MENTAL HEALTH COURT

CITATION:	*In the matter of Brian Andrew Scutt* [2018] QMHC 10
PROCEEDING:	Reference
DELIVERED ON:	7 September 2018 (delivered *ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	7 September 2018
JUDGE:	Flanagan J
ASSISTING PSYCHIATRISTS:	Dr FT Varghese and Dr RE Phillipson
DETERMINATION:	**1. The defendant at the time of the alleged offences was not of unsound mind.** **2. The defendant is permanently unfit for trial.**
CATCHWORDS:	MENTAL HEALTH – DECLARATION OR FINDING OF MENTAL ILLNESS OR INCAPACITY – where the defendant was charged with dangerous operation of a vehicle causing death or grievous bodily harm, and dangerous operation of a vehicle – where the charges arose from the alleged collision of the defendant's vehicle with, and the resulting explosion of, an LPG cylinder outside a café – where, of the 19 people injured in the explosion, two later died of their injuries – where the defendant had likely suffered an epileptic seizure at the wheel of his vehicle shortly before the collision – where the defendant had, prior to the alleged offending, been advised by medical professionals on multiple occasions not to drive due to his diagnosis of epilepsy – whether the defendant was of unsound mind when the offences were allegedly committed, pursuant to s 267 of the *Mental Health Act* 2000 (Qld) – whether the defendant is fit for trial pursuant to s 270 of the *Mental Health Act* 2000 (Qld) *Mental Health Act* 2000 (Qld), s 267, s 270
COUNSEL:	K Prskalo for the defendant J Tate for the Office of the Chief Psychiatrist MB Lehane for the Director of Public Prosecutions (Qld)
SOLICITORS:	Legal Aid Queensland for the defendant Crown Law for the Office of the Chief Psychiatrist Director of Public Prosecutions (Qld)

[1] This is a reference under the *Mental Health Act* 2000 (Qld) in respect of Brian Andrew Scutt, born 24 January 1955. The Court is assisted by Dr Varghese and Dr Phillipson. The reference concerns two charges of dangerous operation of a vehicle causing death or grievous bodily harm, and one charge of dangerous operation of a vehicle, all alleged to have been committed on 9 June 2015.

[2] On this day, it is alleged that the defendant was the driver of a Toyota Landcruiser driving north through Ravenshoe. Approximately 20 people were in or near the Serves You Right Café at 59 Grigg Street, Ravenshoe. Police allege that the defendant's vehicle failed to negotiate a bend and struck a power pole. The vehicle then travelled through parkland, incurring damage from tree branches to both sides and leaving a trail of debris in the park. After that, it crossed a street, striking a tree, and then flattened a wire fence at the rear of the café.

[3] The defendant's vehicle subsequently crashed into and punctured one of two large LPG cylinders outside the café kitchen, resulting in an explosion. This explosion caused a fireball, which engulfed the café's interior and burst through the front and rear glass doors onto the footpath, where people were walking and dining.

[4] As a result of the explosion and resulting fireball, 19 people were seriously injured. Two people tragically later died as a result of their injuries sustained in the explosion. Nicole Dempsey, née Nyholt, aged 37, married with two children, who was the daughter of the café proprietors who were overseas, died from her injuries in the Royal Brisbane and Women's Hospital Burns Unit three days later, as did Margaret Clarke, who was 82 years of age.

[5] The first charge on the reference concerns the defendant dangerously operating the vehicle causing the deaths of Nicole Dempsey and Margaret Clarke. As to the remaining 17 victims, 14 suffered grievous bodily harm, which constitutes the second charge; and three suffered bodily harm, which constitutes the third charge. According to the QP9s, a number of victims were able to self-evacuate from the café, while others were assisted by highly committed local civilians.

[6] A large-scale emergency response commenced involving the Queensland Police Service, Queensland Ambulance Service and the Queensland Fire and Rescue Service. Burns victims were initially triaged and then transported by road and air to local hospitals. Eleven victims were admitted to a specialised burns unit in Brisbane. The defendant was the driver and sole occupant of the vehicle. He received significant burn injuries and was assisted from the vehicle.

