IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B11 of 2012

BETWEEN: JAYANT MUKUNDRAY PATEL
Appellant

AND: THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

PART I - CERTIFICATION FOR INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – ISSUES PRESENTED BY THE APPEAL

2. Whether the case was correctly put to the jury as involving the issue of criminal negligence under s.288 of the Queensland Criminal Code.
3. If not, whether a miscarriage of justice thereby occurred.
4. Whether there was inadmissible evidence admitted.
5. If so, whether a miscarriage of justice thereby occurred.

Submissions on behalf of the Respondent
Form 27D
R.44.03.3

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PART III – Section 78B notices

6. No s.78B notices are required to be given.

PART IV – MATERIAL FACTS

7. The appellant has not set out the material facts concerning this case. Those facts are as follows.

8. The appellant was charged with four counts:

   (a) Three counts of unlawful killing; and,

   (b) One count of doing grievous bodily harm.

9. The first count of unlawful killing concerned Mervyn John Morris. Mr Morris was aged 75. He was suffering from malnutrition, abnormal liver function and cardiac disease, which significantly increased the risks of surgery.[1]

10. In addition, he had diverticular disease.[2] Mr Morris presented with bleeding from the rectum and the appellant noted that he had diverticular disease.[3] The appellant recommended that Mr Morris's sigmoid colon be removed and that he be fitted, as a consequence, with a colostomy bag.[4] The reason for the operation was recorded as "sigmoid diverticulosis".[5] This was done on 23 May 2003.[6] The examination of the removed bowel showed no malignancy, no site of bleeding, the (known) diverticula and no cancer or other abnormality.

11. Mr Morris continued to bleed from his rectum after the surgery. It was probable that the bleeding was in fact being caused by radiation proctitis,[7] a consequence of radiation therapy and in respect of which the removal of the sigmoid colon was irrelevant. He became progressively and increasingly unwell and died on

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1 Summing up 52-90
2 Sometimes called diverticul*osis*, this condition is to be contrasted with diverticul*itis*, which is an inflammation of the diverticula, usually leading to copious bleeding. Mr Morris did not have diverticulitis.
3 Summing up 52-89
4 Summing up 52-82
5 Summing up 52-83
6 Summing up 52-83
7 Summing up 52-89, 92

14 June 2003.

12. The Crown called expert evidence to prove that the operation caused Mr Morris's death. Dr Collopy concluded that "this elderly man died because he was rushed into an unnecessary major bowel operation which is complicated by a partial bowel obstruction, leading to a second operation (the dehiscence repair) and his already sick heart and liver and subsequently his sick lungs could not cope with this. There were additional contributing factors in the malnourishment, the fluid overload and the infection or septicaemia."[8]

13. On the Crown case, the conduct of the appellant in performing the operation to remove the sigmoid colon fell "well below the standard to be expected of a competent surgeon":[9] The source of bleeding had not been identified;[10] there had not been sufficient investigations to determine the site and cause of the bleeding;[11] with his comorbidities, Mr Morris had a high chance of dying as a result of this operation;[12] The primary factor causing death was the operation performed by the appellant.[13]

14. The second count of unlawful killing concerned James Edward Phillips. Mr Phillips was aged 46. He was suffering from end-stage renal failure, heart problems, and difficult vascular access.[14] There were indications that in surgery Mr Phillips would be exposed to significant risks.[15]

15. In 2003 tests showed that Mr Phillips had cancer in his oesophagus.[16]

16. The appellant decided to perform an operation called an oesophagectomy on Mr Phillips. Oesophagectomies are major operations and have about double the risk of mortality of any other operation, including, for example, liver and heart transplants. They have a mortality rate of 3-5% in good units but Mr Phillips's

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8 Transcript 8-67 line 60 – 8-68 line 10
9 Summing up 52-94
10 Summing up 52-93
11 Summing up 52-93
12 Summing up 52-93; transcript 8-68 line 35
13 Summing up 52-95
14 Summing up 52-99
15 Summing up 52-100-101
16 Summing up 52-102

risk of mortality was estimated at 50% or more. They should be conducted by surgeons, and at hospitals, that conduct them routinely.[17] The hospital in Bundaberg had attempted only one oesophagectomy in the time prior to the appellant's arrival. There were only four surgeons in Brisbane who did them routinely. The appellant himself had not done any such operations for at least 2½ years prior this. An oesophagectomy was unnecessary because the nodule of cancer could almost certainly have been treated by other means.[18]

17. Dr Allsop, an expert, said that he thought the "operation went ahead with reckless disregard for the patient's safety"[19] and that "I would have run a mile from this man as a surgical prospect for something as big as an oesophagectomy".[20]

18. The appellant did the operation on 19 May 2003. Mr Phillips died two days later on 21 May 2003.

19. According to Dr Miach the operation killed Mr Phillips. Given his overall condition, his death was not a surprise[21] and, although ultimately caused by his heart stopping because his potassium level became very high,[22] it was due to the combination of his ailments.[23] There was a direct relationship between the operation and the death[24] and the ultimate cause of death, the heart stoppage, was merely "the final straw".[25]

