IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S291 of 2019**

BETWEEN: **WILLIAM RODNEY SWAN**

Appellant

and

10 **THE QUEEN**

Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

20 ### PART II: ISSUES PRESENTED BY THE APPEAL

2. The issues presented in the appeal are:

   (1) Whether there was sufficient evidence to support one of the three pathways of causation relied on by the Crown to be left to the jury (Ground 1 of the appeal);
   (2) Whether the Court of Criminal Appeal ("CCA") failed to determine the appellant's sole ground of appeal in that Court (Ground 2 of the appeal);
   (3) If special leave is granted, whether it was necessary for the trial judge to summarise aspects of the Crown address relating to the issue of causation and/ or
30 comment as to whether causation would be satisfied if various factual findings were made by the jury (Proposed Ground 3 of the appeal).

Filed on behalf of the respondent by:

C Hyland, Solicitor for Public Prosecutions (NSW)
Level 17, 175 Liverpool Street
Sydney NSW 2000
DX 11525 Sydney Downtown

Date of this document: 3 December 2019

Ref: Ryan Thomas
Telephone: (02) 9285 8667
Facsimile: (02) 9285 8950
Email: rthomas@odpp.nsw.gov.au

PART III: NOTICES UNDER S. 78B OF THE *JUDICIARY ACT 1903*

3. The respondent considers that no notice under s. 78B of the *Judiciary Act 1903* is required in this matter.

PART IV: MATERIAL FACTS THAT ARE CONTESTED

4. The factual issue in contention is whether there was evidence to support a specified aspect of the Crown's closing address to the jury.

PART V: ARGUMENT

Factual background

The injuries caused by the assault

5. On 15 April 2013, Mr Kormilets ("the deceased") was the victim of a violent home invasion. During this invasion, the deceased was severely beaten in the head, face and chest by two men.[1] At a subsequent trial, the jury found that the appellant was one of the deceased's assailants. The jury also found that, at the time the assault was committed, the appellant either intended to kill or cause grievous bodily harm to the deceased. Those factual findings were not challenged by the appellant in the CCA and are not sought to be challenged by the appellant in this appeal.

6. The deceased suffered multiple traumatic injuries as a result of his assault at the hands of the appellant and his co-offender. These injuries included a traumatic brain injury, which affected the right and left hemispheres of the deceased's brain, fractures to the deceased's face, sternum and ribs, injuries to both lungs, a tear in the surface of the deceased's spleen and a right renal laceration.[2] The deceased was admitted to the intensive care unit at St Vincent's Hospital. There he received a chest drain, a tracheotomy and respiratory support (described as prolonged ventilation dependence). The emergency physician who treated the appellant

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[1] *Swan v R* [2018] NSWCCA 260 ("CCA judgment") at [2], Core Appeal Book ("CAB") 144.
[2] CCA judgment at [11] and [14], CAB 148 and 149.

described the deceased as sustaining "*severe traumatic life-threatening multi-system injuries*" as a result of the assault.[3]

7. Prior to the invasion of his home in April 2013, the deceased was a robust and fit, 78-year old man, who lived by himself, having cared for his wife prior to her death.[4] The deceased was under treatment for polycythaemia, which causes excessive production of red blood cells in the bone marrow.[5] This condition, which is usually genetic, can cause thrombosis (blood clots) if left untreated.[6] The deceased's condition had been well managed for many years by the deceased's general practitioner and specialist through the use of medication and the condition did not pose any imminent danger to the deceased's health.[7] Indeed, the deceased's general practitioner described the deceased as "*very fit*" for his age, "*quite clear in his mind*" and "*fairly intelligent*" prior to the assault.[8]

8. There was extensive medical evidence concerning the extreme deterioration in the deceased's health following the home invasion.[9] As a result of the traumatic brain injury sustained in the assault, the deceased suffered a severe loss of cognitive function. In particular, the deceased lost the ability to communicate properly, express himself or relate to people.[10] The deceased also lost the ability to swallow (initially he was fed via a nasogastric tube, and later graduated to PEG feeding) and became dual incontinent.[11] The deceased was never able to walk independently again and could not stand unaided for more than 30 seconds. He was "*constantly physically agitated*".[12] The deceased was "*unable to physically undertake any daily living activities*" or to "*mentally comprehend*" them.[13] As Professor Cordner (the

