aggravating features of the appellant's offending were as follows. First, the appellant knew he was subject to the Oregon order which placed limits on the surgery he could perform. He both ignored the order and failed to tell his Bundaberg peers or patients about it. His reprehensible professional behaviour in Oregon was similar to his present offending. Second, he became a surgeon in 1988 and began working in Bundaberg in 2003. For two of these 15 intervening years, he did not work as a surgeon. Third, he undertook remarkably difficult operations, including oesophagectomies. Fourth, he regularly made errors during his surgery. Fifth, and most significantly, his offending resulted in multiple victims.

[175] The appellant's failure to inform staff or patients about the limitations placed on him under the Oregon order demonstrated that he was not motivated by altruism in operating on his victims. He was acting in a self-centred way in trying to redeem his own reputation as a surgeon.

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[90] Trial exhibit GEN093. The order was amended on 1 November 2000 but for present purposes the amendment is not of significance: see trial exhibit GEN096.

[176] Mr Martin tendered a schedule of medical negligence manslaughter convictions, conceding it was difficult to find truly comparable cases, especially where, as here, there were multiple victims. The closest cases, he submitted, were *R v Thomas Sam; R v Manju Sam (No. 18),*[91] and *R v Pearce,*[92] which suggested the appropriate sentence in the present case was well over 10 years imprisonment. The appellant's period in pre-sentence custody should be taken into account by deducting about six months from the head sentence. There were few mitigating features. Although the appellant returned voluntarily to Australia, he could have come back much earlier than he did. His return meant that he had much greater prospects of obtaining bail pending trial. The delay in bringing the appellant to trial was "a consequence of the strictures of the extradition process". Since the appellant's committal for trial in February 2009, the prosecution had been ready to proceed to trial; any delay from that time was not the fault of the prosecution.

Defence counsel's submissions at sentence

[177] Defence counsel made the following submissions at sentence. The appellant comes from a high-achieving family. His sister is a gynaecologist in India and his two brothers are retired engineers living in the USA. He married in 1972. His wife is an internal medicine physician in Oregon. Their daughter, born in 1977, also an internal medicine physician, is training in a sub-speciality of oncology. She is married to a radiologist and they have a son born in 2007. The appellant did his basic medical training in India, obtaining a Master of Surgery in 1976. He migrated to the USA in 1977 as a permanent resident and trained in surgery between 1978 and 1984. He also trained in endoscopy at the Teikeo University of Japan in 1982. He undertook research in immunology at the University of Buffalo between 1985 and 1988. He obtained certification with the American Board of Surgery in 1988 and again in 1996. He became a Fellow of the American College of Surgeons in 1994. He worked as a staff surgeon for Permanente in Portland, Oregon between 1989 and 2001 where he held responsible positions. He was a training doctor for 10 years and was the program director for the surgical training program at Emanuel Hospital between 1992 and 1996. In 1996, he became an approved examiner for the American Board of Surgery.

[178] In 1981, he received the Pennwalt Award from the Rochester Academy of Medicine for the best scientific paper by a surgical trainee. In 1983, he received an award for the best paper presented by a resident at the University of Buffalo, New York. In 1990-1991 and 1991-1992, he received the Teacher of the Year Award for teaching surgery in Portland. In November 1992, he received a Recognition of Excellence in Quality Management award. In 1995, he received a Distinguished Physician Award; and in 1996 an Outstanding Leadership Award; and in 1999 an award for paediatric surgery, all from Permanente. Defence counsel tendered a list of specialised medical publications which the appellant had co-authored.[93]

[179] The appellant was now 60 years old and without previous convictions. He had been subject to a lengthy period of public shaming and humiliation as a result of these charges, not just in Queensland but throughout Australia and in his home town of Portland, Oregon. Whilst on bail, he was personally abused in the streets of Brisbane. He had lost his career. The public shaming and adverse publicity had

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91 [2009] NSWSC 1003; [2011] NSWCCA 36.

92 Unreported, Queensland Supreme Court, Indictment No 96 of 2000, 15 November 2000, Holmes J.

93 Ex 7 at sentence.

also taken away his reputation as a human being. Following his extradition, he lived alone in Brisbane for about two years awaiting trial, apart from occasional visits from his wife. She had taken unpaid leave to spend about three months with him. Otherwise, he had no family or other support during the almost two year bail period. He had been unable to see his daughter or his grandson, or to visit his ailing 92 year old mother in India.

[180] The cases of *Pearce* and *Sam* were distinguishable and were of no assistance in establishing the appropriate sentence in the present case. The judge should find on the evidence that the appellant knew there were real threats pre-operatively to the lives of the victims so that he had to make decisions as to their treatment quickly. The appellant did consult with other specialists within the Bundaberg Hospital about the surgery, but in reality there was no other surgeon from whom he could obtain a second opinion as required by the Oregon order.

