MENTAL HEALTH COURT

CITATION:	*In the matter of DBY* [2018] QMHC 6
PROCEEDING:	Reference
DELIVERED ON:	23 April 2018
DELIVERED AT:	Brisbane
HEARING DATES:	17 November 2017 and 6 March 2018
JUDGE:	Flanagan J
ASSISTING PSYCHIATRISTS:	Dr C Gray and Dr JJ Sundin
DETERMINATION:	**(a) Pursuant to section 269 of the *Mental Health Act* 2000 (Qld) the Court must not make a decision as to whether the defendant was of unsound mind when the first alleged offence of attempted murder was committed.** **(b) Pursuant to section 268 of the *Mental Health Act* 2000 (Qld) the Court must not make a decision as to whether the defendant was of unsound mind when the second alleged offence of attempted murder was committed.** **(c) The defendant is fit for trial.** **(d) The proceedings against the defendant for the two alleged offences of attempted murder be continued according to law.** *Mental Health Act* 2000 (Qld), s 268, s 269. *Attorney-General for the State of Queensland v Austin* [2014] QCA 97, cited. *In the matter of Mark Anthony Smith* [2018] QMHC 1, applied. *R v Schafferius* [1987] 1 Qd R 381, applied**.**
COUNSEL:	MB Lehane for the Director of Public Prosecutions SJ Hamlyn-Harris for the Office of the Chief Psychiatrist C Morgan for the defendant
SOLICITORS:	Director of Public Prosecutions (Qld) Crown Law for the Office of the Chief Psychiatrist Legal Aid Queensland for the defendant

[1] This is a reference under the *Mental Health Act* 2000 (Qld) (the MHA 2000) in relation to DBY. The reference is in respect of two charges of attempted murder allegedly committed between 3 August 2016 and 17 August 2016. Both charges were referred to the Mental Health Court by the Director of Mental Health on 2 March 2017.

[2] The charges concern an allegation that the defendant twice attempted to murder her nine-year-old daughter at the family home at Bribie Island. Both offences are alleged to have occurred during the period of the Royal Queensland Show (Friday 5 August to Sunday 14 August 2016). As to the first charge the defendant told her daughter that they would sleep together in the bathroom. The defendant then laid down a swag on the bathroom floor and they went to sleep. The daughter awoke the next day to find two gas bottles in the bathroom which were opened and continuing to release gas. The daughter felt dizzy and fell over, hitting her head on the laundry basket. She then woke her mother and asked what was happening. The defendant replied, "I'm trying to kill us." The daughter turned off the gas bottles and left the bathroom. She later was told by her mother not to tell anyone about what had happened or she would be taken away. When questioned by police about the details of the first incident, the defendant stated, "I did it", "I did what you said". She admitted that she had placed two nine kilogram LPG gas bottles in the bathroom before taking her daughter into the bathroom. The defendant then waited for her daughter to fall asleep before turning on the gas bottles and falling asleep herself. The defendant stated that her intention was to take both her own life and that of her daughter's because she no longer wanted to live and she did not want her daughter to continue living with the way they had been living in the family home.[1]

[3] The second charge is alleged to have occurred on the same day or the day after the first offence. It is alleged that the defendant and her daughter were sitting on a bed at home, reading a book together. The defendant then suddenly placed her hand over her daughter's mouth and nose, closing them both shut. The daughter felt unable to breathe but successfully managed to forcefully remove her mother's hands from her face. The defendant again attempted to close her daughter's nose and mouth using her hands and again her daughter successfully removed her mother's hands from her face. The daughter then left the room, believing that her mother was attempting to kill her. The defendant later pleaded with her daughter not to tell anybody about what had happened because she would be taken away by the police.

[4] The defendant has consistently disputed the facts of the second alleged offence. All three reporting psychiatrists (Dr Dodemaide, Dr van de Hoef and Dr Scott) opine that the dispute of fact in relation to the second alleged offence does not exist only as a consequence of the defendant's mental condition.[2] Pursuant to section 268(1) of the MHA 2000 the Court must not make a decision as to unsoundness if the Court is satisfied there is reasonable doubt the defendant committed the alleged offence. The Court must not therefore make a decision as to unsoundness in respect of the second alleged offence. All reporting psychiatrists and the Assisting Psychiatrists (Drs Gray and Sundin) are of the unanimous opinion that the defendant is fit for trial. The

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1 The facts are set out in Dr Dodemaide's report dated 24 February 2017 at page 2 and the QP9s.