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[3] CCA judgment at [11], CAB 148.
[4] CCA judgment at [7] and [13], CAB 147 and 149.
[5] T285 - 286, Respondent's Further Materials ("RFM") at 99 - 100.
[6] T285, RFM at 99.
[7] CCA judgment at [13], CAB 149; T285-286; RFM at 99 - 100.
[8] CCA judgment at [13], CAB 149; T284, RFM 98.
[9] CCA judgment at [4], CAB 144.
[10] CCA judgment at [14], CAB 149.
[11] CCA judgment at [9], [11], [14] and [20], CAB 147 - 151.
[12] CCA judgment at [21], CAB 151.
[13] CCA judgment at [23], CAB 151 - 152.

defence expert) stated, at the time of his death, the deceased was "*more or less confined to bed*" as a result of his severe cognitive decline.[14]

9. The deceased remained at St Vincent's Hospital for four months after the assault. During this time, he was readmitted to the intensive care unit on two occasions; first, on 18 May 2013 after losing consciousness on the ward, and second, on 5 July 2013, for respiratory failure as a consequence of hospital acquired pneumonia.[15] Whilst the deceased was in hospital following the home invasion, a decision was made in consultation with the deceased's son that the deceased was "*not for resuscitation and not for ICU/intubation*" in the event of a further episode of aspiration pneumonia.[16] The clinical notes recording this decision state that "*the NFR* [Not for Resuscitation] *order has been signed and is official*".[17]

10. In August 2013, the deceased was discharged to a high level care facility, which provided extensive physical and clinical support to the deceased in all areas of his daily living.[18]

11. Whilst the deceased's condition may be described as having improved in comparison to his condition when first admitted into the ICU, in that the deceased's injuries were no longer immediately life threatening, the deceased still suffered from "*major ongoing debilities*" that were caused by the assault (cf Appellant's Written Submissions ("AWS") at [19]).[19]

12. Nursing notes of the high care facility described the deceased as having severe problems in everyday activities, and requiring full assistance, because he was unable to respond to prompts and directions.[20] In particular, those notes indicated that the deceased was "*unable to physically undertake any daily living activities*" or "*mentally comprehend*" them.[21] When the deceased's general practitioner, Dr

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[14] T394, RFM 167.
[15] T307, RFM 112.
[16] CCA judgment at [12], CAB 148 – 149; T359, RFM 141.
[17] CCA judgment at [12], CAB 148 – 149; T359, RFM 141.
[18] CCA judgment at [18], CAB 150.
[19] T378, RFM 151.
[20] Exhibit AC, RFM 22.
[21] CCA judgment at [23], CAB 151 - 152; Exhibit AD, RFM 84.

Aristoff, visited the deceased in the nursing home in August 2013, he observed that the deceased no longer had the ability to express himself or to relate to people, and that the deceased's physical condition was also very poor because of his inability to swallow.[22] It may be noted that Dr Aristoff had been the deceased's general practitioner for over 20 years, and also spoke Russian, which was the deceased's native language.[23]

13. At the high level care facility, the deceased was also identified as a "*high falls risk*" because he would attempt to get out of a bed or chair, despite being unable to do so unaided. For this reason, he was assigned a bed that was low to the ground. Whilst at the facility, the deceased fell on several occasions from a bed or chair.[24] The notes indicated that the deceased would attempt to get up from a bed or chair and walk to another area unaided, and that he lacked understanding for his personal safety.[25]

14. On 5 December 2013, the deceased was transferred to the Prince of Wales Hospital after his condition deteriorated following a further apparent fall from his bed.[26] At hospital, the deceased was diagnosed as suffering from a fractured hip. In consultation with the deceased's son, medical practitioners at the hospital determined to treat the deceased palliatively rather than to undertake a surgical operation to repair the fracture.[27]

15. The deceased subsequently died in the Prince of Wales Hospital on 10 December 2013.[28]

The expert evidence as to the cause of death

16. Dr Bailey, the forensic pathologist who conducted the autopsy upon the deceased, expressed the view that the cause of the deceased's death was complications of an

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[22] T287, RFM 101.
[23] T283, RFM 97.
[24] CCA judgment at [19], [21]-[23], CAB 150 - 152.
[25] CCA judgment at [23], CAB 151 - 152.
[26] CCA judgment at [25]-[26], CAB 152.
[27] CCA judgment at [28]-[29], CAB 153 - 154.
[28] CCA judgment at [30], CAB 154.