20. The third count of unlawful killing concerned Gerardus Wilhelmus Gosewinus Kemps who was 77 years old. He suffered from heart disease, impaired kidney function, and a left carotid artery murmur. He had recently had an abdominal aortic aneurism repaired and had suffered from complications the seriousness of which required his transfer to a major hospital in Brisbane. An oesophagectomy

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17 Transcript 36-8, Summing up 52-113-114
18 Summing up 52-114
19 Transcript 34-31 line 15
20 Transcript 34-29 line 20
21 Transcript 14-66 lines 10-20
22 Summing up at 52-118
23 Transcript 14-67 line 50
24 Transcript 14-66 line 55
25 Transcript 14-67 line 48

carried greater risks than had that operation.[26]

21. In late 2004 tests showed oesophageal cancer in Mr Kemps.[27] His specialist physician had intended sending him to Brisbane for tests to determine the extent of the cancer.[28] The appellant raised with Mr Kemps the prospect of undergoing an oesophagectomy in Bundaberg and this was then done.[29]

22. At the end of the surgery (at 1.12 pm),[30] staff indicated to the appellant that there were signs Mr Kemps was still bleeding.[31] The appellant nevertheless sent the patient to the Intensive Care Unit and commenced another procedure upon a different patient.[32] In the ICU a very large quantity of blood was transfused into Mr Kemps, to no avail.[33] The bleeding did not stop.

23. The appellant was then performing surgery upon another patient and did not cause Mr Kemps to be returned to surgery until 6.30 pm.[34] The appellant reopened Mr Kemps but did not find the source of the bleeding and did not stop the bleeding.[35] He sent Mr Kemps back to the ICU where he died.

24. Dr Allsop said that the operation ought not to have been embarked upon, and that the appellant did not have the skills to conduct it.[36] In his opinion:

    (a) The bleeding should have been attended to immediately and the patient was "well and truly salvageable at that point";[37]

    (b) By the time the patient was brought back to theatre, 5 hours later, "he's pretty well doomed",[38] "the situation was probably irrecoverable" and

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26 Summing up 52-127
27 Summing up 52-127-128
28 Summing up 52-130
29 Summing up 52-131
30 Summing up 52-143
31 Summing up 52-142
32 Summing up 52-143
33 Summing up 52-146
34 Summing up 52-143
35 Summing up 52-144
36 Transcript 34-50 line20-50
37 Transcript 34-61 line 25-30
38 Transcript 34-60

"unfortunately the die had been cast by then."[39]

(c) As to the standard of care, "he shouldn't be doing these operations. It's not within his capacity to do them and make the appropriate decisions".[40]

25. Dr Jamieson's view was that:

(a) Continued bleeding to the extent of 3 units over an hour in the ICU "would have been enough, on top of this, to have sent me back"[41] "where I would be prepared to leave one patient anaesthetised in the middle of an operation to go back to do the other patient".[42]

(b) A surgeon should be able to find a source of bleeding.[43]

(c) It was "considerably below" the standard of a competent surgeon to have left Mr Kemps bleeding for as long as the appellant did.[44]

(d) The surgery directly resulted in Mr Kemps's death.[45]

26. Mr Vowles was 56 years old when the appellant removed his bowel. Mr Vowles had had cancerous polyps and part of his bowel had been removed previously.[46] The appellant performed a colonoscopy and found a polyp. The biopsy on the polyp showed it was benign but the appellant recommended removal of the bowel.[47]

27. The operation to remove the remnant of Mr Vowles's colon and rectum took place on 4 October 2004. The histopathology report of the removed organs revealed no cancer. Dr O'Loughlin said there was no justification for removal of Mr Vowles's remaining bowel.[48]

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39 Transcript 34-68 line 10
40 Transcript 34-68 line 18
41 Transcript 36-43 line 40
42 *ibid*
43 Transcript 36-44 line 50
44 Transcript 36-46 line 45
45 Transcript 36-47 line 50
46 Summing up 52-
47 Summing up 52-154
48 Summing up 52-155-156

28. Doing so fell well below the standard of a competent general surgeon.[49]

29. The appellant did not give evidence and he called no expert evidence to contradict the Crown's doctors.

30. The Court of Appeal unanimously dismissed an appeal against conviction.

PART V - STATEMENT OF ARGUMENT

31. The indictment simply alleged, relevantly, three counts of unlawful killing and one count of doing grievous bodily harm. The indictment cited the relevant provisions of the Queensland Criminal Code, namely, s.303 (unlawful killing) and s.320 (doing grievous bodily harm).

10 32. In order to secure a conviction on the counts of unlawful killing, the Crown had to prove that the appellant had caused the death of another person, thereby killing him (s.293) and that the killing was unlawful (s.300).[50]

33. In order to secure a conviction on the count of doing grievous bodily harm, the Crown had to prove that the appellant had done grievous bodily harm to another person (s.320 and s.1)[51] and that the doing of such harm was unlawful (s.320).