[181] The schedule of medical criminal negligence manslaughter cases relied on by the prosecution showed that the appropriate sentence for one offence after a trial was no more than five years imprisonment.

[182] There were very significant mitigating features. The appellant was arrested in Portland on 11 March 2008 and held in detention until 21 July 2008, a period of 4 months and 11 days. During his detention in the USA, he was locked in his cell for 22 hours each day. He did not oppose extradition and came to Brisbane on 21 July 2008. He was granted bail but not released until the following day. After his conviction and prior to sentence, he spent a further two days in custody. He was on bail prior to and during his trial for almost two years, during which time he was subject to a surety and required to report to police thrice weekly. This was akin to home detention: he was in a foreign country, without friends and family, and was vilified when out in public. Any future time spent in prison serving a sentence will be especially onerous because of his notoriety and unpopularity, and because of the inability of his family to visit from overseas. An appropriate head sentence to reflect all the offending was four to five years imprisonment. The mitigating features made it appropriate to wholly suspend that sentence, or to suspend it after a short period of actual custody.

The judge's sentencing remarks

[183] The judge made the following findings and observations in his sentencing remarks. In September 2000, the appellant consented to the Oregon order after the Board found he had violated the Oregon Medical Practice Act. The order required him, as part of an improvement plan regime, to obtain a second opinion before undertaking a complicated surgical case. The result was that from December 2000 the appellant's practice was effectively limited to performing outpatient surgeries and seeing patients in a clinic. The appellant ceased medical practice in February 2001 and did not perform surgery again until he began his employment at Bundaberg Hospital on 1 April 2003. The Oregon order did not have effect in Queensland but it was significant in determining the appellant's sentence.

[184] All the surgeries the subject of the present charges were complicated surgical cases within the meaning of that term in the Oregon order. The appellant must have known that there was respectable medical opinion that his level of surgical competence required, in the interests of patients, the obtaining of a second opinion

before embarking on major surgery. The Oregon order and the appellant's surgical misadventures there should have given him reason to reflect on his capabilities before commencing major surgery on the victims of his present charges. The appellant told no-one at Bundaberg Hospital about the Oregon order.

[185] The manslaughter of Mr Morris occurred in this way. The 75 year old Mr Morris suffered from intermittent rectal bleeding. His medical history included acute myocardial infarction, prostate cancer that had been managed with radiotherapy, a right total hip replacement and gall bladder removal. He had complained for more than two years of rectal bleeding. The bright rectal blood loss was probably attributable to radiation proctitis following treatment for prostate cancer. A rectal examination by sigmoidoscope did not locate a bleeding site. The appellant conducted a colonoscopy which disclosed multiple diverticula, especially in the sigmoid and descending colons, but no bleeding point was found. Mr Morris was told to return if the bleeding continued. It did, but a subsequent digital rectal examination revealed no abnormality. He was assessed as having rectal bleeding with an unidentified cause. No proctoscopic examination was done. A barium enema revealed "localised segment of diverticulosis involving sigmoid". The appellant made a note in the medical file stating: "[i]f continues to bleed will need surgical colectomy and colostomy". The following morning there was a small amount of bleeding. The appellant noted in the patient's chart: "Bleeding diverticulosis". The appellant determined to perform the sigmoid colectomy and colostomy to arrest the bleeding.

[186] When the appellant operated on 23 May 2003, no bleeding point was found. He removed the sigmoid colon and replaced it with a colostomy bag. The operation was straightforward and without complication. The patient's progress was satisfactory in the first week following surgery. But on 30 May, when the surgical staples were removed there was obvious wound dehiscence. The appellant performed further surgery to repair the dehiscence. That procedure went "well enough". But on 3 June a nurse noted a small rectal bleed. The surgery had been intended to stop the bleeding.

[187] Poor nutrition was compromising the patient's respiratory function. He was not tolerating a full diet. By 6 June, his abdomen was distended and he looked unwell. He probably had ascites (fluid) in his lungs as well as in his legs and abdomen. On 12 June, he had shortness of breath and ongoing ascites. In the evening, he passed a small amount of fresh looking rectal blood. His condition deteriorated over the following two days. Liver problems may have been contributing to his symptoms, including the ascites. By the early hours of 14 June, he was unable to talk and was suffering respiratory distress. He was transferred to the intensive care unit. He received maximum support to all vital functions but his condition progressively deteriorated. Mr Morris died at 9.45 am on 14 June 2003, three weeks after the competently performed sigmoid colectomy. The jury's verdict meant that the appellant's decision to operate on Mr Morris both caused his death and involved criminal negligence.

