IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **No. S 44 of 2013**

B E T W E E N:

GRAEME STEPHEN REEVES
Applicant
and

THE QUEEN
Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Publication

This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

20 1. Whether the reference to consent to the "nature and extent of the operation" constituted a departure from the accepted test of consent to the "nature of the operation".

2. Whether the proviso was correctly applied in the present case.

3. Whether, having found the sentence manifestly inadequate, the CCA was correct to intervene as it did.

Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

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Part IV: Statement of contested material facts

4. 1 The complainant was referred to the applicant in relation to a VIN 3 lesion on her left labia minora. The applicant excised the entire vulva including the clitoris.

4. 2 The unanimous medical evidence was that the operation was unwarranted.

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4. 3 The respondent does contest the applicant's summary of facts except the contention that the applicant told the complainant that treatment would involve "staged procedures" (AWS [13]). The applicant concedes that is an error. There was no evidence that the applicant told the complainant there would be "staged procedures".

PART V: Applicable Legislative provisions

The respondent agrees with the applicant's list of legislative provisions.

PART VI: Statement of Argument

Consent

6. 1 The applicant submits that the correct test for consent is that the patient be informed "in broad terms of the nature of the procedure to be performed" as stated in ***Rogers v Whitaker***, ***Reibl v Hughes*** and ***Chatterton v Gerson*** (AWS at [39]). Bathurst CJ is said to have erred in referring to "the nature and extent of the procedure" (CCA at [86]) because it added the word "extent" and omitted the words "in broad terms".

6. 2 Bathurst CJ reviewed the authorities and expressly held that the test was that stated in ***Rogers v Whitaker*** (1992) 175 CLR 479 at 490 (CCA at [63], [83]). As the applicant acknowledges, the test was stated correctly at [83]. The fact that it was re-stated in slightly different terms 3 paragraphs later at [86] was plainly not meant to be a departure or variation from ***Rogers v Whitaker***, ***Reibl v Hughes*** [1980] 2 SCR 880 and ***Chatterton v Gerson*** [1981] 1 QB 432 all of which were quoted with approval and adopted.

6. 3 In any event, there is no meaningful distinction between the "nature "of an operation and the "nature and extent" of an operation. It is generally not possible to separate the nature of the operation from the extent of the interference with the body proposed. The nature of the operation comprises the physical act to be undertaken and the extent of the interference with the body proposed (CCA at [82]).

6. 4 The extent of the interference proposed was the issue in the present case. The nature of the operation explained to the complainant was an excision of a small flap of skin from her labia. The operation actually performed involved complete removal of her vulva including the clitoris. It was not suggested even by the

applicant that informing the complainant "in broad terms" that there would be some excision of her labia was sufficient to inform her of the complete removal of her genitalia, on the contrary, the applicant's case was that he told her of the extent of the excision to be performed.

6. 5 The trial judge had explained consent in terms that the medical practitioner must explain the purpose of the operation, the parts of the body to be cut or removed, the possible major consequences and any options or alternative treatments reasonably available (CCA at [57]). The CCA held that this was a misdirection. The decision in this case made it clear that the notion of informed consent should not be introduced into a criminal trial and that the necessity to explain the nature of the procedure to be undertaken does not include explaining possible major consequences or the availability of alternative treatments (CCA at [85] – [88]). The decision of the CCA unequivocally endorses the test from ***Rogers v Whitaker*** for which the applicant contends.

The proviso

6. 6 The applicant submits that the proviso should not have been applied because the misdirection as to consent was a "fundamental defect" which went "to the heart of the trial" (AWS at [51]).

6. 7 Consent was not at the "heart" of the trial. It was the alternative basis of liability which came to assume greater prominence on appeal because the sentencing judge found that the Crown had not established malice. That cast the focus on consent in the appeal but it was not the major issue at the trial itself.

6. 8 The fundamental issue was whether the operation was unwarranted. That question impacted on whether the applicant knew it was unwarranted and whether he told the complainant what he proposed to do. The preponderance of the evidence went to the issue of whether the surgery was necessary. The Crown called 7 expert witnesses on that issue. The two pathologists said there was no abnormality other than VIN3 on the tissue removed, and the 5 oncologists/gynaecologists said the surgery was excessive. All that evidence was contested (Defence Closing Address T 421 - 426) and remains contested, it still being suggested that the complainant had widespread dystrophy and the operation was reasonable (AWS at [21]).