acute fractured neck of the left femur (hip) within a person with complications of subacute blunt force injury to the chest.[29] In her autopsy report, Dr Bailey described the clinical cause of death as appearing to be "*respiratory failure, secondary to blunt force injury of the chest due to prolonged ventilation and ongoing respiratory infections. Fat emboli to the lungs arising from the bone injury, hip fracture, will compound pre-existing respiratory failure*".[30]

17. In particular, Dr Bailey explained that bones contain bone marrow with a very high fat content, and that when the bone breaks, small amounts of fat enter the blood stream, coming to rest in the lungs. When there is a sufficient amount of fat emboli in the lungs, the body is unable to oxygenate the blood. Dr Bailey said that she found widespread fat emboli in the lungs.[31] Although the clinical notes indicated that the deceased had possible aspiration pneumonia and/or aspiration sepsis on his admission to hospital,[32] Dr Bailey did not find any evidence of aspiration pneumonia in the lung sample that she tested.[33] Dr Bailey explained that the presence of emboli in the lungs could mimic the symptoms of aspiration pneumonia. She also stated that it was possible that there was lung infection in parts of the lung that were not sampled.[34]

18. At autopsy, it was also found that the deceased had a 6 centimetre cancerous tumour in the lower part of his left kidney.[35] There were no other tumours found on any other organs and no enlargement of the lymph nodes, suggesting that the cancer had not spread.[36] Similarly, X-rays of the whole of the deceased's pelvis showed no signs of abnormality or evidence of metastases in that bone.[37]

19. Dr Fox, an expert oncologist, gave evidence that it is not uncommon to find renal carcinoma in an elderly patient. He said that such carcinomas are often found at

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[29] T300, RFM 108.
[30] CCA judgment at [33], CAB 156.
[31] CCA judgment at [34]-[35], CAB 156 – 157; T324, RFM 115.
[32] Exhibit AG, RFM 122 – 124.
[33] CCA judgment at [34], CAB 156 – 157; T325, RFM 116.
[34] T325, RFM 116.
[35] CCA judgment at [37], CAB 157.
[36] CCA judgment at [37], CAB 157.
[37] CCA judgment at [47] and [92], CAB 160 – 161 and 176.

autopsy.[38] Dr Fox gave evidence that he did not agree "*at all*" with the proposition that the deceased died from the cancer of the kidney and its sequalae.[39] The defence expert, Professor Cordner, gave evidence that, whilst it was unlikely that there was metastasis in view of the X-rays, it remained a possibility which he thought should be taken into account.[40]

20. At autopsy, it was also found that the deceased had severe coronary disease.[41] Clinical notes relating to the deceased prior to his death indicate that, following his admission to hospital, it was also known that the deceased had rapid atrial fibrillation (irregular heartbeat).[42] Dr Bailey did not include coronary heart disease as one of the contributing factors to the death of the deceased.

The Crown address at trial in respect of the issue of causation

21. Whilst the Crown acknowledged that the "direct" cause of death was the fractured hip, the Crown contended that the fracture resulted from a fall that occurred as a result of the injuries and disabilities which the deceased had suffered in the assault (in other words, the Crown contended that the deceased fell as a result of the brain injury that he sustained in the assault and that, as a consequence, the deceased fractured his hip).[43] This contention was disputed by the appellant and his co-accused. They each submitted that the cause of the fracture was the cancer that was subsequently found at autopsy in the deceased's kidney.[44]

22. In addition to the primary way in which the Crown submitted that causation was established, the Crown's address to the jury suggested that the element of causation could be established in either of the following two ways:

(i) The assault caused injuries to the deceased's lungs, causing respiratory failure, which was exacerbated when the fat emboli travelled to the

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[38] T348, RFM 136.
[39] T349, RFM 137.
[40] CCA judgment at [50], CAB 161 - 162.
[41] CCA judgment at [38], CAB 157 - 158.
[42] CCA judgment at [29], CAB 153 - 154.
[43] CCA judgment at [54], CAB 163; T598, RFM 183. See also AWS at [42], point 2.
[44] SU 63 – 64, CAB 71 – 72.

deceased's lungs following his fractured hip ("the second causation pathway");[45] or

(ii) That the assault had reduced the deceased's quality of life to such an extent that a decision was made not to operate on the deceased's fractured hip, but to treat the fracture palliatively ("the third causation pathway").[46]