[188] The other three surgical procedures resulting in convictions were also performed "competently enough". The appellant's criminal negligence was his "judgment in deciding to commend the surgery to the patient and, having obtained the patient's consent, in taking him to theatre to perform it." The other manslaughter convictions involved the appellant performing oesophagectomies on Mr Phillips and Mr Kemps in circumstances where their health was too precarious for the procedure.

[189] Mr Phillips was born in 1957 and, although not old, was frail, malnourished and unwell. He was an "end-stage renal patient who needed haemodialysis to survive". He had a renal transplant in 1994 which failed about five years later. In 1999, he suffered a heart attack. By June 2000, he had mild myocardial ischaemia. Since January 2003, he suffered from a dangerously high level of potassium (hyperkalaemia). He had his vascular access improved surgically at the Royal Brisbane Hospital and then spent time in intensive care where he experienced serious difficulties including complicated pulmonary oedema. These were distinct indications that he would be at significant risk in any future surgery. Despite this, after Mr Phillips was diagnosed with oesophageal cancer the appellant decided to perform an oesophagectomy on him in Bundaberg.

[190] The anaesthetist, Dr Carter, who was the head of the Bundaberg Hospital intensive care unit, knew Mr Phillips and his medical history and assessed him as a high risk patient. Even so, he considered him suitable for an oesophagectomy. He was satisfied that his unit could cope with the patient's situation, including post-operative dialysis. The renal unit at the Bundaberg Hospital was well regarded and was familiar with Mr Phillips.

[191] Two other doctors, one of whom was a specialist anaesthetist, were satisfied with Mr Phillips' suitability for an oesophagectomy which the appellant performed on 19 May 2003. Mr Phillips died two days later from an acute cardiac event caused by potassium overload. The post-operative dialysis regime had not removed sufficient potassium. The dialysis was the responsibility of the renal unit and was not under the appellant's direction. But the jury verdict established that the oesophagectomy caused Mr Phillips' death and that the appellant's decision to perform it was criminally negligent.

[192] Mr Kemps was born in August 1927. He had been treated for many years for impaired kidney function but was not on dialysis. In 2002, he had an abdominal aortic aneurism repair performed by a vascular surgeon. Post-operatively whilst in intensive care, he developed pulmonary complications. He was transferred to Brisbane for specialist pulmonary care and eventually made a complete recovery. In late 2004, he complained of shortness of breath on exertion, dysphagia and melaena. An endoscopy revealed a cancerous growth at the lower end of the oesophagus. A CT scan showed two enlarged lymph nodes in the mediastinum and at least four focal intrapulmonary lesions lying posteriorly in the right lower lobe, the largest about 12 mm in diameter and showing some spiculation of the margins. This was an indication that the cancer had spread beyond the oesophagus. The CT scan was probably not available to the appellant at the time of the surgery. Physican, Dr Smalberger, planned to send Mr Kemps to Brisbane for treatment. But the appellant decided that he needed an oesophagectomy which the appellant would perform at Bundaberg. Two anaesthetists assessed Mr Kemps as fit for oesophagectomy from an anaesthetic perspective. Mr Kemps died during the surgery from bleeding which the appellant was unable to arrest. It followed from the jury verdict that the appellant was criminally negligent by proceeding to perform the oesophagectomy.

[193] The grievous bodily harm occurred when the appellant removed Mr Vowles' large bowel, wrongly perceiving that he was most likely suffering from familial colon cancer. Biopsies taken from a polyp in the bowel during an earlier colonoscopy showed the growths were benign. The surgery was completely unnecessary.

[194] The following considerations affected the sentence. Most importantly, three lives were lost and in the fourth case, the victim will suffer for the rest of his life. Victim impact statements showed the dreadful effects of the appellant's crimes.

[195] Had the appellant sought a second opinion, another surgeon would likely have advised against the surgery involved in all four counts. As to the manslaughter of Mr Morris, the bleeding point was not identified and other non-invasive treatments were available. As to the manslaughter of Mr Phillips, the patient was frail and had too many complications for an oesophagectomy to be performed on him in Bundaberg. As to the manslaughter of Mr Kemps, the oesophageal cancer was far too advanced, making other palliative treatment preferable. As to the grievous bodily harm done to Mr Vowles, the biopsies showed the polyps were benign and could have been removed without surgery.

[196] The appellant's offending was grave. Denunciation was an important factor in sentencing. The appellant had shown serious disregard for the welfare of his four patients. He did not intend to cause harm and that was significant. The appellant's judgement in deciding to take each patient to surgery was, however, consistent with the jury verdict, so thoroughly reprehensible and involving such grave moral guilt that he should be punished as a criminal.