2 MHA 2000 s 268(2).

proceedings against the defendant for the second alleged offence should therefore continue according to law.[3]

[5] The primary issue in the present reference concerns the application of section 269 of the MHA 2000 which provides:

> "**Dispute relating to substantially material fact**
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> (1) The Mental Health Court must not make a decision under section 267(1)(a) or (b) if the court is satisfied a fact that is substantially material to the opinion of an expert witness is so in dispute it would be unsafe to make the decision.
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> (2) Without limiting subsection (1), a substantially material fact may be –
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> (a) something that happened before, at the same time as, or after the alleged offence was committed; or
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> (b) something about the person's past or present medical or psychiatric treatment."

[6] The Director of Public Prosecutions has identified two facts substantially material to the opinions as to unsoundness of both Dr Dodemaide and Dr van de Hoef which are so in dispute as to make it unsafe for the Court to make a decision whether the defendant was of unsound mind when the first alleged offence was committed. The two disputed facts are:

(a) the defendant's denial of the second act of attempting to kill her daughter; and (b)

the level of alleged domestic violence between the defendant and her husband.[4]

[7] The application of section 269 to the first alleged offence arises in the context where there is a divergence of opinion between the reporting psychiatrists both as to diagnosis and the issue of unsoundness. Dr Dodemaide and Dr van de Hoef consider that the defendant was suffering from a Major Depressive Episode or illness at the time of the commission of the first alleged offence and was deprived by that mental disease of the capacity to know she ought not do the act. Dr Scott however, considers that the defendant's actions were explicable in terms of her Borderline Personality Disorder. Dr Scott does not accept that the defendant was suffering from a Major Depressive Illness at the relevant time and does not support a defence of unsoundness.

[8] On 17 November 2017 the hearing of the reference was adjourned to enable each of the reporting psychiatrists to consider the relevance of section 269 to their findings of unsoundness. In particular, whether the disputed evidence in respect of the level of domestic violence in the relationship and/or the disputed evidence in relation to the

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[3] MHA 2000 s 272.

[4] List of Issues and Recommended Findings, filed on behalf of the Director of Public Prosecutions, 16 November 2017.

second attempted murder charge, were facts substantially material to their opinion. The reporting psychiatrists were specifically requested to address the following issues:

(a) whether either of the following constitute a matter which is substantially material to their opinion on the question of unsoundness:

(i) the domestic history between the defendant and her husband;

(ii) the daughter's version of events in relation to the second alleged charge.

(b) assuming that the history of domestic violence as described by the defendant is not true, is that a matter that is substantially material to their opinion as to charge 1.

(c) assuming that the daughter's version in respect of charge 2 is accepted, is that a matter that is substantially material to their opinion as to unsoundness on charge 1.

[9] The hearing of the reference resumed on 6 March 2018 after each reporting psychiatrist had provided an addendum report addressing these issues. Before considering the reports and evidence of the reporting psychiatrists it is necessary to first consider the operation of section 269 of the MHA 2000.

The Operation of Section 269

[10] Section 269 of the MHA 2000 was recently considered by Dalton J *In the matter of Mark Anthony Smith.*[5] I respectfully adopt her Honour's analysis of the relevant case law:

> "[79] There is case law as to the level of satisfaction which the Mental Health Court must feel before it can determine a reference where either the facts of the offending are in dispute or the facts material to the psychiatric opinion are in dispute. I will now summarise that law but I think the gist of it is neatly captured in a statement made by Philippides J in *Re Keeys*:[6]
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> > 'Clearly, it is not appropriate for the Mental Health Court to embark upon or transgress into the area of fact finding that is ordinarily performed in a criminal trial by a jury, where the facts relating to either the physical or mental elements of the offence are in issue.'
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> [80] The Court of Criminal Appeal dealt with this point in *R v Schafferius.*[7] After explaining his reasons, Thomas J (with whom the other members of the Court agreed) concluded as follows:
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> > 'Proceeding before the Mental Health Tribunal afford a clear example of proceedings that call for the application of a principle that is sometimes called the Briginshaw principle,

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5 [2018] QMHC 1 at [79]-[83].