[7] Police commenced an operation called North Squall to investigate the circumstances surrounding the incident. During the course of the investigation, police identified a number of persons who witnessed the driver's and vehicle's actions pre-explosion.

[8] The vehicle was heard to rev loudly and increase in speed prior to and after mounting the kerb. The driver was described as possibly unconscious and leaning over towards

the passenger side of the vehicle. Witnesses did not observe the vehicle to brake at any stage prior to impacting with the gas bottle.

[9] Further investigations conducted by police indicated that the defendant had a pre-existing medical condition which may have affected his fitness to drive. Witnesses informed police that they had observed the defendant suffer from seizures prior to this incident. Medical records document that two doctors at the Atherton Hospital in both 2009 and 2014 advised the defendant not to drive a motor vehicle and to report his medical condition to the Department of Transport. Department of Transport records indicate that the defendant had not notified the Department regarding his medical condition. The defendant's licence has been cancelled as a result of this incident.

[10] During the course of the investigation, police provided medical records and witness statements to a neurologist, Dr McLaughlin, for review. Dr McLaughlin is of the opinion that there is sufficient evidence to make a diagnosis of epilepsy.

[11] The defendant, in reporting to the forensic psychiatrists who have provided reports in relation to the incident, states that he does not remember ever being told that he was not to drive because of his medical condition.

[12] Dr McLaughlin provided a report dated 10 February 2016. He opines that the defendant had five epileptic seizures – 7 March 2004, 19 May 2009, 25 September 2010, and twice on 18 August 2014. While no underlying cause had been found, there was sufficient evidence to make a diagnosis of epilepsy.

[13] In relation to his seizure on 19 May 2009, the defendant attended the Atherton Hospital. The clinical notes of Dr Suzette Pyke record her view that the defendant had had a tonic-clonic seizure, previously known as a grand mal seizure. It was also stated in Dr Pyke's written notes, and in her letter to the defendant's general practitioner, that advice was given to the defendant not to drive.

[14] Similarly, in relation to a seizure on 18 August 2014, the defendant again attended the Atherton Hospital and was diagnosed with a seizure of unknown cause. In her statement dated 19 June 2015, Dr Briana Van Beekhuizen states that in relation to the presentation of 18 August 2014 that she "had a very long discussion with Mr Scutt about the risk of driving with uncontrolled seizures" and "strongly advised him that he was not to drive or operate heavy machinery until he had been seizure-free for two years."

[15] The prosecution case for the three charges is based on the defendant driving when, because of his medical condition, he had been previously advised not to. In relation to the three charges, the expression "operates a vehicle dangerously" in general does not require any given state of mind on the part of the defendant as an essential element of the offence. 'Dangerously' is to be given the ordinary meaning of something that presents a real risk of injury. The prosecution must prove that there was a situation which, viewed objectively, was dangerous. No part of the prosecution case relies on any alleged conduct on the part of the defendant driving deliberately into the café. To the contrary, there is a significant body of evidence which supports the prosecution case

that the cause of the incident was a medical mishap, most likely an epileptic fit at the wheel, which altered the defendant's state of consciousness or rendered him unconscious.

[16] Dr McLaughlin at page 4 of his report explains the effect of an epileptic seizure on a person while driving:

> "The effect on a person suffering an epileptic seizure while driving a motor vehicle depends on the nature of the seizure. Where a generalised tonic-clonic seizure occurs, there is usually abrupt onset without warning symptoms. The loss of awareness and associated convulsive activity typically lasts from 60 to 120 seconds. During this time a person is no longer in control of the vehicle. The nature of movements occurring during a seizure might result in stiffening of the arm and leg on that side of the body. This could result in the accelerator or brake pedal being forcibly depressed. It can be associated with turning of the steering wheel altering the course of the vehicle."

[17] A number of witnesses were aware that the defendant suffered from seizures. He had been observed driving oddly or awkwardly about six days prior to the incident. On the day of the incident, he complained that he was feeling sick. Not long before the crash, he was observed to be glassy-eyed and emotionless. Two witnesses observed the vehicle travel at speed on its erratic course before impact, and neither could see the outline of a driver. One witness thought the vehicle was driverless, while another thought the driver had slumped sideways. Another witness described the vehicle as "out of control", and that the person in the car appeared to be "on the passenger side, bounding around". The defendant has no recollection at all as to what happened.