6. 9 The applicant contends that the misdirection on consent denied him a proper consideration of his defence but the major focus of the defence was that the operation was warranted and the applicant believed it was warranted. The applicant said he saw a VIN 3 lesion and "widespread abnormality",[1] "all over the vulva"[2], the "whole vulva was abnormal"[3], and in the circumstances, which included the complainant's wish to have the operation done in one go, he was correct to excise the entire vulva including the clitoris. The fact that the pathology testing found no such abnormality was dismissed as a sampling error. It was put to the jury that 3 of the 5 Crown experts acknowledged that simple vulvectomy may be appropriate where there is a mulit-focal lesion spreading over the vulva (Defence Closing Address T 426.10). This misconstrued the expert evidence but it highlighted this as the major issue in the trial, as the applicant to some extent acknowledges (AWS at [55]).

6. 10 Even on the consent issue the misdirection did not go to the core question because what was in contention was not whether the applicant had explained the consequences of the surgery or the availability of alternatives but whether he had mentioned anything even remotely indicating the complete removal of the vulva. This explained why defence counsel raised no objection to the formulation of the directions.

6. 11 There was one consultation between the applicant and the complainant on 5 July 2002. The issue of consent centred on what was said at that consultation.

6. 12 The complainant said the applicant told her that a small flap of skin would be removed. They did not discuss alternatives or major consequences at any length because she was told it was a simple procedure. On that basis she saw no need to get a second opinion in Sydney or Melbourne and wanted it done in Bega.

6. 13 The applicant said he "never" said a small flap of skin was to be excised. He saw extensive dystrophy and told the complainant that all the abnormal skin had to be removed. He drew two diagrams to show what the operation would entail. He had a "clear memory" of what he drew.[4] One diagram showed the area of

[1] Transcript of applicant's evidence at 429.33.
[2] Transcript of applicant's evidence at 444.30.
[3] Transcript of applicant's evidence at 410.25.
[4] Transcript 376.20.

incision which included the whole of the vulva and the clitoris. He said he told the complainant that everything within the dotted lines was to be removed: "*Yes, I pointed out the area of incision, and everything within those dotted lines was to be removed.*"[5] The second diagram showed what the area would look like after the removal: "*To give her some indication of what her genitals would look like after the procedure*"[6]:

> *Q. So we are clear about this, did you simply rely on the use of the words "simple vulvectomy" or was it –*
> *A. No, I explained that I was going to remove the external genitalia, the vulva and within that dotted line.*
>
> *Q. Did you ever say to [CDW] anything to this effect, "Only a small flap of skin will be excised"?*
> *A. Never."*[7]

6. 14 That was put to the complainant in cross examination:

> *Q. I put it to you that GSR never said to you that only a small flap of skin would be excised?*
> *A. A small flap of skin was to be excised."*[8]

6. 15 There was no issue that had the applicant explained the procedure as he claimed that would have been sufficient to inform her of what was proposed. The Crown's own expert said that such diagrams may have been sufficient to inform the patient of the proposed operation.[9]

6. 16 The complainant said no diagrams were shown to her: "*No, absolutely not, No.*"[10]. The only drawing she saw was the drawing on the consent form which showed the small area to be excised on her left labia minora "*Well, as per the discussion I had with GSR, it was only going to be the hatched area on the left minora.*"[11]

6. 17 The complainant said she was not told of the removal of her entire vulva and clitoris: "*God no. Absolutely 100% 1000% no.*"[12] .... "*I had no knowledge whatsoever apart from the consent form of anything that was going to be cut*

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[5] Transcript of applicant's evidence 377.10.
[6] Transcript of applicant's evidence 377.15.
[7] Transcript of applicant's evidence 379.15, 477.40.
[8] Transcript 63.13.
[9] Transcript 270.10, 271.35
[10] Transcript 24.40.
[11] Transcript 76.15
[12] Transcript 24.25.

away from me, apart from the hatched area on the consent form"[13]*..... ... ... "a small flap of skin was to be excised" ... ..."I would never ever ever walk inside that – I wouldn't consent to something like that, nobody would."*[14]

6. 18 There was no question of misunderstanding or miscommunication or lack of explanation about consequences or alternatives. The complainant was told a relatively simple excision was planned. She was not examined with a colposcope. She was not shown diagrams.