23. The appellant does not appear to contend that it was not open to the jury to convict the accused on the primary or second causation pathways. Nor could any such a contention be sustained. In respect of the primary causation pathway, the jury were entitled to conclude that the deceased's fracture resulted from a fall that was a consequence of the injuries and disabilities that the deceased suffered as a result of the assault. It was open to the jury to reject the appellant's contention that the fracture to the hip was the result of the cancer later found in his kidney, particularly having regard to the absence of any evidence that there was metastasis in the deceased's bones. The second causation pathway was supported by the findings of the forensic pathologist following the autopsy (in particular, the finding that the cause of the deceased's death was "*respiratory failure, secondary to blunt force injury of the chest due to prolonged ventilation and ongoing respiratory infections. Fat emboli to the lungs arising from the bon[e] injury, hip fracture, will compound pre-existing respiratory failure*").[47]

24. Rather, the appellant contends that (i) there was insufficient evidence to support the Crown's reliance on the third causation pathway; (ii) that the CCA did not determine this issue; and (iii) that special leave should be granted to now permit the appellant to challenge, for the first time, the directions given at trial. For the reasons outlined below, the respondent submits that the appellant's contentions should not be accepted.

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[45] CCA judgment at [6], CAB 146. See also AWS at [42], point 1.
[46] CCA judgment at [53], CAB 162 - 163; T590, RFM 175. See also AWS at [42], point 3.
[47] CCA judgment at [33], CAB 156.

Ground 1: Whether the impugned Crown theory was supported by evidence

25. The Crown's address in respect of the third causation pathway included the following submission:

> "... even if [the deceased] had a cancer of the kidney, even if it had started to cause him fractures, the fractures are still going to be set by doctors until something else kills him or until that kidney cancer goes all through his body if such a thing is possible. I'll be taking you to Dr Fox's evidence, an oncologist, and he says no he didn't think for a moment that kidney cancer was the cause of [the deceased's] death, even with the [sequelae] of the broken leg. Of course it wasn't. Because of the injuries that he had suffered, a decision had been taken months earlier that if anything, his quality of life was so poor from this very day, from 15 April 2013, that there was to be no more major interventions because certain things were never going to improve."[48]

26. The appellant does not appear to allege that the above reasoning could not satisfy the element of causation. Rather, the appellant's complaint, as per the first ground of appeal, is that there was insufficient evidence for this aspect of the Crown's address to be left to the jury.

27. Contrary to appellant's submissions, there was evidence that was capable of supporting the Crown's submission as to the third causation pathway. In particular:

(i) There was uncontested evidence concerning the deceased's poor quality of life subsequent to the assault. As outlined above, prior to the assault, the deceased was a robust and intelligent 78 year old man. Following the assault, the deceased was no longer able to eat; he was unable to stand or walk unassisted; he was dual incontinent; he was unable to undertake daily life activities or to mentally comprehend them; he was often frustrated and angry. Each of these matters stemmed from the traumatic brain injury that the deceased sustained in the assault and, contrary to the appellant's submissions, there was no evidentiary basis to suppose that the deceased's quality of life would significantly improve (cf AWS at [59]).

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[48] CCA judgment at [53], CAB 162 – 163; T590, RFM 175.

(ii) As acknowledged by Dr Cordner, although some of the physical injuries that were inflicted in the home invasion had healed, the deceased still had the major on-going issue of his severe cognitive decline.[49] As a consequence of his brain injury, the deceased had a range of disabilities and infirmities. The cognitive decline subsequent to the home invasion was the main reason why the deceased was more or less confined to his bed.[50]

(iii) It was not in dispute that a fractured hip was a survivable injury in a healthy person of the deceased's age. Professor Fox's evidence was that an "*otherwise healthy person with a fractured neck of femur would have surgical treatment and recover*".[51] As outlined above, Professor Fox also observed that renal carcinoma is not uncommon in an elderly patient, and that he would refer a patient of the deceased's age with a carcinoma of that type for surgery.[52] The orthopaedic surgeon's notes indicated that the relevant surgery was available to the deceased, once he was medically stabile, and that such surgery was necessary.[53] Similarly, the forensic pathologist gave evidence that the deceased's level of coronary disease was not a bar to surgery.[54]