[197] There were factors in mitigation. The appellant had no previous criminal history. Incarceration was likely to be more than usually difficult for him. He was 60 years old. His family resided overseas and would not be in Queensland to support him through his ordeal. His notoriety would also make prison life stressful. He had spent time in prison in connection with the present and other charged offences from 11 March until 21 July 2008. That 131 day period would be fully taken into account by reducing the head sentence otherwise imposed. Some slight credit should also be given for the almost two years during which he reported thrice weekly and was regularly abused in public.

[198] As already noted, the judge determined that concurrent terms of imprisonment of three years on the grievous bodily harm count and seven years on each of the three manslaughter counts should be imposed.

The appellant's contentions in the sentence appeal

[199] The appellant's counsel made the following submissions to this Court in support of his proposed grounds of appeal and in response to the Attorney-General's grounds of appeal. The Attorney-General's appeal against sentence should be dismissed. As the appellant's sentence was manifestly excessive, he should be granted leave to appeal, his appeal against sentence should be allowed and this Court should re-sentence him on each of the three manslaughter counts to concurrent terms of imprisonment of five years.

[200] The appellant must be sentenced according to the acts or omissions which the judge found made him criminally responsible for the three deaths and the grievous bodily harm. The absence of intention to harm in respect of all four offences is a very significant factor: see *Streatfield v The Queen.*[94] The primary judge placed too much weight on denunciation. In sentencing the appellant under s 9(1) *Penalties and Sentences Act* 1992 (Qld), denunciation (s 9(1)(d)) should not have been the

[94] (1991) 53 A Crim R 320 at 326 per Thomas J (Cooper J agreeing).

primary purpose but rather just punishment (s 9(1)(a)). A just punishment in this case involved concepts of proportionality as discussed by Jacobs J in *Moyse v The Queen*:[95]

> "[A] cardinal principle of sentencing, [is] that the court, whenever it can properly do so, should temper justice with mercy by imposing the lowest, rather than the highest, sentence of imprisonment that can be justified."

[201] The surgery with which each charge was concerned was, the primary judge found, performed "competently enough". The appellant committed these offences in the context of doing his best to treat the sick. His criminal negligence was in his decision to operate. In each case, the victims consented to have the appellant perform the surgery and understood that, as a consequence, they may die. It may be inferred that the appellant intended to assist his victims but harmed them through criminal negligence.

[202] Further, the appellant had been subjected to adverse publicity because of his notoriety. He had lost his position and his professional standing. The judge should have given more weight to the appellant's humiliating public shaming, not just in Queensland but nationally and internationally. These matters were themselves a significant penalty.

[203] There was no established sentencing range and no cogent or particularly useful comparable sentences. The reported cases, particularly *R v Watson; ex parte A-G (Qld)*[96] and *R v Pesnak & Anor*,[97] suggested that a head sentence for a single count of manslaughter of the kind committed by the appellant was less than five years imprisonment. The gravamen of the appellant's offending was his criminally negligent decision to operate in each case. The judge recognised that the actual surgery in each case was "performed competently enough". This is not a case where the appellant re-offended after conviction. The appellant's sentence did not require an element of protection of the community (s 9(1)(e)) as the appellant has no prospect of practising medicine again in Queensland. It was not a case which invoked principles of general deterrence or, because of the international adverse publicity, personal deterrence (s 9(1)(c)).

[204] In fixing the head sentence of seven years imprisonment, the judge took into account 131 days of pre-sentence custody which could not be declared as time served under the sentences imposed, and gave "slight credit" for the fact that the appellant had been on bail for almost two years under adverse circumstances with thrice weekly reporting. The judge should have mitigated the sentence more significantly to reflect these matters. On the judge's approach, the head sentence was in fact in the range of seven and a half to eight years imprisonment. This was a manifestly excessive sentence in this case. It was a sentence which would have been appropriate where an offender had been acquitted of murder and convicted of manslaughter; or was involved in a brutal attack; or killed with a weapon or a motor vehicle. The appellant's offending did not involve medically negligent acts which caused the deaths and serious injury to his patients; his negligence was in his decision to operate. This factor placed his offending in a much lower category. The sentences on each count of manslaughter should be reduced to five years imprisonment.

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95 (1988) 38 A Crim R 169 at 172-173.

96 [2009] QCA 279.

97 (2000) 112 A Crim R 410; [2000] QCA 245.

The submissions on behalf of the Attorney-General

[205] Mr Martin emphasised the following matters in support of the Attorney-General's grounds of appeal and in response to the appellant's proposed grounds of appeal.