6. 19 It was suggested that the complainant may not have realised that the colposcope was used: *"[CDW] might well have been examined by a colposcope and not realised."* (Defence Closing Address T 396.40) and she may have forgotten whether Acetic acid was placed on her vulva (Defence Closing Address T397.4). The complainant said she knew how the colposcope was used and it did not occur: "*It was not used.....It was not used on me.*"[15] The unlikelihood of her not knowing she had been examined with a colposcope was confirmed by Dr Pesce who pointed out that a colposcope is a "*fairly large piece of equipment*" and it would be "*pretty obvious*" that it was being used for an internal examination.[16] The examination involves putting a diluted solution of Acetic Acid onto a swab or gauze and laying that on the vulva and keeping it there for some time to soak into the skin thereby highlighting any abnormalities.[17] Dr Pesce pointed out that Acetic acid is vinegar, so in addition to the other indicators, there is the odour of vinegar, which is "*usually fairly strong*".[18]

6. 20 The issue of whether the colposcope was used was not merely an incidental detail, it went to the fundamental question of whether the operation was warranted because if the colposcope was not used then it meant that the applicant did not see the multi-focal dystrophy he claimed. The expert evidence suggested that even if the colposcope was used such a major operation should not be undertaken without taking biopsies of the suspect tissue. The applicant

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[13] Transcript 63.10.
[14] Transcript 76.1.
[15] Transcript 51.7.
[16] Transcript 209.15.
[17] Transcript 209.45. The applicant said he conducted the examination in this way: T 371.45..
[18] Transcript 210.15.

appeared to agree that generally "staged biopsies" would be appropriate[19] however said it was not necessary in this case because he saw extensive dystrophy under the colposcope in addition to the VIN 3 lesion and the complainant indicated she was very busy and wanted the procedure done in one go.

6. 21 The applicant contends that the questions about explaining the consequences of the procedure and the directions about informed consent raised the possibility that the applicant was convicted for negligence or for failure to explain the procedure adequately (AWS at [53]) but the passages to which the applicant refers do not raise that possibility, they address two other issues.

6. 22 Firstly, they related to whether the applicant told the complainant the extent of what was proposed. For example, in relation to the impact of the surgery on sexual activity, the applicant said he told the complainant that her genitals would look different but that intercourse would still be possible. The complainant agreed he probably said that.[20] But the issue remained whether the complainant was told that a small flap of skin would be removed so that the explanation that she would look different but that intercourse would be possible raised no particular concern. There was evidence that the sexual implications of such radical surgery were more serious and complex than the brief explanation given by the applicant but the issue was not whether the full implications had been explained but whether the complainant had been told that her vulva and clitoris were to be removed at all. The fact that the serious implications of such radical surgery were not discussed was evidence that the complainant was not told the extent of the procedure proposed, as she claimed, not that liability might accrue for failure to explain.

6. 23 Secondly, the questions went to the more fundamental issue of whether the procedure was warranted because the evidence was that a patient's choice to proceed with a particular surgery is an important consideration in whether it is reasonable to proceed. Dr Pesce said that at the end of the day it was the patient's choice whether she wanted her vulva removed. Where there is a condition for which the treatment options are either a complete removal or a series of procedures a patient may prefer complete removal in one go than

[19] Transcript of applicant's evidence 441.10.
[20] Transcript 63.43.

undergoing repeated treatments and that preference would be an important consideration in determining whether it was reasonable to do a complete removal provided the patient understood what they were agreeing to:

> *Q. In 2002 wouldn't one option, one reasonable option which a gynaecologist would consider be a simple vulvectomy?*
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> *A. It could be considered ... ... To make the assumption that a patient asked for it to be treated on a single occasion implying not wanting to attend for a follow-up, things like that, so in that situation there might. I might mean that the more radical operation might be considered. But if I think the patient made that choice, indicated that preference I would say do you understand however, that that means we have to do a much larger operation which will have significantly more implications for you, and how you recover from it, sexual function and you know issues such as the morbidity of, the potential complications, surgery, blood loss, infection, other things like that. I accept that we might be considering a more extensive operation than might be the one you would consider in all other circumstances but you can really only take that decision finally by balancing up the perceived advantages of having it treated as a single operation rather than the perceived disadvantage of the more extensive surgery."*[21]

6. 24 The applicant claimed that one of the reasons he opted for complete removal was that the complainant told him she was busy and wanted it done in one go:

> *"I discussed or suggested travelling to Sydney or Melbourne and she said that was impossible, she could not – she didn't have time and she was too busy. I--"*[22] *.... ... ...*
>
> *Q. Now what did you tell her, given what she had wanted it done in one and wanting it done in Bega did you make – did you suggest an options to her?*
>
> *A. Well, allowing that she set the criteria informally for me to fulfil I didn't have any options."*[23].

6. 25 The references to explaining the consequences and the options went to the issue of whether the operation was warranted, but again, that came down to the

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[21] Transcript 221.15.
[22] Transcript of applicant's evidence 375.15.
[23] Transcript of applicant's evidence 375.40.

simple question of whether the complainant was told that only a small flap of skin was to be excised for if she was told that then the question of choosing the more radical procedure did not arise.