34. The Code provides two paths to conviction in the circumstances of these four cases.[52] One path lies through s.288. This provides:

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

35. Section 288 does not impose criminal liability; rather, it imposes a duty upon a person. The duty attaches to the person if he or she undertakes to do certain acts. The duty is a composite one to "have reasonable skill" and to "use

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49 Summing up 52-155
50 Absent an element rendering a killing murder (s.302), an unlawful killing is manslaughter
51 S.1 provides that "grievous bodily harm" includes the loss of a distinct part of an organ of the body.
52 The defences which may arise are dealt with later.

reasonable care" in doing such acts.

36. The duty is not expressed to be owed to any person.[53] The section then addresses the consequence of an omission to observe or perform that duty. The consequence is that the person is "held to have caused any consequences" which "result ... by reason of any [such] omission". It can be seen that the section does not impose any criminal liability upon a person by reason of his or her doing an act or omitting to do an act.[54] Rather than fixing upon acts or omissions, s.288 fixes upon the existence of the duty and the omission to fulfil that duty as the *facta* upon which the section then visits a conceptual consequence, that of causation.[55] A duty is, of course, a legal construct. And an "omission to observe or perform that duty" is a legal conclusion drawn, first, from the existence of a legal duty and, second, from the acts or omissions of the accused.[56]

37. A conclusion that a person has failed to observe or perform a duty imposed by s.288 therefore raises a further inquiry: have any, and if so what, consequences resulted from that failure? Once the consequences have been identified, the person is "held to have caused" them. This conclusion does not, of itself, result in criminal liability. For such liability to attach, there must be a substantive provision of the Code which has that effect. Section 293 and 300 (manslaughter) and s.320 (doing grievous bodily harm) are such provisions.

38. In the case of Mr Morris, Mr Phillips and Mr Vowles, it was the duty of the appellant to have reasonable skill and to use reasonable care in doing the

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53 Unlike the civil sphere, where the discourse is usually in Hohfeldian terms and concerns a right as a correlative of duty, in the criminal sphere the discussion of duties imposed by law is usually concerned with attaching criminal liability to a person by the identification of a breach of a duty imposed by law as a link in the chain of causation: see the discussion in *Criminal Omissions,* Hughes, 67 Yale Law Journal 590 at 627 *et seq.*

54 The criminal law has always treated acts and omissions differently and has been prepared to fix liability in respect of acts more readily than in respect of omissions: see the discussion in *Criminal Omissions, supra*; *Absolute Liability for Criminal Omissions,* Bein, 1966 Israel Law Review 489; *Responsibility and Fault,* Honore, Hart Publishing 1999, at 41 *et seq.*

55 Once a duty is imposed by law, the significance of omissions as a source of liability alters radically: see the discussion in Honore, *supra,* at 54 *et seq.*

56 It is uncontroversial, and it is common ground, that the duty is not easily breached; the breach must be one which involves "grave moral guilt": see *R v Scarth* (1945) Q St R 38; *Callaghan v The Queen* (1952) 87 CLR 115; *Evgeniou v The Queen* (1963-1964) 508.

surgery. It was the Crown case that he failed to observe the duty of care by doing the surgery in the circumstances proved in this case. To use the words of s.288 itself, the appellant failed to have reasonable skill or to use reasonable care in operating upon Mr Morris and Mr Phillips as a consequence of which they both died. The breach of duty was constituted by the acts of cutting open Mr Morris's abdomen and removing his sigmoid colon, by cutting open Mr Phillips and removing his oesophagus and by cutting open Mr Vowles and removing his bowel. It was careless and unskilled to do the acts in circumstances in which the cutting and removal was not justified by their condition and when because it was likely to kill Mr Morris and Mr Phillips.

39. Section 288 has the result that a particular act, done as part of a surgical operation, will constitute a breach of duty if it is done without reasonable care or by a person without reasonable skill. It could not be argued that if *all* of the acts constituting the surgical operation are done without reasonable care (because they are uncalled for and are likely to kill) or by a person who did not have reasonable skill that the section does not apply to render the person responsible for causing the result[57]. The Crown alleged that doing all of the acts and omissions involved in the removal of the sigmoid colon, the oesophagus and the bowel respectively constituted a breach of the duty imposed by s.288. That breach of duty caused Mr Morris and Mr Phillips to die and did grievous bodily harm to Mr Vowles. The appellant is "held to have caused" those consequences. He thereby killed Mr Morris and Mr Phillips (s.293) and caused grievous bodily harm to Mr Vowles (s.320). It was inapposite to say "the surgery itself was competently performed" when it was wholly negligent to do it.