[206] The appellant performed the operations the subject of the four charges despite the Oregon order which restricted his performance of complicated surgery in Oregon without a second opinion. He did not disclose the terms of the Oregon order to Queensland Health or to anyone at the Bundaberg Hospital. His experiences in Oregon should have made him circumspect about undertaking these surgeries. He also had a disciplinary history, including gross negligence, in New York State. He had not performed surgery for two years prior to taking up his appointment in Bundaberg. The appellant's offending was serial. He repeated later surgeries in the face of his earlier failures. Multiple deaths, and in one case serious permanent injury, resulted. The appellant's decisions to perform the surgeries were considered; the surgeries were not performed in an emergency situation. The victims were sick or elderly and in their relationship with their surgeon, the appellant, they were vulnerable. His offending may have been caused by vanity and a desire to perform complex surgery to restore his reputation.

[207] There were no closely comparable decisions. The present case was unique and the sentencing exercise involved "green fields". The most relevant decisions were *Pearce*, *Sam* and perhaps *Pesnak*. The present case was worse than *Sam*.

[208] There were a number of New Zealand cases on the schedule of medical criminal negligence manslaughter cases but these were of no assistance. This was because the test for criminal negligence in New Zealand (and some other jurisdictions) was not the criminal test of gross negligence applicable in Queensland but the civil test of negligence. For that reason, suspended sentences for medical criminal negligence manslaughter were common in those jurisdictions.

[209] Even accepting that the effective sentence imposed on the appellant reflects his period of pre-sentence custody, the sentence was inadequate. It was effectively one of seven years and eight months. The time to be served in custody before parole eligibility (three years and six months) was insufficient in light of the sentences imposed for a single manslaughter offence in *Pearce* and in *Sam*. A sentence of at least 10 years imprisonment should be substituted. The offences should each be declared serious violent offences so that the appellant is required to serve 80 per cent of the sentence imposed in each case.

Conclusion on the sentence appeal and application

[210] The maximum penalty for each of the three manslaughter offences is life imprisonment. The maximum penalty for the offence of doing grievous bodily harm is 14 years imprisonment. None of the offences involved an element of intention to harm. This appeal effectively concerns only the sentence of seven years imprisonment imposed on each of the three counts of manslaughter. But it must be appreciated that the seven year sentence imposed on each manslaughter offence was a global one, reflecting the totality of the appellant's criminality in all four offences. This was an entirely legitimate approach for the judge to take and neither party contends otherwise.

[211] This Court has often observed that the sentences imposed for offences of manslaughter vary enormously, according to the pertaining diverse facts and

circumstances of each case. All counsel agree that comparable cases are of limited assistance in this appeal. That concession is rightly made.

[212] Mr Martin on behalf of the Attorney-General invited this Court to conclude that the appellant performed at least some of the surgeries the subject of the present charges negligently. Mr Martin also made that submission below but the judge rejected it. Neither party contended that any of the findings made by the judge on sentence were not reasonably open. In these circumstances, this Court should consider the sentence appeal on the basis of the facts determined by the sentencing judge, set out in detail earlier in these reasons, in particular that the appellant performed the surgeries "competently enough".[98]

[213] Perhaps the most similar case factually is the New Zealand Court of Appeal decision in *R v Ramstead*.[99] Ramstead, although charged with three counts of manslaughter and two counts of making a false statement, was convicted of only one count of manslaughter. He was a cardio-thoracic surgeon who negligently performed surgery on a 72 year old patient, causing her death. He was sentenced to six months imprisonment fully suspended for six months.

[214] But it is common ground that *Ramstead* is of little assistance in this sentence appeal. That is because the approach taken to the concept of criminal negligence in New Zealand (and some other jurisdictions) is quite different to that taken in Queensland. This difference in approach is discussed in *R v Scarth* where the majority affirmed that in Queensland criminal negligence is established only if the offender's conduct is so thoroughly reprehensible and involves such grave moral guilt as to require that it be treated as a crime deserving of punishment.[100] Philp J (in dissent) explained the New Zealand approach to criminal negligence taken by a bench of seven judges in *R v Storey*:[101] the degree of negligence to found a conviction of manslaughter need be no higher than that required to found a claim for damages in a civil action for negligence.[102] It follows that the New Zealand authorities, some of which were factually comparable, and those from jurisdictions adopting a similar jurisprudential approach to criminal negligence, are of no assistance in Queensland.

[215] All counsel placed reliance on the sentence imposed in *Pearce*, a decision of Holmes J (as her Honour then was) from which neither party appealed. Pearce was convicted after a trial. A general practitioner, she administered morphine 10 times the appropriate dose to a 15 month old child who had burnt her hand on an oven. Pearce did not examine the child's injuries carefully and did not consider less radical pain relief options. She was sentenced to five years imprisonment suspended after serving six months with an operational period of five years.