6. 26 The delay in complaint went to the same issue. As defence counsel put it, if the complainant had truly been told that only a small flap of skin was to be excised yet woke up in hospital finding her entire genitalia removed she "*would be screaming blue bloody murder*" (Defence Closing Address T417.10). There would have been some complaint to medical staff, to her GP or to the applicant himself yet nothing was said for 2 years (Defence Closing Address T419.5). It was said to be unbelievable that she would go back to the applicant to have the stitches removed which involved a further procedure on her genitals under general anaesthetic had she not been informed: "*Now do you think ladies and gentlemen if she really believed at that time that the accused had done this completely unauthorised operation upon her, you think she would have gone back to him.*"(T419 .25).

6. 27 There was no issue that had the applicant explained the operation as he claimed and illustrated the extent of the procedure that would have been sufficient. The complainant may have misunderstood but she was adequately informed. It was suggested at one stage of the Defence Closing that the jury might come to a conclusion that there was a genuine misunderstanding or a failure of meeting of the minds in which case the issue was whether the applicant honestly believed that the complainant consented for if he did the Crown had not proved malice (Defence Closing Address at 427.33) although that suggestion depended on the jury believing that the applicant "never" said that only a small flap of skin was to be excised and had told the complainant the extent of the proposed procedure as he claimed.

6. 28 Contrary to the applicant's submission that the CCA failed to consider whether it was <u>possible</u> that the jury convicted on the basis of informed consent or inadequate communication (AWS at [52]), Bathurst CJ recited that submission (CCA at [101]) and rejected it (CCA at [102]).

6. 29 The issue could not have been more clearly or starkly defined. The complainant said she was told that only a small flap of skin was to be excised, she was not examined with a colposcope, she was not shown diagrams. The applicant said

he never said that a small flap of skin would be excised, he used the colposcope and he gave her 2 diagrams. There was no possibility that the jury might have thought the issue was about whether the complainant had been told that her urine would puddle.

6. 30 Bathurst CJ was correct that, as presented to the jury, what was clearly in issue was whether the complainant had consented to a relatively minor procedure rather than the operation actually performed (CCA at [102]). When answering the note from the jury about informed consent the trial judge explained that the Crown had to prove that there was not informed consent "to the full extent of the operation including removal of the labia and clitoris" (SU 74.25). As Bathurst CJ noted this bought the jury's attention back to the particular issue in the trial (CCA at [103]).

6. 31 The applicant's contention that the proviso should not have been applied because the case depended on the credibility of the complainant and the applicant (AWS at [50]) overlooks the large body of evidence, especially the mostly unchallenged medical evidence, supporting the complainant's account.

6. 32 The consent form (Ex A) listed the operation to be performed as a "simple vulvectomy". "Simple vulvectomy" is a technical term denoting the removal of the vulva and clitoris, which is to be contrasted with radical vulvectomy which involves a deeper incision to the level of the basement tissue adjacent to the bone to get clearance of the cancer.[24] To that extent the form was correct. However, the form also stipulated the condition to be treated and a diagram of the affected area. The diagnosis was stated to be "VIN III". The diagram showed a small area on the left labia.

6. 33 That information was false. The applicant accepted that the VIN 3 lesion did not warrant removal of the entire vulva. This was a "rare" procedure[25] and the condition which required it was the extensive dystrophy over the whole vulva. The applicant believed the dystrophy was caused by lichen sclerosis. It was significant that the consent form contained no reference to that condition but instead a diagnosis and diagram consistent with what the complainant said she had been told.

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[24] Transcript 169.4.
[25] Transcript of applicant's evidence 400.25

6. 34 The applicant explained the omission by saying that the form was filled out "in a matter of seconds" and was meant to be a "rough idea" of what was planned, it was not a binding document. He accepted that it might have been misleading and could have been better expressed: "*This is a recommendation, this is not a plan for treatment.... ... ... So this is not a binding document in terms of what's occurring in a situation to give a rough idea of what's going on. But it's not precise and I accept that, you know, may be it could've be better filled out.*"[26]