40. The case of Mr Kemps was different. Mr Kemps was ill but was fit to undergo an oesophagectomy.[58] However, during the course of the operation he began to bleed. The appellant could not find the source of the bleeding and, instead of continuing to search for it and stopping the bleeding, he caused Mr Kemps to be sent to the Intensive Care Unit where he continued to bleed. By the time Mr

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57 Although the common law of negligence is irrelevant here, the doing of unnecessary surgery which is likely to kill would be regarded as negligent

58 Summing up 52-132

Kemps was brought back to surgery for another attempt to find the source of bleeding, he was doomed".[59] The appellant's failure to search for and to find the site of bleeding and to stop it constituted a breach of his duty to use reasonable care and to have reasonable skill. The case was a paradigm s.288 case.[60]

41. There was a second path to secure a conviction in the cases of Mr Morris, Mr Phillips and Mr Vowles, but one upon which the Crown did not rely because the learned trial judge ruled[61] that it could not.[62] It was open to the Crown to allege and to prove that the appellant's performance of the operation, the cutting, the removal of the sigmoid colon, the stitching, the attachment of a colostomy bag and the incidental treatment, in short the subjection of Mr Morris and Mr Phillips to the trauma of the operation, killed them. Absent a defence rendering the killings not unlawful, the appellant would have been guilty of manslaughter. Similarly, in the case of Mr Vowles, it was open to allege and prove simply the doing of grievous bodily harm (about which there could be no argument) and then to negative any defence.

42. Conceptually, there is no difference between such cases and any other prosecution involving a wounding which causes death or grievous bodily harm. In particular, no reliance upon a breach of duty needed to be alleged.[63]

43. It is this path which the appellant *now* submits was the only path open to the Crown.[64] At the trial the appellant submitted the contrary, namely that the *only* path to conviction in these cases lay in s.288 as the source of causation.[65]

44. However, the appellant's submissions then and now were both wrong because nothing in the Code precludes the Crown advancing only one of two available

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59 Transcript 34-60

60 There was another basis upon which the Crown alleged criminal liability; it is set out in the summing up at 52-133-138. The appellant's submission that the trial judge's general statement at the beginning of the summing up that the case did not involve "botched surgery" was "confusing" (appellant's submissions paragraph 87) has no substance. It is not explained. No redirection was sought.

61 It is respectfully submitted that that ruling was wrong.

62 Because the trial judge did not permit it to do so: see ruling of Byrne SJA of 2 June 2010 transcript 41-1 *et seq.*

63 Consent to wounding or doing grievous bodily harm would not constitute a defence.

64 See paragraphs 30 to 32 of the appellant's submissions.

65 See the written outline of the appellant handed up on 1 June 2010 in relation to "ruling 3".

paths to conviction or advancing both as alternatives. A case based upon s.288 would and did, of course, preclude the appellant raising s.23 as a defence. Relevantly, s.23 provides that a person is not criminally responsible for an event that occurs by accident. However, s.23 is expressed to be "subject to the express provisions of this Code relating to negligent acts and omissions". Section 288 is an express provision of the Code relating to negligent acts and omissions.[66]

45. However the defence of mistake under s.24[67] and the specific surgery defence under s.282[68] would be available.

46. The appellant raised defences under s.24 in relation to Mr Morris,[69] Mr Phillips[70] and Mr Vowles.[71] The issue was whether the appellant had performed the operation in the mistaken but reasonable belief that Mr Morris's bleeding was a diverticular bleed.[72] The corollary issue was whether, if that belief was held and was reasonably held, the state of affairs the subject of the belief was such that the performance of the operation would not result in criminal liability.[73] The Crown called evidence to prove that even such a mistaken belief did not justify the removal of the sigmoid colon. In Mr Vowles's case, the issue was whether the appellant's belief in a diagnosis of "familial cancer" justified the operation.[74] In Mr Phillips's case, the issue was whether the appellant's had a belief in his diagnosis, whether it was reasonable and whether it justified surgery.[75]

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66 *Callaghan v The Queen* (1952) 87 CLR 115

67 Section 24 provides: A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

68 Section 282(1) provides, relevantly: A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill, a surgical operation on or medical treatment of—
(a) a person …; or
(b) …;
if performing the operation or providing the medical treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

69 Summing up 52-73

70 Summing up 52-120

71 Summing up 52-151

72 See summing up at transcript 52-73

73 See summing up at transcript 52-97

74 Summing up 52-151

75 Summing up 52-120

47. The defence under s.24, insofar as it required the Crown to negative that each mistaken belief was held or that it was reasonable therefore raised the same issues of diagnosis and unjustified surgery as did the issue of breach of duty in each case.

48. A defence under s.282 would have required the Crown to negative any one of the following:

(a) The surgical operation was performed in good faith;

(b) The surgical operation was performed with reasonable care and skill;

(c) The performance of the surgical operation was reasonable having regard to the patient's state at the time and to all the circumstances of the case.

49. If s.282 had been relied upon, the Crown would have had to negative the fact the performance of the operation was reasonable having regard to the patients' states at the time and to all the circumstances of the case. Consequently, such a defence would have raised the same issues of diagnosis and unjustified surgery as did the issue of breach of duty.

50. A defence under s.23 would involve the issue whether the death[76] was an event that occurred by accident. Section 23 relevantly provides:

> Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for ...an event that occurs by accident.