(iv) Against the background of the evidence of the severe deterioration in the deceased's health, there was also evidence that, prior to the deceased's fall on 5 December 2013, a decision had already been made by the deceased's son and medical practitioners whilst the deceased was still in hospital in relation to the injuries sustained during the home invasion and prior to his transfer to a high care facility that he would not be resuscitated or intubated in the event of a further episode of aspiration pneumonia.[55] The clinical notes in respect of the decision not to operate on 6 December 2013 also record consultation with the deceased's son.[56] Those notes indicate that the deceased's son felt that the deceased had deteriorated significantly since the deceased was released from

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[49] T378, RFM 151.
[50] T394, RFM 167.
[51] CCA judgment at [48], CAB 161.
[52] CCA judgment at [48], CAB 161.
[53] CCA judgment at [28]; CAB 153.
[54] CCA judgment at [52], CAB 162; T380, RFM 153.
[55] CCA judgment at [12], CAB 148 - 149; T359, RFM 141.
[56] CCA judgment at [29], CAB 153 - 154; Exhibit AG, RFM 123-124.

hospital into the high care nursing facility in August. The structure of the notes may be noted. The heading of the note reads "*Decision re palliative care vs operative*." They indicate that the deceased's son stated that he agreed with the previous decision that his father should not be the subject of any invasive treatment. The son was then updated on further confirmed and possible medical conditions. In particular, he was told about the confirmed hip fracture, the confirmed atrial fibrillation, possible stroke, possible aspiration sepsis and the possible presence of a malignant cancer.[57] After receiving this information, the son then confirmed that the deceased should be provided "*comfort care*" and that IV fluids should be withdrawn.[58]

28. In view of the above evidence, even if the fracture of the deceased's hip was pathological in nature (that is, even if the fracture was caused by the cancer that was subsequently found at autopsy), it was open to the jury to draw the inference that the decision not to conduct surgery on the deceased's fractured hip was made because of the poor quality of life that had been forced on the deceased as a direct consequence of the attack, such that the assault "*substantially*" or "*significantly*" contributed to the deceased's death.

29. The appellant's contention is that there was insufficient evidence to permit the third causation pathway to be left to the jury. To make out this contention, it is necessary to take the evidence in the trial at its highest. As this Court has held in a related context, "*if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision*": ***Doney v The Queen*** [1990] HCA 51; 171 CLR 207 at 214-215.

30. The question to be considered in determining whether the issue should be left to the jury is not whether the inference that was sought to be drawn by the Crown is the only available inference. Rather, "*when the case is undoubtedly capable of the inference of guilt, albeit some other inference or theory be possible, it is for the*

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[57] CCA judgment at [29], CAB 153 - 154; Exhibit AG, RFM 124.
[58] CCA judgment at [29], CAB 153 - 154; Exhibit AG, RFM 124.

jury, properly directed, and for them alone, to say not merely whether it carries a strong probability of guilt, but whether the inference exists actually and clearly, and so completely overcomes all other inferences or hypotheses, as to leave no reasonable doubt of guilt in their minds": ***Peacock v The King*** [1911] HCA 66; 13 CLR 619 at 651-652.

31. For this reason, even if alternative inferences were open in respect of one or more of the particular clinical notes, the existence of such alternative inferences could not justify removing this issue from the jury (cf AWS at [69]). The jury were properly directed as to the drawing of inferences.[59] Provided the notes were capable of supporting the inferences in question, the determination of whether those inferences should be accepted beyond reasonable doubt was a question for the jury, as the "*constitutional tribunal for deciding issues of fact*": ***The Queen v Baden-Clay*** [2016] HCA 35; 258 CLR 308 at [65].

32. In any event, many of the alternative inferences posited by the appellant at AWS [69] were not open on the evidence. For example, as the deceased's son was not told that the deceased was suffering from aspiration pneumonia, or malignant cancer, but was rather told that there was a possibility that he was suffering from those conditions, it would not be reasonable to infer that the deceased's son and medical staff were motivated by the fear of "*a never-ending cycle of aspiration sepsis / pneumonia*" or the prospect of ongoing pathological fractures (cf AWS [69(a)] and [69(b)]).

33. As the deceased's wife had died some years before, the deceased's son was authorised by s. 33A of the *Guardianship Act* 1987 (NSW) to provide consent to the carrying out of medical treatment in circumstances where the deceased was incapable of providing such consent.[60] At the time that the decision was made for the fracture to be treated palliatively, the deceased had "*lost the ability to communicate properly, express himself and relate to people*"; and could not "*relate his symptoms and his complaints*" to medical practitioners (including his general

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[59] SU at 7 – 10; CAB 15 – 18.