[18] There are four psychiatric reports before the Court: Dr Greg McKeough dated 6 February 2018, Dr Pamela van de Hoef dated 31 March 2018, Dr Edward Heffernan dated 14 April 2018, and one from Dr Tania Rohde dated 21 August 2018. Dr McKeough's opinion is that it is likely the defendant was unconscious from an epileptic seizure at the time of the incident. Dr van de Hoef notes that epilepsy is not a mental illness. A seizure at the wheel would have rendered the defendant unable to control his actions at the material time. Dr van de Hoef further opines at page 25 of her report:

> "However, his prolonged deliberate concealment of his epilepsy, and active and prolonged avoidance of assessment and treatment of it in my view directly led to another seizure, which resulted in the Ravenshoe disaster, and I cannot diagnose any state of mental disease that can explain the deliberate concealment and avoidance. In that case, I therefore cannot support a finding of unsoundness of mind."

[19] To similar effect is the opinion of Dr Heffernan at page 19 of his report where he states:

> "If Mr Scutt lost control of his vehicle because of a seizure due to epilepsy then the mental disease and issues of unsoundness of mind would not be a relevant consideration to deprivation of the capacities."

[20] There is no suggestion in the present case that the defendant in deciding to drive on 9 June 2015 was deprived of any of the relevant capacities. Both Dr van de Hoef and Dr Heffernan agree that the defendant developed a paranoid psychotic disorder in early 2015. This was characterised by delusional beliefs he had cancer and that he was being watched by police who were planning to arrest him, as well as persecutory and referral delusions relating to the town of Ravenshoe and the Serves You Right Café itself. He was also anxious and had suicidal ideation.

[21] According to Dr Heffernan, there seems little doubt that the defendant had epilepsy characterised by seizures, and mental disorder characterised by cognitive decline, psychotic symptoms, and mood and behaviour changes prior to the incident. The differential diagnosis for the psychotic symptoms includes the onset in context of a neurocognitive disorder (dementing illness), a mood disorder with psychotic features, which in the course of the hearing Dr Heffernan stated is probably more accurately identified as psychotic depression or depression with psychotic features, secondary to epilepsy. Dr Heffernan concludes that on balance, the most likely diagnosis explaining the onset of the defendant's cognitive and psychotic symptoms is a neurocognitive disorder. He states:

> "This diagnosis requires evidence of a cognitive decline such that it interferes with independence and function. The reports of Mr Scutt, his wife and others support this, as does the available account of the neuropsychological testing, his treating psychiatrist and the assessment of the geriatrician during his inpatient treatment in 2015. Psychotic symptoms are not uncommon with a neurocognitive disorder, particularly with causes such as Frontotemporal, Lewy body or Alzheimer's disease. It is unclear what the cause of Mr Scutt's neurocognitive disorder is, and further assessment, and testing, particularly neuropsychological testing and neuroimaging may assist."

[22] Dr van de Hoef also supports a present diagnosis of moderately severe dementia. The primary issue therefore is whether the defendant is temporarily or permanently unfit for trial. Dr Rohde in the most recent report of 21 August 2018 opines as follows in relation to the issue of fitness for trial:

> "Mr Scutt presents as unfit for trial. He displays a limited depth of understanding of the processes of court, having explained these processes in a rudimentary fashion when discussed in previous interviews. Mr Scutt's cognitive impairment and diagnosed progressive cognitive disorder negatively impact upon his fitness for trial and impair his ability to understand and meaningfully participate in court proceedings, including directing and constructing a defence, and understanding the evidence to be considered. The progressive nature of his cognitive disorder results in an unfitness for trial which will in all likelihood be permanent."

[23] Dr van de Hoef at page 26 of her report states in relation to the issue of fitness for trial as follows:

> "In my opinion, however, when I saw him, Brian Scutt's predominant feature on mental state examination was a moderately severe dementia, and it is that condition which I think renders him unfit for trial as he barely

> understands the charges against him, and he seemed to me to be incapable of instructing counsel or entering a meaningful plea. He did not understand, in even a basic way, the nature and function of the agents of the Court. He could not, in my view, withstand the rigours of a trial without detriment to his mental health, and moreover, given his significant cognitive impairment and poor coping skills would be likely to respond to that stress in a catastrophic reaction, or with threats or attempts to self-harm. I think it is likely that unfitness will be of a permanent nature."