51. The burden upon the Crown in negativing this defence would have been a lesser one than that which it bore in proving criminal negligence under s.288 because reasonable foreseeability does not involve any issue of "grave moral guilt". The test involves the familiar standard of reasonable foreseeability. Further, the appellant would have been limited in this defence by the terms of s.23(1A) which provides:

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[76] The "event" is the consequence of the accused's act, whether death or grievous bodily harm: *R v Taiters* (1997) 1 Qd R 333 at 335; *Kaporonovski v The Queen* (1973) 133 CLR 209 at 215 per McTiernan ACJ and Menzies J, 231 per Gibbs J; *The Queen v Van den Bemd* (1993) 179 CLR 137 at 142 per Brennan J, 152-153 per McHugh J.

> However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.

52. Mr Morris and Mr Phillips both suffered from particular weaknesses that rendered them likely to die and did cause them to die from the operation.

53. The appellant's case in this Court is that the Crown could *only* secure a conviction by basing its case upon ss.293 and 300.[77]

54. However, it is well established that in manslaughter cases the Crown can proceed by way of two alternative paths to conviction: by contending that an accused directly or indirectly caused death[78] (which would allow a defence under s.23 to be raised) and also by contending that the death was caused by a breach of duty imposed by s.285, s.286, s.288, s.289 or s.290 (in which case s.23 would be inapplicable but other defences might be engaged).[79]

55. In this case, although the Crown had submitted to the trial judge that it could contend simply that the appellant had directly or indirectly caused the death of the three patients and done grievous bodily harm to a fourth, the learned trial judge did not permit the Crown to do so. Instead, the Crown was required to proceed upon a single basis, that which was based upon s.288. As has been said, this was the outcome desired by the appellant (no doubt because of a correct tactical appreciation that the Crown's task would thereby be harder). The appellant submitted to the trial judge that "the Crown must prove its case pursuant to s.288"[80] and that the Crown had to prove that a duty of care was owed, that that duty was breached and that the breach of duty caused the death

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77 See appellant's outline paragraph 30.

78 Section 293 provides: Except as hereinafter set forth, any person who causes the death of another, *directly or indirectly, by any means whatever*, is deemed to have killed that other person.

79 *Griffiths v The Queen* (1994) 69 ALJR 77 at 79 per Brennan, Dawson and Gaudron JJ; *R v Stott and Van Embden* (2002) 2 Qd R 313 at 320-321 per McPherson JA, 323 per Atkinson J. The contrary view, suggested in *R v Hodgetts and Jackson* (1990) 1 Qd R 456 at 459.40 per Thomas J, at 480 per Ambrose J, that such prosecution *must* proceed by way of the breach of duty provisions, is inconsistent with the decision of the High Court in *Griffiths* and appears to have been based upon a misreading of *Evgeniou v The Queen*. Even in *Hodgetts and Jackson* it appears that Thomas JA acknowledged that the Crown might proceed in the alternative: see at 462.45.

80 See paragraph 15 of his written submissions made on 1 June 2010.

of another.[81]

56. The burden upon the Crown was therefore a heavier one because it had to establish negligence to a criminal degree whereas under s.23 all the Crown had to show was that an ordinary person in the position of the appellant would reasonably have foreseen the consequences; under s.282 all the Crown had to show was that the operation was not reasonable in the circumstances including the state of the patient.

57. The appellant's position was therefore advantaged by the course adopted.

58. The appellant himself also contended expressly that the defence under s.282 "has no application to an allegation of manslaughter or grievous bodily harm by criminal negligence."[82] He did not explain the legal basis for that submission (and it is respectfully submitted that as a legal proposition it was wrong). But, in the context of the present case that submission was forensically understandable because if the Crown proved criminal negligence under s.288 it would, by that very proof, have negatived any possible defence under s.282.[83]

59. The Crown case always included an allegation that, due to all the circumstances, the surgery which was undertaken[84] ought not to have been undertaken, and that to perform the operation (albeit it competently) constituted a breach of the duty imposed by s 288 of the Code. It was particularised that way[85]. It was opened to the jury by the Crown prosecutor in that way[86], and the judge left it to the jury in that way[87]. The Court of Appeal held that the s 288 duty may be breached where the act of doing the operation was a criminally negligent act, albeit that the surgery itself was competently performed[88].

60. By its notice of contention, the Crown submits that even if the Court of Appeal

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81 See paragraph 13 of his written submissions made on 1 June 2010.
82 See paragraph 7 of his written submissions made on 1 June 2010.
83 As the Court of Appeal concluded at paragraph [44]
84 Which is the subject of counts 9, 10, 11 and 12 on the indictment
85 See Court of Appeal paragraphs [113] – [120]
86 See eg as to Morris at Transcript 1-51
87 See eg as to Morris at Summing up 52-90
88 *R v Patel ex parte Attorney-General (Qld)* [2011] QCA 81 at [38] and [53]

(and the trial judge) were wrong as to the operation of s 288 of the Code, there has been no miscarriage of justice[89] because the evidence supported the appellant's guilt on the other legal basis and the jury has found those facts which support the case on those other legal bases. Futher, the Court should be convinced beyond reasonable doubt that the appellant is guilty of the offences with which he was charged[90].

