

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Patel (No 3)* [2013] QSC 001

PARTIES: **THE QUEEN**

**v**

**JAYANT MUKUNDRAY PATEL  
(Defendant)**

FILE NO/S: Indictment No 387 of 2009

DIVISION: Trial Division

PROCEEDING: Pre-trial hearing

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 18 January 2013

DELIVERED AT: Brisbane

HEARING DATE: 16 January 2013

JUDGE: Fryberg J

- ORDERS:
- 1. Order that the following provisions of the particulars filed on 11 January 2013 be struck out:**
    - (a) paras 3a and 3b;**
    - (b) paras 4a and 4b;**
    - (c) paras 5a and 5b;**
    - (d) paras 7a and 7b;**
    - (e) para 8;**
    - (f) para 9; and**
    - (g) so much of paras 10-12 as refers to the foregoing paragraphs.**
  - 2. Further order that the Crown provide further particulars of the liver disease and the history of heart disease referred to in para 5c(iv) of the particulars. In the latter case that may be done by delivering typescripts of the relevant history, identifying their source.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS, OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – where the applicant faces a retrial on a charge of manslaughter – application for an order that a count on the indictment be permanently stayed or alternatively that the further amended particulars of that count be struck out – whether the amended particulars fail to particularise the charge

[Criminal Code 1899](#) (Qld), s 288

*Patel v The Queen* [2012] HCA 29, cited  
*R v Patel* [2012] QSC 419, cited  
*R v Patel* [2012] QSC 420, followed

COUNSEL: P E Smith and K Hillard for the applicant  
 M J Byrne SC and D Meredith for the respondent  
 SOLICITORS: Raniga Lawyers for the applicant  
 Director of Public Prosecutions (Qld) for the respondent

[1] **FRYBERG J:** The earlier history of this matter is well known.<sup>1</sup> By count 9 the accused is charged with the manslaughter of Mervyn John Morris. The Crown relies on s 288 of the *Criminal Code* and has delivered particulars accordingly. On 20 December the third set of particulars so delivered was struck out and it was ordered that the Crown file and serve proper particulars on or before 11 January 2013.<sup>2</sup> A fresh set of particulars was filed and served<sup>3</sup> and it is those particulars which form the foundation for the present application by the accused for orders that count 9 be quashed or proceedings on it be stayed.

[2] The major challenge in the argument as presented relates to particulars of causation. As to the relevant law, I venture to repeat what I wrote on the previous occasion this question was before the court:

“[29] ... That issue should be discussed in its statutory context. That context was summarised by the High Court:

‘11. Under the *Criminal Code*, a person who causes the death of another is deemed to have killed that other person (s 293). A person who unlawfully kills another in circumstances which do not constitute murder is guilty of manslaughter (s 303). A person who kills another does so unlawfully unless the killing is authorised, justified or excused by law (s 291). In the present case, for convictions on the counts of manslaughter to be returned it was necessary for the prosecution to prove that the appellant caused the death of the three patients, thereby killing them (s 293).’<sup>4</sup>

[30] When the preconditions for its operation are satisfied, s 288 does two things: it imposes specified duties on a person and it deems that person to have caused any consequences that result to anyone's life or health by reason of a breach of duty. This deemed causation satisfies the requirement of causation in s 293. Instead of an examination of causation under that section, the relevant issue (insofar as it relates to causation) is

<sup>1</sup> *Patel v The Queen* [2012] HCA 29; *R v Patel* [2012] QSC 419.

<sup>2</sup> *R v Patel (No 2)* [2012] QSC 420.

<sup>3</sup> Annexure A to these reasons the judgment.

<sup>4</sup> *Patel v The Queen* [2012] HCA 29.

whether an alleged injury to life or health is a consequence which results from a breach of duty.”<sup>5</sup>