6 [2010] QMHC 44 at [32].

7 [1987] 1 Qd R 381.

namely that the degree of satisfaction to a civil proceeding may vary according to the gravity of the fact to be proved.

…

The above considerations lead to the view that there is no warrant for the application of a standard of proof beyond reasonable doubt, but that findings should be made only in reliance on clear and convincing evidence, and upon a firm satisfaction consistent with the gravity of the proceeding. In short, [a proceeding in the Mental Health Tribunal] is a proceeding at the "grave" end of the Briginshaw principle. Indeed, in cases where it seems that the facts are so in dispute that it would be unsafe to make a determination the Tribunal is required to stay its hand (s. 33(2)). This is consistent with the view the Tribunal should proceed to a finding only in clear cases, and that it is not intended to be a substitute for a criminal trial, although in appropriate cases it will render a criminal trial unnecessary. Quite often the precise details of the alleged crime will be critical to the assessment of the alleged offender's mental condition at the relevant time, and if those details are in any way in dispute the only way to resolve them is by the adversarial scrutiny of a criminal trial before the jury.' – p 383.

[81] Section 33(2) of the Act being spoken of there provided:

'If in a reference made to it the Mental Health Tribunal is of the opinion that the facts are so in dispute that it would be unsafe to make a determination such as is referred to in provision (a) or (b) of subsection (1), it shall refrain from making the determination but shall inquire and determine whether the person in question is fit for trial.'

[82] The Court of Appeal considered this dicta in *Attorney-General (Qld) v Kamali*.[8] It was said:

'The standard of proof in these matters is on the balance of probabilities with the *Briginshaw* qualification, as confirmed by *Schafferius. Schafferius* should not be read as excluding a finding in all but the clearest of cases. Certainly the gravity of such proceedings warrants the Tribunal's exercising caution. But if the judge constituting the Tribunal is sufficiently satisfied that there is evidence which, if accepted, would warrant the finding, and believes that the evidence should be accepted, then the finding should be made, notwithstanding that there may be other contrary evidence in the case which the judge is disinclined to accept.'

[83] Then in *DAR v DPP (Qld) & Anor*,[9] the Court of Appeal said:

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8 (1999) 106 A Crim R 269 at [9].

9 [2008] QCA 309 at [83]ff.

> 'The first point to be made here is that this Court in *A-G (Qld) v Kamali* did not deny that the cautious approach suggested in *R v Schafferius* was the correct approach. The MHC did not err in approaching its fact finding function by searching for clear and convincing evidence of the direction in which the balance of probabilities tilted.'"

[11] To the above analysis I would add the observations of Margaret McMurdo P in *Attorney-General for the State of Queensland v Austin*:[10]

> "The MHC was required to determine under section 269(1) whether that fact was *so* in dispute that it was unsafe for it to decide the reference. The mere fact that a party has challenged the accuracy of a substantial material fact does not mean that under section 269 the MHC must not decide the question of unsoundness of mind. The determination of whether the fact was so in dispute it would be unsafe to make the decision was a matter of judgment and an assessment of degree for the MHC after reviewing the relevant evidence and advice of the assisting psychiatrists and considering the submissions of the parties."

[12] As is evident from my review of the evidence below, I am satisfied that facts, which are substantially material to the opinions expressed by Drs Dodemaide and van de Hoef, are so in dispute it would be unsafe for this Court to make a finding as to unsoundness in respect of the first alleged charge.

Dr Dodemaide

[13] Dr Dodemaide has provided four reports to the Court. A section 238 report dated 24 February 2017, a short addendum report dated 2 March 2017, an updated report dated 10 November 2017 and a more recent report dated 12 February 2018. Dr Dodemaide gave oral evidence both on 17 November 2017 and 6 March 2018.