61. The Crown relies upon s 668E(1A) of the Code ("the proviso"). The issue is one of determining whether there has been a "miscarriage of justice" caused by an error in the trial process.[91] A miscarriage might arise because the outcome of the trial is unjust[92]. A miscarriage might arise because the process of the trial was so inherently flawed that a fair trial has been denied[93]. The categories of "miscarriage of justice" are not closed[94]. The proviso cannot be applied to maintain a conviction unless the appellate court is satisfied of the appellant's guilt[95]. However, the court ought to consider the issues which the jury were in fact asked to consider[96]. Misdirection on the elements of an offence is not necessarily determinative against the operation of the proviso[97].

62. If, notwithstanding any error by the trial judge in formulating the legal case against the appellant, on a solid evidentiary basis the jury has found beyond reasonable doubt the factual elements necessary to establish guilt and the court is left in no reasonable doubt as to the guilt of the appellant, then in the circumstances of this case, there has been no miscarriage of justice and the appeal ought to be dismissed.

63. On the manslaughter counts, the Crown was obliged to prove that the appellant

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89 Section 668E(1A) of the *Code*
90 Definition of *"grievous bodily harm"*
91 *Weiss v The Queen* (2005) 224 CLR 300 at [9] and [31]
92 *Nudd v The Queen* (2006) 80 ALJR 614 at [3]-[6]
93 *Nudd v The Queen* (2006) 80 ALJR 614 at [6]; *Weiss v The Queen* (2006) 224 CLR 300 at [45]
94 *Nudd v The Queen* (2006) 80 ALJR 614 at [6] and *Weiss v The Queen* (2006) 224 CLR 300 at [40]
95 *Weiss v The Queen* (2006) 224 CLR 300 at [41] and [44]; and *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 at [29]
96 *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 at [28]
97 *Krakouer v The Queen* (1998) 194 CLR 202; *Darkan v The Queen* (2006) 227 CLR 373

"unlawfully killed" the patients[98]. On the grievous bodily harm count, the Crown was obliged to prove that the appellant "unlawfully did grievous bodily harm to the patient"[99]. There was no doubt that the patients the subject of each of the manslaughter counts died after the surgery in each case. There was also no doubt that the patient the subject of the grievous bodily harm count suffered grievous bodily harm[100].

64. There were therefore only two real issues at the trial:

(a) Whether the appellant caused the death, or the grievous bodily harm;

(b) Whether the killing or the grievous bodily harm was "unlawful" ie whether it was "authorised or justified or excused by law"[101].

65. There was an overwhelming body of evidence that the appellant's acts in performing the surgery in fact caused the deaths and the grievous bodily harm.

66. Section 288 excludes the operation of s 23 but, if s 288 were not available, convictions would still have followed if the deaths and the grievous bodily harm were "caused"[102] by the act of surgery unless s 23 of the Code was raised and the Crown failed to exclude its operation beyond reasonable doubt[103].

67. The first limb of s 23[104] could never have been be available. The surgical acts which caused the deaths and the grievous bodily harm were clearly willed acts.

68. The second limb of s 23[105] would be enlivened if the "event", relevantly the deaths or the grievous bodily harm, occurred by "accident" in that the deaths or the grievous bodily harm were neither a foreseen nor a foreseeable consequence

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98 *Code* s 300

99 *Code* s 320

100 *Code* s 1 definition of *"grievous bodily harm"*

101 *Code* s 291

102 *Code* s 293 provides, relevantly, that any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.

103 *Mullen v R* [1938] St R Qd 97 applying *Woolmington v DPP* [1935] ac 462 and see *Stevens v R* (2005) 227 CLR 319

104 No criminal responsibility for acts or omissions which occur independently of the exercise of the offender's will

105 An event which occurs by accident

of the acts of surgery[106].

69. Whether or not s 288 is relied upon, s 282 must be disproved. For the Crown to disprove the defence, it must disprove at least one element of s.282 beyond reasonable doubt. One element, disproof of which negatives the defence, is that the surgery was "reasonable having regard to ... all the circumstances". Here the Crown sought to prove the case under s 288 by proving that the surgery should not have been performed having regard to the known circumstances of the patients.

70. Hence, the relevant elements which the Crown had to prove are:

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Where s 288 is not relied upon	Where s 288 is relied upon
The appellant did an act (the surgery).	The appellant did an act (the surgery).
The act caused the death or grievous bodily harm.	The act caused the death or grievous bodily harm.
The death or grievous bodily harm was a foreseen or foreseeable consequence of the act[107]	The act was an act which "is or may be dangerous to human life or health"[108].
The surgery was not "reasonable having regard to the patient's state at the time and to all the circumstances of the case"[109].	The act of undertaking the surgery involved such a great falling short of the standards that had been expected and showed such serious disregard for the patient's welfare ... that the act was so thoroughly reprehensible involving such grave and moral guilt that it should be treated as a crime deserving of punishment.