[216] Mr Martin placed considerable emphasis on *Sam*. Mr and Mrs Sam were convicted in New South Wales after a trial. They had neglected to obtain proper medical treatment for their nine month old baby girl who suffered from severe eczema, a condition readily treatable by conventional medicine. Their neglect continued after being advised to seek medical treatment. Instead, Mr Sam, a homeopath, insisted on homeopathic remedies. The untreated eczema became severely infected

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98 See [188] of these reasons.

99 Unreported, New Zealand Court of Appeal, CA No 428 of 1996, 12 May 1997.

100 [1945] St R Qd 38 at 46 per Macrossan SPJ, 58 per Stanley AJ.

101 [1931] NZLR 417; [1931] GLR 105.

102 [1945] St R Qd 38 at 48-49.

and ultimately killed the child. The judge considered this was "a most serious case of manslaughter by criminal negligence".[103] It would have been obvious to any reasonable parent that the child's condition was serious and demanded proper medical treatment. She had suffered severe eczema for a considerable period with associated pain and discomfort. Failing to seek proper assistance was cruel. The child suffered helplessly and unnecessarily from a treatable condition. Mr Sam displayed an arrogant approach to what he perceived to be the superior benefits of homeopathy compared to conventional medicine. Mrs Sam was inclined to defer to her husband on this issue. Mr Sam was also grossly negligent as a homeopath in his treatment of the child. His culpability was both as a parent and as a homeopath. General deterrence was an important factor in sentencing so that parents understood the serious consequences of breaching the trust reposed in them to care for their infant children. The sentence imposed on Mr Sam must also reflect an element of general deterrence to alternative health providers who fail to ensure a patient receives conventional medical treatment where the patient is not responding appropriately to alternative treatment. The Sams had limited insight into their offence and little contrition and remorse. Whilst grieving for their baby daughter, they blamed others for her death. Mr Sam was sentenced to six years non-parole with an additional two years. Mrs Sam was sentenced to four years non-parole with an additional 16 months.

[217] In dismissing the Sams' appeals against sentence, the New South Wales Court of Criminal Appeal noted the child was severely malnourished, grossly unwell and suffering great pain when she died; their failure in their obligations to the child warranted their imprisonment; the sentences gave proper regard to the Sams' circumstances and to those of their young, dependant son.[104]

[218] Both parties have placed some reliance on *Pesnak*. After a trial, Mr and Mr Pesnak were convicted of manslaughter of a 53 year old woman. The Pesnaks and the deceased, who were all tertiary educated, shared the spiritual beliefs of Breatharianism. They believed that the atmosphere contains the energy force, prana, which, though scientifically undetectable, replaces the need for normal minimal requirements of food and drink. The deceased voluntarily commenced a 21 day spiritual cleansing program of fasting, supervised by Mr Pesnak and assisted by Mrs Pesnak. By the sixth day, there were visible signs that the deceased was not coping, physically or mentally. Her symptoms progressively worsened to the point where she vomited black flakes, lost bladder control, was unable to write, and was having grave difficulty breathing. Eventually Mr Pesnak got emergency help and the woman was hospitalised. She was by then unconscious and severely dehydrated and was placed on a respirator and life support system. She had aspirated gastric content, damaging her lungs and making normal breathing difficult. She died some time later from pneumonia with the underlying causes of cerebral infarction (stroke); acute renal (kidney) failure and ischaemia of the right foot. All these symptoms can be brought on through severe dehydration. By the time her most severe symptoms were apparent, medical treatment could not have prevented her death.

[219] Mr Pesnak was originally sentenced to six years imprisonment and Mrs Pesnak to three years imprisonment. This Court accepted that the sentences were manifestly

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103 [2009] NSWSC 1003 at [132].

104 [2011] NSWCCA 36.

excessive. The Pesnaks were aged 61 and 63, had no prior convictions and expressed remorse. They had been exemplary community members, completing their working life in paid employment, successfully raising a family, and looking after their own aged parents. A sentence was warranted which would deter those who would engage in irrational and dangerous conduct in the name of spirituality or religion. This Court substituted a sentence of four years in Mr Pesnak's case with parole eligibility after 18 months, and in Mrs Pesnak's case two years imprisonment with parole eligibility after nine months.

[220] The appellant's counsel has placed reliance on the more recent case of *Watson*. Watson, who was 32 at sentence, pleaded guilty to the manslaughter of his 26 year old wife during a diving exercise. His plea was on the basis of criminal negligence in that he, an experienced diver, was acting as the "buddy" of his inexperienced wife. He failed to perform his duty towards her during the diving exercise, thereby contributing to her death. Watson was originally sentenced to four and a half years imprisonment, suspended after 12 months, with an operational period of four years. On the Attorney-General's successful appeal, a sentence was substituted of four and a half years imprisonment, suspended after 18 months, with an operational period of four and a half years.