6. 35 The letter the applicant wrote to the referring GP after the consultation (EX J) was also false in that it failed to mention the major abnormality claimed to be found. The GP, Dr Salisbury, had referred the complainant to the applicant having detected a VIN 3 lesion which was confirmed by pathology. The applicant wrote to her after the consultation and confirmed the diagnosis of VIN 3: "*Examination, as you are aware, shows quite localised VIN 3 on the left labia minor extending to the majora.*" yet that was not what he found: "*That's what is on the letter, yes. It's not what I saw.*"[27] What he found was extensive dystrophy which he believed was lichen sclerosis. He had no explanation for why he had given a false description omitting the extensive dystrophy: "*Now I agree I neglected to put down dystrophy and I don't know why I did that.*"[28] The letter also stated that it would be "*simple to adequately excise this lesion without the need for grafting*". This was misleading for the operation did not involve "excising this lesion" it was, as the applicant described it himself, "radical surgery" (Ex B) involving removal of the entire vulva. It was again significant that this reference to excising the lesion echoed what the complainant said the applicant told her.

6. 36 The applicant notes that in the second paragraph of the letter there was a reference to "extensive in situ cancer" and it is suggested that this was a reference to the widespread dystrophy but Dr Dalrymple explained that this was a reference to the VIN 3 lesion: "*No in situ cancer is VIN.*"[29] .. .. .."*In situ cancer is an old term for preinvasive disease, but I would not consider a 2 cm lesion excessive.*"[30] The applicant now refers to certain ambiguities in the letter (AWS

[26] Transcript of applicant's evidence 465.35
[27] Transcript of applicant's evidence at 431.35.
[28] Transcript of applicant's evidence at 434.45
[29] Transcript 175.32.
[30] Transcript 168.20

at [57]) but it was conceded at trial that the letter had not referred to dystrophy. The significance of the omission was not merely a matter of inference, there was expert evidence that such a condition would have been expected to be mentioned to the GP.[31]

6. 37 The operation report (Ex O) noted that a simple vulvectomy had been performed and contained a drawing showing what was excised. Under the heading "indication for operation" the applicant wrote "VIN 3 on biopsy". This was incorrect for, as the applicant acknowledged, the "quite localised" VIN 3 lesion did not warrant such a procedure. The true indication for the operation was said to be widespread dystrophy but that was again omitted. Dr Davy said that the operation report "*usually includes all relevant abnormal findings*" so it was to be assumed from the drawing on the report that there was only one area of abnormality.[32] Professor Korda agreed.[33]

6. 38 The request for a pathology examination on the excised tissue (Ex L) listed "VIN 3" under "test requested" and "clinical notes". The applicant claimed that the whole of the complainant's vulva was dystrophic[34] and he believed that she had lichen sclerosis but that was not mentioned on the pathology request form. The diagram on the form showed an area on the left labia as the area to be tested similar to that on the consent form. According to Professor Hacker the omission of the condition was not unusual on such forms, so a mere omission would not have been significant in itself, but as he pointed out, this form was "*fairly detailed*"[35], it even included a diagram and so it was significant that having specified the condition to be tested and its location the applicant had omitted the very condition requring confirmation. Dr Pesce thought it was important to mark the potential areas of abnormality on the request form particularly where some might be more subtle than others and may be missed on visual examination.[36]

6. 39 The pathology test results confirmed that the complainant did not have lichen sclerosis. The applicant conceded that but maintained that she may have had

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[31] Transcript 151.5, 210.40, 272.20
[32] Transcript 151.43.
[33] Transcript 266.10
[34] Transcript of applicant's evidence at 410.25.
[35] Transcript 262.20
[36] Transcript 207.20, 266.5.

dystrophy: "*At the time I believed--.....--it was a possibility, now it's clear that she didn't. It doesn't mean she didn't have dystrophy.*"[37] The other significance of this evidence was that it demonstrated that the applicant removed the complainant's genitalia on the basis of what was only "a possibility".

6. 40 One explanation put in closing address for the negative pathology finding was that it was possible that the complainant had lichen sclerosis when examined on 5 July 2002 but did not have it at the time of the operation one month later because such conditions come and go and it may have gone by the time of the operation (Defence Closing Address T 406.35). This hardly advanced the defence case as both Dr Dalrymple and Professor Harker said that even if there was widespread lichen sclerosis it should be treated with steroids and not by excising large amounts of skin because removal of large amounts of skin does not prevent recurrence[38] or improve your outcome.[39]

6. 41 The major explanation for why the pathology showed no abnormality was sampling error. The testing was done by selecting various sites on the specimen and the applicant said that the fact that nothing was found meant only that there was nothing on the particular sites sampled. It did not prove that the unsampled parts were normal. The applicant said the pathologist had "*randomly*"[40] sampled only "*a small portion*"[41]of the tissue and so it was very possible that the abnormality was missed. But as the applicant claimed the abnormality was "*all over the vulva*"[42], the "*whole vulva was abnormal*"[43], it must have seemed particularly fortuitous that the pathologists missed it in all 13 test sites selected.