- [3] In broad terms the accused makes three criticisms of the latest particulars: the failure to identify how each of the alleged breaches of duty is causally related to the conditions which were the immediate cause of Mr Morris's death renders the particulars largely unmanageable; the failure to specify which breaches are to be read conjunctively and which disjunctively in relation to the various alleged consequences makes the particulars unfair; and the particulars (or some of them) are so broad as to make liability “essentially unlimited”. There are also requests for further particulars in relation to a small number of matters of detail.
- [4] The second submission was founded on something said by me in my reasons for judgment in the previous application. The particulars as now framed seem to me to make it tolerably clear that the Crown intends everything to be read disjunctively. In other words, its case is that every breach separately and individually caused every consequence alleged. I would have thought, without knowing the evidence, that this was an unlikely position, but it is a matter for the Crown. There is no reason to think that the prosecutors are deliberately casting the particulars more widely than the case which they intend to run to distract or confuse the defence. The accused may be entitled to assume that the witnesses have made statements to the prosecution which warrant the wide case which the particulars express. If the witnesses do not make good that case, it may reflect on their credibility. Alternatively it may result in a mistrial.
- [5] More importantly, having regard to the orders which I intend to make in relation to the first general submission, most of the difficulties of which the accused complains will in any event disappear.
- [6] The particulars contain five threads. It is convenient to identify them separately in terms which display my understanding of these threads and to deal with the first and third general submissions separately and to the extent necessary in relation to each.

### **Fitness for the operation**

- [7] The Crown has particularised:
- (a) it was the duty of the accused under s 588, prior to conducting *any* operation on Mr Morris, to perform the procedures and investigations necessary to ascertain Mr Morris’s fitness for that operation;<sup>6</sup>
  - (b) between 1 April and 23 May 2003 the accused undertook to determine Mr Morris's fitness for a sigmoid colectomy and colostomy;<sup>7</sup>
  - (c) the accused failed to do the necessary procedures and investigations in that he did not:
    - (i) consult a physician to assess Mr Morris's cardiological condition;
    - (ii) investigate the condition of Mr Morris's liver by performing a further CT scan and then referring Mr Morris to a physician

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<sup>5</sup> *R v Patel (No 2)* [2012] QSC 420.

<sup>6</sup> Paragraph 4a.

<sup>7</sup> Paragraph 3a.

or gastroenterologist for advice on the status of liver disease, the cause of the disease and the risk of surgery;<sup>8</sup>

- (d) those omissions were criminally negligent;<sup>9</sup>
- (e) on 23 May 2003 the accused performed a sigmoid colectomy and colostomy on Mr Morris;<sup>10</sup>
- (f) on 14 June 2003 Mr Morris died; and his death was caused by cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia;<sup>11</sup>
- (g) each of those conditions was substantially caused by the sigmoid colectomy and colostomy;<sup>12</sup>
- (h) each of those conditions was a consequence of (ie caused by) the failure to do the necessary procedures and investigations;<sup>13</sup> and
- (i) the death was also a consequence of (ie caused by) the accused's failure to correctly ascertain the fitness of Mr Morris for any operation.<sup>14</sup>

Elsewhere, in the context of the thread relating to the recommendation and performance of the operation, the prosecution alleges that Mr Morris was not fit for the operation for reasons there stated<sup>15</sup>, but it has not alleged that the procedures and investigations now under discussion would have revealed this.

#### *Paragraphs 4a and 5a*

- [8] Both paragraphs are criticised by the accused on the ground that liability is alleged which is too broad and unlimited in that it relates to the carrying out of *any* operation. He submits:

“16. The new particulars mean that no matter what is alleged the Accused did or should have done, no operation should ever have been performed for any condition, even one that was hypothetically diagnosable arising from the investigations and procedures the Crown assert the Accused should have performed.”

The particulars are said to be “so broad that the liability is essentially unlimited”.

- [9] In my judgment that submission fails. The particulars are not embarrassing or lacking in precision in this respect. They make it clear that the Crown case is that Mr Morris should have undergone the procedures and investigations set out in para 5a before *any* operation (or at least any operation to remedy rectal bleeding) was conducted. I see nothing unfair in the allegation.
- [10] The accused also submitted that there was insufficient particularity concerning what were the necessary procedures. However nothing was said to demonstrate that the descriptions in paras 5a(i) and (ii) were too vague. The Crown is entitled to make the pleaded case if it wishes to do so, although why it does not simply allege that the

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<sup>8</sup> Paragraph 5a.  
<sup>9</sup> Paragraph 13.  
<sup>10</sup> Paragraph 3d.  
<sup>11</sup> Paragraph 6.  
<sup>12</sup> Paragraphs 8c and 8d.  
<sup>13</sup> Paragraph 6.  
<sup>14</sup> Paragraph 7a.  
<sup>15</sup> Paragraph 5c(iv).

procedures and investigations should have related to Mr Morris's fitness for the sigmoid colectomy and colostomy I do not understand.