[60] It may be noted that, in accordance with the *Guardianship Act*, the deceased's son was nominated in nursing home records as a "*person responsible*": Exhibit AD, RFM 63, 67.

practitioner, who spoke Russian).[61] There is no basis to suggest that the Prince of Wales Hospital may have felt wrongly bound by the earlier "not for resuscitation note" (cf AWS [69(e)]. Indeed, the notes of the December decision to treat the fracture palliatively clearly indicate that the previous "not for resuscitation note" was not considered to be binding.

34. Similarly, there is no evidence that either the earlier "not-for resuscitation decision" or the December decision to provide palliative care in response to the fractured hip were made contrary to the wishes of the deceased (cf AWS at [69(f)] and [67]). As outlined above, the evidence was that the deceased's son had a close relationship with his father, and that the deceased's son was acutely aware of the significant deterioration in his father's condition.[62]

35. The remaining inferences suggested by the appellant at AWS [69], namely that the prospects of stabilisation for surgery was not regarded as viable or would be distressing to the deceased (AWS [69(c)]), or that the doctors considered that there was a poor prospect of the deceased surviving surgery or living for any length of time thereafter (AWS [69(d)]), could only have significance if the concerns about surgery related to medical conditions that were unrelated to the injuries sustained in the home invasion. As outlined above, there was evidence that neither the possibility of cancer, nor the suspected heart conditions posed a bar to surgery of the fractured hip.

36. Neither counsel for the appellant, nor counsel for the appellant's co-offender objected to the relevant aspects of the Crown's closing address dealing with the third causation pathway. As the CCA observed, "*there is some significance in the fact that the alleged evidentiary lacunae in the Crown case was not apparent to either the trial judge nor counsel for either the applicant or his co-accused*".[63] In this respect, it may be noted that the explanation as to why there was no surgery

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[61] CCA judgment at [14], CAB 149; T289, RFM 103.
[62] CCA judgment at [7] – [9], CAB 147 - 148.
[63] CCA judgment at [87], CAB 174.

performed on the deceased's hip was first raised in the Crown's opening address (cf AWS at [43]).[64]

37. For the reasons outlined above, the Crown's closing address on the third causation pathway was supported by evidence. Accordingly, appeal ground 1 cannot be established.

Ground 2: Whether the CCA failed to consider the appellant's sole ground of appeal as particularised

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38. The CCA did not fail to consider the appellant's sole ground of appeal as particularised in that court.

39. The appellant's sole ground of appeal in the CCA was that there was insufficient evidence to support the Crown's submission to the jury that they could be satisfied that causation was established because the assault had reduced the deceased's quality of life to such an extent that a decision was made not to operate on the deceased's fractured hip, but to treat the fracture palliatively.[65] This issue was determined by the CCA, adversely to the appellant.

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40. The references in the CCA's judgment to an "*inability*" to surgically treat the deceased's fractured hip and that the deceased "*could not*" be surgically treated[66] need to be read within the context of the judgment as a whole. When the judgment is read as a whole, it is clear that that the CCA was not under the mistaken belief that it was impossible for surgery to occur. The CCA was well aware that a decision had been made not to operate, and that that decision involved a choice as to whether to operate (cf AWS at [56] and [58]). Rather, the CCA's use of the words "*could not*" and "*inability*" simply referred to the inability of medical staff to operate *once* the deceased's son and medical staff had made the decision that there would be no surgical intervention.

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[64] CCA judgment at [5], CAB 145 - 146.
[65] CCA judgment at [3] - [4] and [67], CAB 144 and 168.
[66] CCA judgment at [93] and [99], CAB 176 and 178.

41. That the CCA was not under the misapprehension alleged by the appellant is demonstrated by the following matters.

42. First, the CCA correctly summarised the submissions of each of the parties in the CCA proceedings.[67] This summary demonstrated that the court recognised that the issue in dispute between the parties concerned the inferences that could be drawn in respect of the decision for the deceased not to have surgery.[68]

43. Second, the evidence which the CCA considered in determining whether the impugned pathway was open concerned evidence that related to the decision by the deceased's son to not proceed by way of surgical intervention, but rather by way of palliative care.[69]

44. Finally, the CCA's conclusion that it was open to the jury to find that a "*significant reason for the inability to surgically treat the fracture was the consequence of the injuries suffered from the assault*"[70] was expressed to be supported by all of the evidence set out in the judgment, including:

> "... evidence of the deterioration in the deceased's condition, the evidence that, after the aspiration pneumonia which the deceased suffered whilst at St Vincent's Hospital, it was determined that if a similar incident occurred he would be 'Not for Resuscitation', the evidence of his condition at the nursing home, and the ultimate decision not to operate at Prince of Wales Hospital, which referred back to the earlier decision made at St Vincent's Hospital".[71]

45. The CCA was well aware that there was a choice involved and that an "*ultimate decision*" had been made in relation to whether there should be surgical intervention in respect of the hip fracture. Further, in making that ultimate decision there had been reference back to the earlier "*decision*" that had been made by medical staff after consultation with the son at St Vincent's Hospital to not proceed by way of surgical intervention.

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[67] CCA judgment at [67] – [85], CAB 168 – 173.
[68] See especially CCA judgment at [83] – [84], CAB 173.
[69] See especially CCA judgment at [93], CAB 176.
[70] CCA judgment at [99], CAB 178.
[71] CCA judgment at [100], CAB 178 – 179.

46. It was by taking into account all of the matters summarised at [99] that the CCA ultimately found that there was evidence capable of supporting the impugned pathway which involved the decision to not proceed by surgical intervention but rather palliative care.

47. There is no contradiction between the reasoning urged by the Crown at trial and that adopted by the CCA (cf AWS at [58]). At trial, the Crown's submissions in respect of the third causation pathway were predicated on an acceptance that a choice had been made not to pursue surgery that could otherwise have been undertaken. The Crown contended that a choice was made not to pursue surgery because of the deceased's catastrophic injuries that were caused by the violent assault. The appellant did not dispute that such reasoning was capable of satisfying the element of causation. His contention was that there was insufficient evidence to leave this issue to the jury. The CCA rejected this contention, finding that the evidence was capable of supporting the pathway of reasoning impugned by the appellant.

48. The appellant has not established ground 2 of the appeal.

Proposed Ground 3: The trial judge's directions

49. The appellant seeks special leave to raise an additional ground of appeal (AWS at [73] – [78]). As the appellant acknowledges, this ground of appeal was not raised at the special leave hearing; nor was it raised either at trial or in the proceedings before the CCA (AWS at [74]).

50. This Court has power to grant special leave even where the point sought to be relied on was not raised in the proceedings below: ***Gipp v The Queen*** [1998] HCA 21; 194 CLR 106 at 153; ***Crampton v The Queen*** [2000] HCA 60; 206 CLR 161 at [14]; ***Fingleton v R*** [2005] HCA 34; 227 CLR 166 at [6], [144] and [195].

51. However, it is well established that this power should only be exercised in "*exceptional circumstances*": ***Crampton*** at [14]; ***Fingleton*** at [144] and [195]. The

requirement is because of "*the overarching societal interest in the finality of litigation in criminal matters*" and the nature of the adversarial system, by which, litigants are generally bound by the conduct of counsel, and in which it is left to the parties to define the issues and to select the arguments upon which they rely, so as to preserve the neutrality of the decision-making tribunal: ***Crampton*** at [15] – [19].

52. For these reasons, it is not sufficient to merely establish that the raising of a new ground of appeal would not deny the respondent procedural fairness for special leave to be granted (cf AWS at [74]). The absence of such prejudice does not amount to "*exceptional circumstances*" to warrant the power being exercised.

53. Proposed ground of appeal 3 is not of the character of decisions such as ***Crampton***. The proposed ground does not raise "*a point of law that provides a complete answer*" to the charge (cf ***Crampton*** at [21]; ***Fingleton*** at [6] and [56]). As outlined below, the appellant accepts that the trial judge's directions on causation were "*formulated in accordance with the law*" (AWS at [76]). Rather, the appellant's main complaint is that in her Honour's summing up, the trial judge did not explain the legal consequences of finding particular facts proven or not proven to the jury (AWS at [76]). The appellant does not state with precision what directions should have been given (cf ***Smith v R*** [2019] NSWCCA 162 at [67]). Nor does the appellant identify how the failure to give any particular direction has given rise to a miscarriage of justice: s. 6 of the *Criminal Appeal Act* 1912 (NSW).

54. The mischief that the appellant asserts as having flowed from the asserted failure of the trial judge is that, if the trial judge had so directed, the deficiency that is the subject of ground 1 of the appeal would have been noticed (AWS at [78]). This allegation does not relevantly add to the grounds of appeal to which special leave has been granted. If ground 1 of the appeal is established, it would not be necessary to determine this proposed ground of appeal. If ground 1 of the appeal is not established, the asserted miscarriage the subject of this ground of appeal would likewise fail.