6. 42 Dr Dalrymple said the sampling was not random: "*These samples are not random samples. They have been systematic slices taken through the area of disease on the left side and then further samples taken else where down the length of the vulva?*"[44] However, as the applicant points out, Dr Dalrymple agreed it was possible that if there was a "*half centimetre lesion*" somewhere on

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[37] Transcript of applicant's evidence at 404.30.
[38] Transcript 179.20, 253.45.
[39] Transcript 178.43.
[40] Transcript of applicant's evidence at 413.27, 428.30.
[41] Transcript of applicant's evidence at 415.22.
[42] Transcript of applicant's evidence at 444.30.
[43] Transcript of applicant's evidence at 410.25.
[44] Transcript 177.1.

the sample you could take 20 samples and still miss it.[45] That did not support the sampling error theory because the applicant did not claim there was a half centimetre lesion somewhere on the vulva, he claimed the whole vulva was dystrophic which made missing it considerably more unlikely.

6. 43 It was significant that all of the doctors interpreted the pathology tests in the same way. They considered there was nothing in the records to indicate the special circumstances[46] which would warrant this "major surgical procedure".[47]

6. 44 The applicant submits that Bathurst CJ's approach was illogical as his Honour accepted that it was possible the applicant believed the surgery was necessary yet much of the evidence referred to established that he could not have seen the multi-focal dystrophy he claimed (AWS at [54]). This was not illogical because there was a difference between believing the surgery was necessary and whether the multi-focal dystrophy was present. The sentencing judge considered there was a possibility that, however wrongly, the applicant believed that he should perform the operation "*in order to eradicate the possibility that the potential cancer could become malignant and invasive*" (ROS 14.3). The "potential cancer" appears to have been a reference to the VIN 3 lesion which was a pre cancerous condition which carried a high risk of developing into an invasive cancer if left untreated.[48] The applicant's possible belief, if he held it, was wrong because, while simple vulvectomy was once considered the appropriate treatment for VIN 3 it had not been used for that condition since about the 1990s.[49]

6. 45 The applicant also submits that Bathurst CJ omitted relevant factors in the review of the evidence such as the fact that the complainant agreed that atrophy was mentioned. The complainant said the applicant told her that atrophy was a thinning of the vulva and something that occurred with age[50]. This provided no support for the applicant's account, on the contrary, it showed that the complainant had a good recall of what she was told and was very

[45] Transcript at 178.5.
[46] Transcript 213.25.
[47] Transcript 168.45, 211.20.
[48] Transcript 260.45.
[49] Transcript 252.40, 261.45.
[50] Transcript 52.10.

unlikely to have forgotten or misunderstood had she been told there was widespread abnormality requiring total excision of her genitalia.

6. 46 Another omitted factor was said to be the doubt as to the complainant's credibility which arose from her denial that she told the applicant that she had the VIN 3 lesion for 2 years when she had told Dr Dalrymple much the same thing 3 years later (AWS [59], [63](viii)). The complainant did not tell Dr Dalrymple that she had the lesion for 2 years, she told him that she had "*irritation in the vulva*"[51]for 2 years, he merely assumed she was referring to that area: "*I had assumed that that was the area about which she was, was referring*"[52]. The complainant had ongoing problems with vulval irritation. She had it again 3 years after the operation, when Dr Dalrymple saw her, which he treated with steroid cream.[53]

6. 47 The applicant also cites the fact that 3 of the 5 experts accepted that simple vulvectomy might have been appropriate where there was multifocal disease (AWS at [21]). This is a refinement of the submission made in closing address that 3 of the 5 experts thought that the operation was reasonable.[54] In fact, the 3 named experts thought there was no multifocal disease and the operation was unwarranted.

6. 48 It is true that Professor Harker was asked to assume that if the patient had a VIN 3 lesion and lichen sclerosis and wanted the condition treated in one go it would be reasonable to perform a simple vulvectomy to which Professor Harker's response was "*if a patient had in fact lichen sclerosis it might be something to consider but there is no evidence that this patient had lichen sclerosis.*"[55] Professor Harker was clear that there was no lichen sclerosis in this case. The applicant had conceded that. He also made it clear that before excising the entire vulva a biopsy should be performed to confirm that lichen sclerosis or some other abnormality actually exists: "*That would be the appropriate thing to do, if you thought that there was a multi focal disease to get biopsies of the lesions you considered suspicious.*"[56] .. .. "*Absolutely. I*

[51] Transcript 174.25.
[52] Transcript 180.23.
[53] Transcript 174.40.
[54] Defence Closing Address T426.10.
[55] Quoted in the Defence Closing Address at T424.25.
[56] Transcript at 259.30.

mean, you would want to have tissue evidence that this was in fact lichen sclerosis. That was the reason for doing the vulvectomy and you wouldn't really do that."[57] Dr Dalrymple had given evidence to the same effect.[58] Professor Harker also emphasised that efforts would be made to preserve the clitoris.[59] And of course, the other major premise of the question was inapplicable for the complainant had not expressed the wish to have her vulva removed in one go.