[14] His opinion is that the defendant at the time of the first alleged offence was suffering from a severe acute episode of recurrent Major Depressive Disorder. Dr Dodemaide makes a differential diagnosis of Major Depressive Episode, Adjustment Disorder, Bipolar Affective Disorder, or Dysthymic Disorder as well as a Post-Traumatic Stress Disorder.[11]

[15] In his report dated 24 February 2017 Dr Dodemaide opines that the defendant was deprived of the capacity to know that she ought not do the act due to the effect of being in a state of severe major depression. It is apparent from Dr Dodemaide's reasoning that

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10 [2014] QCA 97 at [92].

11 In his report dated 10 November 2017 Dr Dodemaide, having reviewed the transcript of numerous text messages between the defendant and her husband, gave an additional diagnosis of Borderline Personality Disorder.

his opinion is informed by the history of "systematic domestic abuse throughout her marriage", as reported by the defendant to Dr Dodemaide.[12]

[16] In oral evidence Dr Dodemaide accepted that the allegations of domestic violence was one of a number of factors that influenced the defendant's mental state.[13] He also accepted that the history and extent of the alleged domestic violence was a substantially relevant matter for him in forming his opinion as to the defendant being deprived of the capacity to know she ought not do the act.[14]

[17] In his report dated 12 February 2018 Dr Dodemaide sought to address the section 269 considerations raised by the DPP. As to the defendant's claims of domestic violence Dr Dodemaide remained of the opinion that these claims were "genuine". Whilst the defendant may have reported with a degree of bias or exaggeration, Dr Dodemaide found no evidence to suggest that the reported history of domestic violence by the defendant was the result of psychosis or intentional fabrication.

[18] As to the disputed facts concerning the second attempted murder, Dr Dodemaide speculated as to possible explanations for the inconsistency between the accounts provided by the defendant and her daughter. Having set out these possible explanations, Dr Dodemaide opined as follows:

> "From what information is currently available, there is no means to determine which, if any, of these speculative scenarios actually apply to the issue in question. Assuming that the incident did indeed occur, a further assumption that has been posited in the evidence is that the incidents regarding both charges occurred within approximately 24 hours of each other and the incident involving attempted asphyxiation in charge 2 occurred after the attempted gassing in charge 1. Assuming these things, the question then comes to whether or not [the defendant] was of unsound mind at the time of charge 2 occurring. Working under these assumptions, but without having knowledge about [the defendant's] mental state regarding charge 2, I can only speculate about her state of mind at the time. Although a person's mental state is not static and each moment in time provides a separate opportunity for moral reasoning about one's actions, it is almost certain that [the defendant's] state of depression would not have changed within the time between incidents and may even have acutely worsened considering the failed attempt to end the lives of her daughter and herself by gassing."[15]

[19] The difficulty I have with Dr Dodemaide's opinion, particularly in relation to the issue of domestic violence, is that for the purposes of section 269, the question is not whether Dr Dodemaide accepts the defendant's account of the extent of domestic violence, but rather whether this disputed fact is substantially material to his opinion as to unsoundness. Similarly, in relation to the factual dispute as to the second alleged

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12 Report of Dr Dodemaide dated 24 February 2017, page 14, lines 690-700.
13 Transcript, 17 November 2017, 1-14, lines 3-4.
14 Transcript, 17 November 2017, 1-14, lines 32-34.
15 Dr Dodemaide's report 12 February 2018, page 4, lines 153-165.

attempted murder, the formulation by Dr Dodemaide of an opinion as to unsoundness appears to be based on both speculation and assumptions.

[20] Dr Dodemaide clarified the opinions expressed in his report dated 12 February 2018 in oral evidence.

[21] Dr Dodemaide accepted that the defendant's reporting of the domestic violence was an important factor in reaching his conclusion as to unsoundness.[16] He accepted that if there was minimal or no domestic violence this would affect his opinion as to unsoundness.[17] Dr Dodemaide also accepted that if the defendant had in fact committed the second alleged attempted murder, this would be substantially material to his opinion as to the state of mind of the defendant at the time of the first alleged attempted murder.[18] He agreed that if the defendant had sought to conceal the second attempted murder, such concealment would cause him to reconsider his opinion in respect of the first alleged charge.