55. The appellant was represented by senior counsel in the CCA, who determined to limit the ground of appeal to a challenge concerning the sufficiency of evidence to support a submission in the Crown's address. Special leave should not now be granted to permit the appellant to raise a new ground of appeal related to the trial judge's directions, which was not the subject of submissions or determination in the CCA, particularly where those directions were also not sought at trial: see also Rule 4 of the *Criminal Appeal Rules*.

56. In any event, the trial judge did not err as alleged in proposed ground 3. The trial judge summarised the evidence in the trial. The trial judge directed the jury that the Crown had the onus of proving beyond reasonable doubt that the appellant or his co-accused caused the death of the deceased. The trial judge instructed the jury that "*the criminal law defines 'caused' as meaning 'substantially contributed to' or 'significantly contributed to'*".[72] The trial judge continued:

> "The act need not be the only cause of death or the most important cause of death or even the only important cause of death. The Crown must prove that the acts of the accused substantially or significantly contributed to the death, and you should approach that question in a common sense and practical way and you should do so bearing in mind that you are considering criminal responsibility for homicide, the most serious offence known in the law".[73]

57. The trial judge explained that in deciding whether the Crown had established causation, the jury should apply their "*common sense*" to all of the facts, including the evidence of the injuries, the evidence of the deceased's condition before and after the assault and all of the expert evidence.

58. The trial judge also instructed the jury that, as there was "*evidence of more than one medical condition being present at the time of* [the deceased's] *death*", the jury were required to "*determine whether the act or acts of the accused remained an operating and substantial cause of* [the deceased's] *death at the time of his death on 10 December 2013…*"[74] The trial judge directed the jury that if they were not satisfied beyond reasonable doubt that one or both accused did an act that caused

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[72] SU at 25, CAB 33.
[73] SU at 25, CAB 33.
[74] SU at 25, CAB 33.

the death of the deceased in the way explained, then the jury were required to return a verdict of not guilty in respect of murder and manslaughter.[75]

59. In her summing up, the trial judge identified the legal issues in the case, which included the issue of causation, and related the law to those issues: ***RPS v R*** [2000] HCA 3; 199 CLR 620 at [41]. In doing so, her Honour fulfilled her obligation "*to explain to the jurors so much of the law as they needed to know in order to decide the issues that arose from the charges, the evidence, the case for the prosecution and the defence case*": ***The Queen v Chai*** [2002] HCA 12; 187 ALR 436 at [18].

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60. It was not necessary for her Honour to proceed to provide further comment on different aspects of the factual matrix, or to express any views as to whether the jury should find the test of causation that her Honour had (correctly) articulated satisfied consequent upon various factual findings. Indeed, as Gaudron ACJ, Gummow, Kirby and Hayne JJ observed in ***RPS v R*** [2000] HCA 3; 199 CLR 620 at [42], "*much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.*"

20 61. For the reasons outlined above, special leave should not be granted in respect of proposed ground of appeal 3.

Conclusion

62. For the reasons outlined above, there was evidence to support a path of reasoning by the jury that causation was satisfied because the assault had reduced the deceased's quality of life to such an extent that a decision was made not to operate on the deceased's fractured hip, but to treat the fracture palliatively. The CCA was correct to dismiss the appellant's appeal on this ground.

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[75] SU at 26, CAB 34.

PART VI: ARGUMENT IN RESPECT OF NOTICE OF CONTENTION OR CROSS-APPEAL

63. The respondent has not filed a notice of contention or notice of cross-appeal in this matter.

PART VII: ESTIMATE

64. The respondent estimates that 1 hour will be required for the presentation of the respondent's oral argument.

Dated: 3 December 2019

L Babb
Director of Public Prosecutions
Telephone: (02) 9285 8890
Facsimile: (02) 9285 8601
Email: lbabb@odpp.nsw.gov.au

T L Smith
A/ Deputy Director of Public Prosecutions
Telephone: (02) 9285 8890
Facsimile: (02) 9285 8601
Email: tsmith@odpp.nsw.gov.au

B K Baker
Crown Prosecutor
Telephone: (02) 9285 8823
Facsimile: (02) 9285 8601
Email: bbaker@odpp.nsw.gov.au