6. 49 Similar assumptions were put to the second named doctor, Dr Pesce. His response was the same, namely, that there was no evidence of the "special circumstances" which would warrant this more aggressive surgery.[60] Dr Pesce also stated that it was not necessary to remove the complainant's clitoris[61], there was a less invasive approach available. He said it was important to remove all abnormal skin but "*keeping in mind that you want to remove as little tissue as possible.*"[62] Dr Pesce acknowledged that the wishes of the patient are important and would be a factor to consider but that depended on the patient being informed of the options; localised excision with follow ups or the more radical excision, and being informed of the risks and benefits of each procedure.[63]

6. 50 The third expert named, Dr Korda,[64] said that if there was widespread dystrophy local excision was the preferable treatment "*although a simple vulvectomy with preservation of the clitoris would have been appropriate if there was extensive multi-focal disease.*"[65] Again, the emphasis on preservation of the clitoris highlighted how excessive the operation had been. Dr Korda also thought the complainant did not have dystrophy.[66] He also considered that if dystrophy had been found he would have expected the applicant to have mentioned it in the letter to the GP.[67] He said if he had found dystrophy on examination with a colpscope he would have biopsied those areas[68]: "*you would not, you would*

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[57] Transcript at 263.23.
[58] Transcript 166.43.
[59] Transcript 253.15 – 254.25
[60] Transcript 213.25.
[61] Transcript 207.30.
[62] Transcript 213.20.
[63] Transcript 208.45 – 209.10.
[64] Transcript 426.35.
[65] Tranascript 271.20 quoted in defence Closing Address at 426.5.
[66] Transcript 269.1.
[67] Transcript 272.20.
[68] Transcript 268.30.

attempt not to remove the vulva or excise the vulva without histological confirmation."[69] Dr Korda thought the operation *"was too radical, I don't think it was appropriate."*[70]

6. 51 This focus on isolated answers taken out of context only underscores the unanimity of the expert evidence and the cumulative effect of that evidence. This was not a case where the opinion of one or two experts was countered or qualified by other experts. All 5 experts said the operation was excessive. That evidence was unchallenged, in fact, the experts were said to be "impressive", except perhaps Dr Davy[71], who was said to have been too scathing in her criticism.

6. 52 That also applied to the supporting evidence. The omission of the crucial diagnosis from the letter to the GP may not have been so significant in isolation. But the cumulative impact of the omission from the letter, the consent form, the operation report and the request for pathology made it very difficult to believe that if such an important condition had truly been detected it could have been so consistently omitted from all the key documents.

6. 53 The defence suggestion that the complainant had misunderstood or forgotten that her entire vulva was to be excised was hard to accept when her GP and even the hospital staff were unaware of what was to occur. The applicant said that both the anaesthetic nurse and the scrub nurse were surprised at the extent of tissue to be removed[72] (although the scrub nurse, Mr Ferrara could not recall the conversation). The applicant attributed this to their inexperience:

> *I'm a little disappointed that the nurses who were in the theatre at that time obviously didn't understand what it was. That surprised me.*
>
> *Q. But Nurse Demmery, got a shock when you were taking so much?*
> *A. She still doesn't know what it is.*
>
> *Q. Yes.*
> *A. That's her problem not mine. And I would have thought you should – if you don't know you should actually go to the trouble of finding out."*[73]

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[69] Transcript 265.43, 268.30.
[70] Transcript 269.5.
[71] Defence Closing Address T421.13
[72] Transcript at 500 – 501.
[73] Transcript of applicant's evidence at 472.35.

6. 54 The anaesthetic nurse, Nurse Demmery said she commented that the amount of tissue being removed was "*fairly radical*"[74] and the applicant replied that he was doing it to prevent the cancer spreading. Nurse Demmery said, ""*You wouldn't be taking my clitoris, no matter what." And he then said that the patient's husband was dead so it didn't matter anyway.*"[75] (CCA at [25]).