Dr van de Hoef

[22] Dr van de Hoef provided three reports dated 7 October 2017, 16 January 2018 and 2 March 2018. She is of the opinion that at the time of the alleged first offence the defendant was suffering from a severe episode of recurrent Major Depression, "with marked agitation and powerful depressive cognitions of helplessness, hopelessness and nihilism".[19] According to Dr van de Hoef, while the defendant was not clearly having psychotic features at the time of the first alleged offence, she thinks the defendant came close to that, and regardless, was at the severe end of the spectrum of clinical depression. Dr van de Hoef notes however, that the defendant much more clearly had psychotic features of a severe Major Depressive Disorder in the first week the defendant was in high security after being arrested.

[23] Dr van de Hoef opines that the defendant's recurrent depressive illness may be part of a Bipolar Affective Disorder. In this respect she accepts that the defendant's clinical presentation and history are entirely consistent with Borderline Personality Disorder.

[24] As to the question of unsoundness, Dr van de Hoef in her report dated 7 October 2017, concludes that the defendant clearly knew the nature of the act and because of its timing and her arrangements, retained the capacity to control her actions. Her depressive illness was however, severe enough at the material time as to deprive her of the capacity to know that she ought not do the act. Dr van de Hoef therefore supports a finding of unsoundness. In oral evidence however, Dr van de Hoef accepted that the present case constituted a marginal case of actual deprivation of the relevant capacity.[20]

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16 Transcript, 6 March 2018, 1-9, lines 6-26.
17 Transcript, 6 March 2018, 1-10, lines 5-17.
18 Transcript, 6 March 2018, 1-11, lines 17-27.
19 Report of Dr van de Hoef, 7 October 2017, page 16.
20 Transcript, 6 March 2018, 1-39, line 45 to 1-40, line 8; 1-69, lines 15-18.

[25] It is evident from a fair reading of Dr van de Hoef's report dated 7 October 2017, that she placed reliance on the domestic history in formulating her opinion as to unsoundness:

> "In my opinion, having considered all the available material, [the defendant] suffered from a recurrent severe Major Depressive Episode, which qualifies I think as a disease of the mind in Section 27 of the Criminal Code. This most recent episode of illness had its onset in the violent worsening conflict in her troubled marriage and against a decade long background of alleged domestic violence of many types, from about July 2015, not long before which there had been a specific assault which 'broke something' in her."[21]

[26] Dr van de Hoef accepted in oral evidence that she had relied on the defendant's description of the domestic violence (both in relation to herself and to her daughter) in determining the issue of unsoundness.[22] She also accepted that the information provided by the defendant as to the nature and extent of domestic violence was material to the formulation of her opinion as to unsoundness.[23] Dr van de Hoef, in her more recent report dated 16 January 2018, specifically states that the domestic violence as described by the defendant, would have been a significant contributing factor in developing depressive symptoms and desperate ideas to escape by suicide.[24]

[27] As to the dispute of fact concerning the second alleged attempted murder, Dr van de Hoef opines in her report dated 16 January 2018:

> "Whatever the true position, I do not think this dispute of fact would cause me to alter my initial opinions expressed in relation to [the defendant's] diagnosis and deprivation of the relevant capacities."[25]

[28] Dr van de Hoef's opinion in this respect appears to be informed by an underlying acceptance of the defendant's denial of the second alleged charge. In the course of her oral evidence Dr van de Hoef made it clear that she struggled with the daughter's account of the second alleged charge.[26] Dr van de Hoef conceded that if the defendant had deliberately concealed the second act of attempted murder, this would cause her to review her conclusions as to unsoundness in relation to the first alleged offence.[27]

Dr Scott

[29] Dr Scott prepared four reports dated 20 June 2017, 15 November 2017, 19 February 2018 and 3 March 2018. Dr Scott, in his report of 20 June 2017, unlike Drs Dodemaide and van de Hoef, does not support a finding of unsoundness.

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21 Report of Dr van de Hoef, 7 October 2017, page 18.
22 Transcript, 6 March 2018, 1-42, lines 1-42.
23 Transcript, 6 March 2018, 1-44, lines 1-6.
24 Report of Dr van de Hoef, 16 January 2018, page 4.
25 Report of Dr van de Hoef, 16 January 2018, page 5.
26 Transcript, 6 March 2018, 1-31, lines 6-11.
27 Transcript, 6 March 2018, 1-32, lines 9-20.