[24] Dr Heffernan at page 20 of his report also opines that the defendant's unfitness for trial is likely to be permanent. In oral evidence, Dr Heffernan described the defendant as being "drastically unfit". Both Dr van de Hoef and Dr Heffernan identify that at the most basic level, the defendant could not even understand the nature of the charges brought against him, even when, according to Dr Heffernan, this was sought to be explained to the defendant on three occasions. It is not so much a case of the defendant being unable to follow proceedings. His unfitness for trial is at a very fundamental level, namely, a basic inability to even understand the nature of the case brought against him by the prosecution.

[25] Dr van de Hoef in oral evidence stated that the defendant's dementia is likely to progress, rendering his unfitness for trial permanent. The defendant hearing delusional voices would also add to him not being fit for trial, and according to Dr van de Hoef, he is incapable of even entering a meaningful plea, because he could not understand the nature of the charges, and he has a very poor understanding of the nature of the proceedings. Further, Dr van de Hoef opined that the defendant could not even generally follow the proceedings if these first two initial hurdles were somehow overcome.

[26] Dr Heffernan summarises his findings in relation to fitness in his report at page 20 as follows:

> "Although Mr Scutt could name a charge of 'dangerous driving' he did not fully comprehend the nature and extent of the charges he was facing. He did not seem able to incorporate the relevance of the diagnosis of epilepsy, previous medical advice and how this related to the charges. He could outline the meaning of a guilty and not guilty plea, and could describe the roles of officials in the Court process in general and brief terms. I did not believe however, he would have the capacity to understand what was occurring during Court proceedings. I did not think he could follow the Court process due to his apparent challenges with thought processing. As a result, I also believe he would not be able to understand the effect of complex evidence against him, despite efforts to accommodate for this. I believe the later [sic] would also compromise his ability to make a defence and answer the charges."

[27] Dr Heffernan added this to his opinion:

> "Neurocognitive testing would help objectively demonstrate the extent of his cognitive impairment, but my conclusion based on the assessment of 23/02/2018 was that he was unfit for trial and that the probable cause was a

> neurocognitive disorder. The usual course of a neurocognitive disorder is that it becomes progressively worse. Therefore, the unfitness is likely to be permanent."

[28] Dr Heffernan in expressing that opinion has a distinct benefit in that he first assessed the defendant as early as 2015 after the alleged offending. He therefore has a longitudinal view of the defendant's progress and symptoms. Dr Phillipson, who assists the Court, advises the Court that he supports the views of both Dr van de Hoef and Dr Heffernan that the dementing illness is likely to progress, and the Court should find that the defendant is permanently unfit for trial. Dr Varghese, in an insightful examination of both Dr van de Hoef and Dr Heffernan, suggests an alternative scenario, namely, that many of the presenting symptoms of the defendant were consistent with a psychotic depression, or a depression with psychotic features.

[29] The issue that these questions raised for both Dr van de Hoef and Dr Heffernan was that the Court would be in a better position to determine whether the defendant was permanently unfit for trial if he was further treated for his depression, and underwent further neurocognitive testing, including neuroimaging. Both Dr Heffernan and Dr van de Hoef are of the view that the underlying dementia that the defendant has is sufficient to support their opinions that he is permanently unfit for trial. They do not believe that any further treatment for depression or neurocognitive testing would alter their opinions in this respect.

[30] I accept the evidence of both Dr Heffernan and Dr van de Hoef as to the defendant being permanently unfit for trial, but I also take on board Dr Varghese's view that it is in the defendant's own interest in terms of his future treatment, including the fact that he has previously had renal failure and a transplant, for there to be undertaken further neurocognitive testing. The Court therefore finds that:

1. The defendant at the time of the alleged offences was not of unsound mind.

2. The defendant is permanently unfit for trial.

[31] The assisting psychiatrists advise, and I accept, that a forensic order in this case, given the serious nature of the offending, is necessary.