76. The jury was directed that in order to convict, the breach of duty must be

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106 *Kaporonovski v The Queen* (1973) 133 CLR 209; *R v Taiters* [1997] 1 Qd R 333; *R v Falconer* (1990) 171 CLR 30 at 38; and *Ugle v The Queen* (2002) 211 CLR 171

107 To exclude s 23

108 Section 288

109 Section 282

"gross" and "reprehensible"[110]. Consequently, in determining that the appellant had breached those duties, the jury must have been satisfied:

(a) That the acts (the surgery) caused the events (the death and the grievous bodily harm); and

(b) That the acts were at least foreseeable; and

(c) That "the performance of the operation [was not] reasonable, having regard to the patient's state at the time and to all the circumstances of the case", ie, the exclusion of one element in s.282.

77. It is not fatal to the convictions that the elements of the offences (and any defences) may have been misstated to the jury. The issue is whether that misstatement caused a miscarriage of justice.

78. Here, any error in the way the case was left prejudiced the Crown and not the appellant and was the course advocated by the appellant. By having the case put on the basis of a breach of a duty imposed by s 288, the Crown undertook (and discharged) the burden of proving negligence to the criminal standard. The Crown proved that undertaking the surgery was "thoroughly reprehensible", involved 'grave moral guilt" and should be treated as a crime deserving of punishment. If s 288 did not apply, then it was only necessary was for the Crown to prove that the surgery caused the deaths and the grievous bodily harm and that the surgery was not "reasonable having regard to the patient's state at the time and to all the circumstances of the case" and that it was reasonably foreseeable.[111]

79. There was a significant body of evidence led to prove that it was a gross breach of duty to the appellant to operate on the patients. There was a significant body of evidence led to prove that the deaths and the grievous bodily harm were causally connected to the surgical operations. For example, Dr Jamieson called

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110 *Bateman* [1925] 19 Cr App R 8

111 This is not a case like *Handlen & Paddison v The Queen* (2011) 86 ALJR 14. There the trial fundamentally miscarried as the errors resulted in the failure of the trial court to properly consider what evidence was and was not admissible, and for the jury to fail to consider essential factual elements.

it "foolish"[112] and Dr Allsop said it was "very wide of the mark and unreasonable."[113] That evidence was not contradicted; the appellant called no evidence.

80. On the case as presented, the jury must have been satisfied beyond reasonable doubt that it was a gross and reprehensible act to conduct surgery in the circumstances of the individual patients and that the surgery killed Mr Morris, Mr Phillips and Mr Kemps and caused grievous bodily harm to Mr Voyles.

81. The jury must therefore also have been satisfied beyond reasonable doubt that the deaths or grievous bodily harm were at least foreseeable within the meaning of s.23 and that the surgery was not reasonable having regard to each patient's state at the time and to all the circumstances of the case within the meaning of s.282.

82. On all the evidence, the court would be satisfied that the appellant is guilty of each count beyond reasonable doubt.

83. The appellant contends that he was "deprived of an opportunity to make decisions as to how he conducted his defence under the correct provisions".[114] First, the course of the trial as one based upon the need to prove criminal negligence was a course advocated by the appellant himself. To that extent, any resulting limitation in his choice was of his own making and he was not "deprived" of it. Second, the contention seems to be that the accused may have decided to give evidence to avail himself of a defence. However, it was incumbent upon the Crown to disprove "reasonableness" under s.282 just as it was incumbent upon the Crown to prove unreasonableness under s.288. The appellant did not enter the witness box to refute unreasonableness and there is nothing to suggest that he would have entered the witness box to establish reasonableness.

84. The appellant's submissions concerning the particulars appear to involve a

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112 Transcript 36-20
113 Transcript 34-36
114 Appellant's outline paragraph 45

contention that, by reason of the alteration of particulars in the case, some evidence was admitted which ought not have been admitted.[115]

85. The Court of Appeal dealt with this argument at paragraphs [80] to [143]. At paragraph [134] the Court of Appeal concluded:

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

86. The Court of Appeal also observed, in paragraphs [141] and [142]:

> Defence counsel were content between day 10 and day 43 to proceed with the case as particularised by the prosecution. ... Defence counsel also made no application during this period for evidence to be excluded in the exercise of the judge's discretion ...
>
> The failure to press for further particulars, viewed objectively, is readily explicable as a tactical decision. It is often not in the interests of the defence to have the prosecution case stripped of unnecessary distractions and fully focused.

87. These observations echoed the rulings of the trial judge who, as the Court of Appeal found, held that the case intended to be propounded by the prosecution on the final particulars was embraced by the old particulars. He observed that the old 'particulars largely lacked legal coherence' and that in contrast 'the new are sensible enough'.[116]

88. The Court of Appeal concluded that much of the appellant's argument that the amendment to particulars rendered much admitted evidence irrelevant was based upon a false premise.[117] Pressed by the Court of Appeal, the appellant's counsel identified particular evidence which should not have been admitted[118] and the Court of Appeal then considered that evidence and concluded that only one piece of evidence had been rendered irrelevant and it would have been "unlikely to have had prominence in the jury's deliberations".[119]

89. The evidence referred to in Schedules A, B, C and D was all admissible.

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115 See paragraph 70 of the appellant's outline. Otherwise, the submissions appear to involve nothing more than repeating that there had been "unfairness" but without specifying what was unfair.