6. 55 The comment that it did not matter as the complainant's husband was dead confirmed the impression, evident from the medical evidence as a whole, that the applicant seemed out of touch with current medical practice.

6. 56 The applicant denied making the comment[76] and it was put to Nurse Demmery that he "never" said those or similar words.[77] The same had been put to the complainant. In the complainant's case, a number of reasons were suggested as to why she may have misunderstood what the applicant said, such as that she was under considerable stress over the death of her husband and problems with her business, but Nurse Demmery was an independent witness reporting a conversation in a professional context with no reason to have misunderstood.

6. 57 The crucial finding was that the operation was unwarranted. The applicant claimed he saw extensive multi focal dystrophy. Had that condition actually been present the operation may not have been unreasonable. The finding that it was unreasonable reflected the medical and other evidence that there was no multi-focal dystrophy. If there was no extensive dystrophy then the applicant did not see it as he claimed, which in turn explained why he did not tell the complainant. That was why the necessity of the operation, rather than consent, was the fundamental issue in the trial.

6. 58 There are no circumstances warranting the grant of special leave in this case. The applicable legal principles are not in issue. The accepted test from ***Rogers v Whittaker*** for which the applicant contends was adopted by the CCA and it was made clear that the concept of informed consent has no role in a criminal trial and that the directions to that effect were wrong. The application of the proviso depended on the particular evidence and the factual issues raised. Special leave should be refused.

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[74] Transcript at 91.48.
[75] Transcript at 92.5.
[76] Transcript of applicant's evidence at 552.25.
[77] Transcript 101.17.

Sentence

6. 59 In addition to the maliciously inflict GBH with intent offence the applicant was also sentenced for indecent assault and obtain money by deception offences.

6. 60 The indecent assault charge arose from a sexual assault committed on a female patient during a pap smear examination (CCA at [293]). The applicant rubbed the woman's clitoris: "*He just kept rubbing my clitoris, and he didn't stop .. .. No, it was a – like a rubbing from side to side. If anything I thought I was being masturbated.*" (CCA at [297]). This offence occurred in February 2003, 4 months after the maliciously inflict GBH with intent offence.

6. 61 The obtain money by deception offence arose from the applicant's continued practice as an obstetrician for a period of about 1½ years after being disqualified.

6. 62 The applicant was 51 – 53 at the time of these offences, 59 at sentence. He was married with 3 children. He had no prior convictions. The applicant had a very successful practice in Sydney but as a result of overwork and stress he consulted a psychiatrist in 1996 and was diagnosed with a depressive illness (CCA at [250]). The applicant has been in psychotherapy since that time and responded well to medication. He considered he was not depressed at the time of the offences (CCA at [259]). He gave evidence to the effect that he moved to Bega to "*do less work and relax more*" and it worked. He said life was less stressful in Bega and "*it was a very pleasant lifestyle.*"[78]

6. 63 The Crown accepted that the applicant's depressive condition was a matter to be taken into account (CCA at [244]) however it was submitted that it had been given undue weight. The CCA was correct to find that the evidence established that the applicant had responded well to treatment and counselling and that his mental condition played very little role during the 1½ years the offences were committed and did not warrant the significance placed upon it by the sentencing judge (CCA at [265]).

6. 64 The applicant has shown no remorse or contrition and continues to maintain that the removal of the complainant's vulva was warranted and denies the indecent assault offence.

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[78] Transcript of sentence proceedings 17/6/11 at 16.50.

6. 65 The applicant suffered some medical problems including diabetes (CCA at [120]) vascular and kidney disease. The applicant submits that the CCA failed to have regard to the evidence of his deteriorating health in re-sentencing.

6. 66 In a letter dated 3 August 2012 Dr Jacques Ette (Attachment to Affidavit of Gabrielle Drennan) addressed each of the matters raised by the applicant. Dr Ette noted that the applicant's renal condition had been long standing and linked to his diabetes. Justice Health provides Dialysis services for patients and the applicant's condition was being closely monitored. All recommendations from the treating specialists were being implemented. Nursing Unit Manager Miriam Nolan stated that special dietary requirements were accommodated and that a doctor would be consulted to address some of the applicant's dietary concerns. The evidence was that these health issues were being properly managed by Justice Health and the correction authorities and did not warrant exercise of the residual discretion.

6. 67 However, it is apparent, as the applicant points out, that this material was not referred to in re-sentencing. The evidence of the applicant's condition and its management is now 1 year out of date. Were the applicant's medical condition considered a matter requiring further attention the issue should be remitted to the CCA for current evidence as to the applicant's present status.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

Dated: 2 August 2013

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