[221] As both parties have rightly conceded, there are no decisions of this Court, or indeed in other comparable jurisdictions, which are close to the unusual matrix of circumstances pertaining in this notorious case.

[222] *Sam* is clearly a quite different example of manslaughter by criminal negligence. It involved the Sams' criminal negligence, both as parents and as health providers, in causing prolonged suffering to their vulnerable baby who was suffering from a condition readily treatable by conventional medicine. Their criminal negligence was found to be cruel. The sentence imposed on Mr Sam, effectively eight years imprisonment to serve six years, was intended to act as a deterrent, both to parents who breach their duty to infant children and to alternative health providers who fail to ensure a vulnerable patient receives conventional medical treatment. Those factors of deterrence did not loom so large in the present case. On the other hand, *Sam* involved the death of one baby whereas the appellant shortened the lives of three elderly or ill people and caused serious grievous bodily harm to another. Further, the different sentencing regimes that exist for state offences in New South Wales and Queensland make comparisons with sentences like *Sam* of limited use in this sentence appeal.

[223] *Pesnak* and *Watson* are also quite different factually from the present case. But the sentences imposed in those cases (where criminal negligence resulted in one death) do not suggest that the sentence imposed in this case (where criminal negligence resulted in three deaths and one serious episode of grievous bodily harm) is excessive. That is because the effective global sentence of seven years imprisonment imposed on the appellant on each manslaughter count was intended to punish his criminality in all four offences. Further, in *Watson* the respondent, unlike the present appellant, had the benefit of remorse, cooperation with authorities, and an early plea of guilty.

[224] Perhaps the most useful comparable case to which we have been referred is *Pearce*. The sentence imposed there for a single manslaughter by medical criminal negligence was five years imprisonment suspended after serving six months with an operational period of five years. Again, the sentence in *Pearce* suggests that the sentence in the present case, for three deaths and an additional serious instance of

grievous bodily harm, was not manifestly excessive. That is the more so when the appellant's history of medical negligence is considered.

[225] The appellant's counsel has submitted that the sentencing judge placed too much emphasis on denunciation and gave insufficient weight to the other purposes of sentencing set out in s 9(1) *Penalties and Sentences Act*. That sub-section relevantly provides:

> "9 Sentencing guidelines
>
> (1) The only purposes for which sentences may be imposed on an offender are—
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
>
> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
>
> (c) to deter the offender or other persons from committing the same or a similar offence; or
>
> (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
>
> (e) to protect the Queensland community from the offender; or
>
> (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e)."

[226] In support of that contention, counsel particularly emphasised s 9(1)(a) and Jacob J's observations in *Moyse*, that a cardinal principle of sentencing is that judges should impose the lowest sentence that can be justified in the circumstances. We would be surprised if any Queensland judicial officers did not sentence according to this principle, but reasonable and proper views will vary as to what is the lowest justifiable sentence in the circumstances. Appellate courts recognise that in any particular case there is seldom only one appropriate sentence but rather an appropriate sentencing range. Jacob J's observations are of no assistance to the appellant in his application for leave to appeal against sentence unless the judge imposed on him a manifestly excessive sentence outside the appropriate range, or otherwise erred in law or fact in the sentencing process.

[227] Neither party suggests that the purpose of sentencing stated in s 9(1)(b) has application in this case. And, for the following reasons, deterrence, whether general or personal (s 9(1)(c)) does not loom large as a purpose of sentencing in this case. The appellant is elderly and is unlikely to achieve re-registration as a doctor in Queensland, even were he to seek it, so that personal deterrence is not a significant sentencing principle in this case. Fortunately, it is not suggested that there is a prevalence amongst doctors subject to orders limiting their practice, to operate in disregard of those orders and to encourage patients to undertake dangerous surgery which is clearly not in the patients' best interests. The dearth of cases comparable to the present case in itself suggests that offending of the type and scale committed by the appellant is so uncommon that general deterrence is not a critical factor in this sentence. For similar reasons, the sentencing principle of protection of the Queensland community from the offender (s 9(1)(e)) has no significant role in sentencing the appellant.

[228] The primary judge considered that an important factor in sentencing the appellant was "to make it clear that the community, acting through the court, denounces the sort of conduct in which [the appellant] was involved" (s 9(1)(d)). The appellant contends his Honour was wrong in this approach.