116 Court of Appeal paragraph [91]

117 Court of Appeal paragraph [121]

118 Court of Appeal paragraph [125]

119 Court of Appeal paragraphs [136] and [137]

(a) Many of the references are to the voluminous evidence given about the state of each patient between the operation and the time of death. This evidence demonstrated the progression of health from operation by way of a steady decline to ultimate death: see for example all of the evidence identified in the second bullet point on Schedule A.

(b) Other references relate to the appellant's general lack of competence, a matter which it was relevant to prove upon the issue whether his alleged breach of duty was "morally grave": see for example the evidence identified in third and fourth bullet points in Schedule A. The appellant's submission appears to assume that, in proving criminal negligence on the part of the appellant in doing an operation, evidence that he was generally an incompetent surgeon in the field of that operation is irrelevant; such a contention cannot be sustained.

(c) Other references concern evidence about the appellant's conduct after the acts of surgery which indicate consciousness on his part that he had been careless. They were admissible to prove negligence and to prove the gravity of the breach. Examples are in the first and fourth bullet points on page 3 of the Schedules, the third last bullet point on page 4 and the second and third bullet points on page 6.

(d) These matters were also relevant to the s.24 defence, both as to the existence of the appellant's belief and as to its reasonableness.

90. The appellant's submissions about the ventilator evidence involve misstatements about the evidence that was led. The evidence concerned the appellant's request to turn off a ventilator fitted to a brain-dead patient in order to free up a bed in the Intensive Care Unit. It was stressed in the opening that there was no suggestion that the turning off was morally wrong or that it was premature.[120] As the opening stressed, the evidence was relevant to the appellant's haste to conclude the surgery upon Mr Kemps when there was no reason for haste. The evidence was said to be relevant to the issue of carelessness and the gravity of

[120] Transcript 2-19 lines 55-60 and Court of Appeal [126] and [136]

the carelessness. The Court of Appeal concluded that that evidence was irrelevant.[121] It is respectfully submitted that that conclusion was wrong because, if the jury accepted that the appellant was insisting upon the prompt turning off of the ventilator in order to make it available to his own patient, in circumstances lacking urgency and when no adequate investigations had been done to justify surgery, the evidence was relevant to the issues of carelessness and its extent.

91. In any event, as the Court of Appeal held, there was no miscarriage of justice by reason of its admission. The evidence was relevant when it was admitted[122] and was admitted over objection. The objection was not renewed when the particulars changed nor was any particular direction sought about it.[123]

92. None of this evidence (except that relating to the ventilator) was objected to. None of it was the subject of any application for special directions to the jury.

93. The Court of Appeal quoted the terms of the Oregon order at [152]. It concerns a prohibition issued by the Oregon medical board prohibiting the appellant from doing surgery of the kind which was the subject of these charges without first obtaining a second opinion from approved surgeons. The trial judge ruled that it was relevant to the appellant's awareness of his own lack of competence.[124] The Court of Appeal concluded that it was relevant to the appellant's negligence.125 Having been ruled admissible, the order was admitted by consent without the need for further proof of its making or terms.

94. The objection to its admissibility was not renewed after the change in particulars nor was it explained why, if it was so prejudicial, no special direction concerning it was ever sought.

95. The appellant submits in this appeal that this evidence was "prejudicial" and so

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121 Court of Appeal [136]
122 Court of Appeal [127]
123 Court of Appeal [128]
124 Court of Appeal [154]
125 Court of Appeal [155]; it was also relevant to the issue of the reasonableness and honesty of the appellant's mistaken belief in his own diagnosis although the trial judge's directions were much more favourable to the appellant: see Court of Appeal at [158]

it was because it tended to prove the appellant's guilt. The appellant has not identified any reason why the evidence ought not have been admitted.

96. The evidence concerning the patient James Graves is set out at paragraphs [106] to [112] of the reasons of the Court of Appeal. Beyond asserting that the evidence was "irrelevant on the final issue ... whether the decision to operate was criminally negligent" and that it had a prejudicial effect,[126] the appellant has not identified any reasons why the Court of Appeal and the trial judge were wrong in their reasoning that the evidence was relevant.[127]

97. The appellant had performed an oesophagectomy upon Mr Graves in June 2003. He suffered complications from that surgery and the evidence suggested that the appellant was well outside the field of his competence in treating Mr Graves. The evidence was led to show that, by the time the appellant came to perform the same surgery upon Mr Kemps and Mr Phillips, the appellant must have known of his limited competence.[128] Upon that basis the Court of Appeal held that it had rightly been admitted.

Dated: 5 April 2012

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126 Appellant's outline paragraph 96
127 cf *Harriman v The Queen* (1989) 167 CLR 590
128 Court of Appeal [131]-[132]