[30] Dr Scott opines that at the relevant time the defendant did have a mental illness, namely Post-Traumatic Stress Disorder and Borderline Personality Disorder. This mental illness did not however, deprive the defendant of any of the relevant capacities.

[31] In Dr Scott's opinion, the collateral history and more particularly the history documented by the defendant's General Practitioner does not indicate that the defendant had developed a Major Depressive Episode with either melancholic or psychotic features.

[32] While Dr Scott accepts that at the material time the defendant's emotional regulation, judgment and distress tolerant skills were likely to have been impaired, he does not accept that she had a mental illness which deprived her of any of the capacities. In particular, Dr Scott refers to the defendant's behaviour leading to the alleged first offence. This behaviour, in Dr Scott's view, demonstrates premeditation. The defendant had purchased a gas cylinder earlier from a hardware store. She administered sedating medication to her daughter in a milkshake and took her to a bathroom, which was a confined space in which ventilation could be reduced. After her daughter was asleep the defendant brought two gas cylinders into the room and turned on the gas.

[33] Dr Scott also refers to the defendant's immediate post-offence conduct as indicating that the defendant understood that she ought not to have done what she did. This conduct included collecting the gas cylinders and returning them to the barbeque area and urging her daughter not to tell anybody about what she had tried to do.

[34] In his report dated 19 February 2018, Dr Scott addresses the impact of the two assumptions on his opinion as to unsoundness for the purposes of section 269.[28] According to Dr Scott, neither of these assumptions affect his opinion as to unsoundness in respect to the first alleged offence. This is unsurprising as Dr Scott did not consider the defendant a reliable historian and thought her reporting as to the nature and extent of the alleged domestic violence to be exaggerated.

[35] In oral evidence Dr Scott opined that for an expert to determine soundness of mind in relation to the first alleged charge, the fact that a second attempted murder occurred or may have occurred within the same 24 hours would inform the expert as to issues of unsoundness.[29] Dr Scott was also of the view that the accuracy of the reporting by the defendant of the nature of the relationship between the father and the daughter was also relevant to the formulation of any opinion as to unsoundness in respect of the first alleged charge.[30]

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[28] The first assumption was that the history of domestic violence as described by the defendant was not true. The second assumption was that the version of the daughter in respect of the second alleged charge of attempted murder was true.

[29] Transcript, 6 March 2018, 1-54, line 45 to 1-55, line 2.

[30] Transcript, 6 March 2018, 1-64, lines 4-40.

The Assisting Psychiatrists

[36] Dr Sundin, after noting the differences in opinion as to unsoundness between Dr van de Hoef and Dr Scott, advised as follows:

> "We have in this situation a case where the details are disputed. Dr van de Hoef and Dr Dodemaide, I believe, did concede that there was a dispute or capability for different interpretation on the details which were material to their opinions. As I understand a previous decision made by Justice Lyons in May 2013, a finding of unsoundness of mind should only be made on clear and convincing evidence. In my opinion, in the light of two senior experienced psychiatrists arriving at quite opposing opinions on the subject of deprivation of the capacity to know that she ought not do the act, it would be unsafe for this Court to make a determination as to unsoundness of mind. I would recommend to this Court that section 269 applies and the matter should be resolved by the adversarial process of the ordinary court system."[31]

[37] Dr Gray agreed with Dr Sundin.

The Parties' Submissions

[38] The DPP submits that while the doctors' opinions as to the application of section 269 can be of assistance, it is ultimately a matter for the Court to decide whether a fact that is substantially material to the opinion of an expert witness is so in dispute it would be unsafe to make a decision as to unsoundness.[32] The DPP points to inconsistencies between the defendant's version and the medical and police records. These inconsistencies are highlighted in Dr Scott's report of 20 June 2017. The DPP also points to inconsistencies between the defendant's account and that of her daughter and husband, both in relation to the nature and extent of domestic abuse and the defendant's denial of the second alleged attempted murder. The DPP highlights the temporal connection between the two alleged charges, submitting that a dispute as to the defendant's culpability in respect of the second alleged charge is substantially material, pursuant to section 269, for any finding of unsoundness as to the first alleged charge:

> "For example, if the defendant is found to have determinedly concealed the second attempted murder from the outset, it is difficult to conceive how she would not have been aware of the wrongfulness of the conduct at the time. In turn, this would provide further support for the conclusion that she was also aware of the wrongfulness of her actions on the first occasion, as a change in reasoning capacity between the two acts in such a short timeframe would seem improbable."[33]

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[31] Transcript, 6 March 2018, 1-72, lines 5-16.
[32] Outline of Argument on Behalf of Director of Public Prosecutions, [5].
[33] Outline of Argument on Behalf of Director or Public Prosecutions, [9].

[39] Counsel for the Chief Psychiatrist submits that the Court should prefer the opinion of Dr Scott over that of Drs Dodemaide and van de Hoef as to the issue of unsoundness.[34] The difficulty with this submission is that pursuant to section 269(1), the Court must not make a decision as to unsoundness if it is satisfied a fact that is substantially material to the opinion of an expert witness is so in dispute it would be unsafe to make the decision. If section 269(1) applies, the Court must not make any decision as to unsoundness. The Chief Psychiatrist's primary submission however, is that the Court should not proceed to make any decision as to unsoundness because there are factual issues which can only be resolved by a jury.[35]

[40] Counsel for the defendant conceded that in light of the oral evidence of Drs Dodemaide and van de Hoef, the Court should find that there are facts substantially in dispute for the purposes of section 269.[36] The relevant factual dispute identified by counsel for the defendant is whether the defendant is a truthful historian:

> "… that is, whether the account that she's given to the doctors, particularly Drs van de Hoef and Dodemaide – whether that account is truthful even though her perceptions may not be inaccurate or whether it is not an account that can be relied upon. And Dr Scott's reports and the words he uses make it quite clear that he – and I think he states as much, that he doesn't consider her a reliable historian."[37]

[41] This concession was, in my view, properly made by counsel.

Consideration

[42] The wording of section 269(1) makes it clear that it is for the Court to be satisfied whether a fact that is substantially material to the opinion of an expert witness is so in dispute as to make it unsafe to make a decision as to unsoundness. I accept the submission of the DPP that while the Court may be assisted by the opinions of the reporting psychiatrists, it is the Court that must ultimately be satisfied of the relevant test posited by section 269(1).

[43] In the context of the present case, that test is to be applied in circumstances where there is a divergence of expert opinion concerning whether the defendant was of unsound mind at the time of the commission of the first alleged attempted murder.

[44] In light of the submissions of the DPP and the defendant, there are four identifiable disputes of fact which, in my view, are substantially material to the opinions expressed by Drs Dodemaide and van de Hoef:

(a) the defendant's denial of the second alleged attempted murder of her daughter;

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34 Transcript, 6 March 2018, 1-68, lines 25-30.
35 Transcript, 6 March 2018, 1-70, lines 9-16.
36 Transcript, 6 March 2018, 1-71, lines 5-10.
37 Transcript, 6 March 2018, 1-71, lines 7-11.

(b) the reporting by the defendant to the psychiatrists as to the nature and extent of the alleged domestic abuse by the father in relation to the daughter;

(c) the reporting by the defendant to the psychiatrists as to the nature and extent of the alleged domestic abuse by the husband in relation to the defendant; and

(d) more generally, whether the defendant is a truthful historian.

[45] As to (a), because the defendant denies the second alleged attempted murder, none of the psychiatrists have investigated or examined the defendant's state of mind at the time of the commission of this offence. If the daughter's version of events is accepted and the defendant has falsely denied the second alleged offence, this would, in my view, constitute a disputed fact substantially material to any opinion as to the defendant's state of mind when the first alleged offence was committed. In both instances the victim is the same, namely the defendant's daughter. Further, both offences are alleged to have been committed within a period of 24 hours. If the defendant has falsely denied any involvement in the second offence, this may be indicative of her seeking to conceal the act, appreciating that she ought not to have committed the act. While there is evidence that the mental state of the defendant deteriorated within a week or so after she was arrested, it is unlikely that there would be any significant change in her mental state from the commission of the first alleged offence to the commission of the second alleged offence. Both offences are so intertwined that it would be unsafe to make any finding of unsoundness in relation to one where the other is denied.