[229] Decades before Medicare was introduced throughout Australia by the Commonwealth government, Queensland boasted a free and functional public hospital system. The elderly, frail and ill members of any community are necessarily those most likely to be hospital users. They are particularly vulnerable at such times and need and seek advice from specialist medical practitioners and health providers in making difficult decisions in their best interests about undertaking medical treatment, including surgery. They often have to make these decisions urgently and at a time when they may well be emotional, confused and overwrought. The appellant, a specialist surgeon, encouraged his four victims to undergo unnecessary or unadvised and dangerous surgery without informing them about the conditions imposed on him under the Oregon order, or that in some instances, the Bundaberg Hospital was an unsuitable venue to undertake such major surgery. Whilst some doctors, primarily anaesthetists, approved beforehand the surgeries undertaken by the appellant on the present victims, they did so without knowledge of the limitations placed on him under the Oregon order and probably only out of deference to him.

[230] Serious medical criminal negligence like that of which the appellant has been convicted, is not easy to investigate or to prove. Its effect on its immediate victims could hardly be more grave. The lives of the three manslaughter victims, Mr Morris, Mr Phillips and Mr Kemps, were tragically cut short, and the quality of Mr Vowles' life was irrevocably and seriously diminished. But the effect of the appellant's offending is broader than its impact on the immediate victims. It detrimentally impacted on the lives of the victims' families and friends. It had the potential to undermine the Queensland public's confidence in its hospital system. For these reasons, the primary judge was right to recognise that an important purpose in sentencing the appellant was to make it clear that the community, acting through the courts, denounced his conduct in committing the present offences. Insofar as the appellant's counsel contends otherwise, that contention must be rejected. But that is not to say that any sentence imposed on the appellant must not also punish him "in a way that is just in all the circumstances" (s 9(1)(a)).

[231] The appellant spent four and one-third months in pre-sentence custody in the USA and in Australia. He then spent almost two years on bail in Queensland, during which he was required to report to police thrice weekly, was mostly separated from his family, and was subjected to public vilification. The judge seems to have taken these matters into account in moderating the head sentence to one of seven years imprisonment. This suggests that the effective global sentence for the offending in all four counts should be seen as one of about eight years imprisonment. The judge determined that he should not declare any of the offences to be serious violent offences under s 161A *Penalties and Sentences Act*, so that the appellant is presently eligible for parole half way through his seven year sentence.[105]

[232] We have already referred to the grave features of the appellant's offending. But there were also significant mitigating features. He had no criminal convictions. His

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105 *Corrective Services Act* 2006 (Qld), s 184(2).

professional background presents as an enigma. On the one hand, his blemished history as a medical practitioner was outlined by Mr Martin at first instance and in this appeal. On the other, the appellant's counsel at sentence presented evidence that he had given many years of community service as a capable doctor, teacher and researcher. It is plain that the time he spends in prison in Queensland will be particularly difficult for him because his family does not reside here and his notoriety will make prison life especially stressful. His professional career is in tatters. His reputation has been destroyed. He is now 60 years old and is unlikely to ever work again as a surgeon.

[233] These competing factors made the sentencing of the appellant a novel and difficult exercise. In our view, the sentence imposed properly balances the exacerbating and mitigating features of this unique case. It was not manifestly excessive. It adequately recognised the appellant's circumstances between extradition and trial and his public shaming. The judge made no error, either in placing considerable weight on the sentencing principle of denunciation, or in any other way. It follows that the appellant's application for leave to appeal against sentence must be refused.

[234] Since Mr Martin made his submissions to this Court in the Attorney-General's appeal against sentence under s 669A(1) of the Code, the High Court has determined in *Lacey v Attorney-General of Queensland*[106] that:

> "the appellate jurisdiction conferred upon the Court of Appeal by s 669A(1) requires that error on the part of the sentencing judge be demonstrated before the Court's 'unfettered discretion' to vary the sentence is enlivened."[107]

[235] It follows that, to succeed in the Attorney-General's appeal against sentence, Mr Martin must persuade this Court that the sentence imposed was manifestly inadequate or that the judge erred in some other way. He contends that a sentence of at least 10 years imprisonment should have been imposed or, at the very least, that the offences should have been declared serious violent offences under s 161A. Such declarations would have the effect that the appellant would be ineligible for parole until he had served 80 per cent of his sentence.[108]

[236] After careful consideration of the competing exacerbating and mitigating features, we are unpersuaded that the sentences were manifestly inadequate; failed to reflect adequately the gravity of the offending; failed to take sufficiently into account general deterrence; gave too much weight to mitigating factors; or that the judge erred in failing to declare the appellant to be convicted of serious violent offences. It follows that, as the Attorney-General has not demonstrated any judicial error in the sentencing process, the Attorney-General's appeal against sentence must be dismissed.[109]

ORDERS

1. Appeal against conviction dismissed.
2. Attorney-General's appeal against sentence dismissed.
3. Application for leave to appeal against sentence refused.

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106 [2011] HCA 10.

107 Above, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [62].

108 *Corrective Services Act* 2006 (Qld), s 182.

109 *Lacey v Attorney-General of Queensland* [2011] HCA 10.