[46] As to (b), Dr van de Hoef, in arriving at her finding of unsoundness in respect of the first alleged offence, referred to the defendant viewing her own predicament as her daughter's predicament too.[38] The defendant reported to Dr van de Hoef that her daughter had been subjected to abuse, including being mistreated by her father for over 10 years. This abuse included depriving the daughter of the necessities of life, as well as verbal abuse and on one occasion physical abuse.[39] Dr Scott, in oral evidence, expressed the view that the defendant's reporting of the nature of the relationship between the father and the daughter is substantially material to the formulation of any opinion as to deprivation of capacity.[40] Further, as observed by Dr Scott, there is no objective evidence that the father ever mistreated his daughter. There are, for example, no reports from Child Services, from the police or from any other person that substantiates the allegations made by the defendant against her husband in respect of the daughter.[41] The defendant's reporting of this relationship is in dispute. Dr Scott explained how the nature of this relationship is substantially material to the formulation of an opinion as to unsoundness:

> "For her to make those allegations, to repeatedly say that is very material, because it goes to her thinking, her ability to justify what she's done, and it

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[38] Report of Dr van de Hoef, 7 October 2017, page 17.

[39] Report of Dr van de Hoef, 7 October 2017, page 7.

[40] Transcript, 6 March 2018, 1-64, lines 4-12.

[41] Transcript, 6 March 2018, 1-64, lines 14-20.

> is a – I believe a very critical aspect, that in all the things that [the defendant] has reported, there is very little to substantiate it …"[42]

[47] As to (c), the defendant's reporting of the nature and extent of the alleged domestic violence was, on a fair reading of the reports of Drs Dodemaide and van de Hoef, substantially material to the formulation of their opinions as to unsoundness in respect of the first alleged offence. While there is evidence of police attending the defendant's residence on 12 July 2015 and a protection order being obtained, much of the history of domestic violence given by the defendant is uncorroborated. As to the incident on 12 July 2015, this involved the defendant being pushed over by her husband onto a plastic crate and her phone being grabbed from her hand. These actions were admitted by the husband when questioned by police. The husband has provided a police statement dated 30 August 2016 which is silent as to the extensive allegations of domestic violence made by the defendant. The defendant's allegations include her husband breaking her ribs in South Africa. As noted by Dr Scott however, in his report dated 19 February 2018, there is no report or advice from the relevant hospital in South Africa confirming that the defendant had treatment for broken ribs or any other injuries.[43] The defendant also reported to Dr Dodemaide that in September 2014 she had a counselling session regarding domestic abuse by her husband. This counselling session was alleged to have been conducted at either the Caboolture Neighbourhood Centre or at the Caboolture Community Health Clinic. As noted by Dr Scott, there is no report or advice from either the Caboolture Neighbourhood Centre or the Caboolture Community Health Clinic confirming that the defendant had any counselling in September 2014 or at any other time.[44] Although the husband has not yet specifically addressed each of the defendant's allegations of domestic abuse as reported to Drs Dodemaide and van de Hoef, it is apparent from Dr Scott's report dated 19 February 2018 that these allegations are disputed.

[48] I am therefore satisfied that in light of the disputed facts which are, in my view, substantially material to the opinions expressed by Drs Dodemaide and van de Hoef, it would be unsafe to make any decision as to unsoundness in relation to the first alleged offence.

Disposition

1. Pursuant to section 269 of the *Mental Health Act* 2000 (Qld) the Court must not make a decision as to whether the defendant was of unsound mind when the first alleged offence was committed.

2. Pursuant to section 268 of the *Mental Health Act* 2000 (Qld) the Court must not make a decision as to whether the defendant was of unsound mind when the second alleged offence of attempted murder was committed.

3. The defendant is fit for trial.

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42 Transcript, 6 March 2018, 1-64, lines 20-24.

43 Report of Dr Scott, 19 February 2018, page 2.

44 Report of Dr Scott, 19 February 2018, page 3.

4. The proceedings against the defendant for the two alleged offences of attempted murder be continued according to law.