- [11] Third, the accused submitted that the particulars of the breach, ie para 5a, should state what the cardiological condition and liver disease referred to were and how they related to fitness for the operation. In my judgment those were matters which may have been relevant to causation, but not to breach. The breach is adequately particularised without stating what would have been discovered if the omitted conduct had been performed.
- [12] It emerged in the course of oral submissions that the Crown case may in fact be somewhat different from what is alleged in para 5a. It was suggested that what the Crown really wanted to allege was that Mr Morris's cardiological condition was known and that a physician should have been consulted to advise on his fitness for the operation in the light of that known condition. No specific application was made in relation to this suggestion and in the light of the orders which I intend to make it is unnecessary to refer to the matter further.

### *Causation*

- [13] Finally, the accused submitted that paras 6, 7 and 8 of the particulars did not identify how the failure to carry out the necessary investigations and procedures caused the death. That submission cannot be wholly accepted. The particulars do identify the immediate causes of death: cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia. They assert that each of those immediate causes was in turn caused by the sigmoid colectomy and colostomy. What they do not particularise is a causal link between the breach (the failure to do the necessary procedures and investigations) and the performance of that operation. Particulars of the causal link might, for example, identify what would have been the outcome of the cardiological assessment and the advice regarding the liver disease and demonstrate how that assessment or advice would or ought to have led to the operations not being performed in all the circumstances (identifying them).
- [14] I find the particulars deficient in this respect.
- [15] Depending upon precisely what evidence it intends to adduce, that might have required the Crown to give further particulars of the condition and the disease which would have been ascertained and how that condition affected fitness for the sigmoid colectomy and colostomy, as the accused submits should have been done. It would have depended upon precisely how the prosecution formulated the causal link.
- [16] Another area of controversy, also dependent on that formulation, which would be opened up were the Crown to seek leave to amend the particulars to complete the causal link, would be whether the particulars as amended reflect the correct legal test for determining whether an event (in this case, Mr Morris's death) is a consequence within the meaning of s 288. That would require consideration of the scope of the risk created by an alleged breach of duty. This issue was discussed both orally and in written submissions in the previous application<sup>16</sup>, but it was unnecessary to deal with it in the reasons the judgment. It was mentioned only briefly in the course of argument on the present application. Questions of the relevance of foreseeability and cases such as *Royall v The Queen*<sup>17</sup>, *R v Sherrington*

<sup>16</sup> *R v Patel (No 2)* [2012] QSC 420.

<sup>17</sup> [\[1991\] HCA 27](#); (1991) 172 CLR 378.

and *Kuchler*<sup>18</sup>, *Nydam v The Queen*<sup>19</sup>, *R v Bateman*<sup>20</sup>, *Re Polemis*<sup>21</sup>, *The Wagon Mound (No 2)*<sup>22</sup> and *R v Hodgetts and Jackson*<sup>23</sup> might have to be considered. It is unnecessary to embark upon such matters for the purposes of formulating reasons for judgment on the present application.

- [17] There is another difficulty. The prosecution has not alleged that it was the accused's duty to ascertain Mr Morris's fitness for the operation *correctly*, nor has it alleged breach of any such duty. It has alleged only a duty to perform the necessary procedures and investigations. The breach is alleged only as a failure to do the procedures and investigations necessary to correctly ascertain Mr Morris's fitness for the operation. As I read that allegation it is an allegation that the accused failed to do all of the necessary procedures and investigations, not that he failed to turn his mind to the question of Mr Morris's fitness for the operation. The failure to do the procedures and investigations particularised<sup>24</sup> is alleged to have caused the death.<sup>25</sup> So far, so good. However under the heading "Causation" appears this further allegation:

- "7. Mr Morris' death was a consequence of the breach of duty by:  
a. Not correctly ascertaining the fitness of Mr Morris for any operation".

Apart from the confused syntax, that allegation makes sense only if the duty imposed by s 288 of the *Code* required the accused to ascertain Mr Morris's fitness correctly.

- [18] Whether the duty contained such a requirement would obviously be a matter of considerable controversy. So, potentially, would an allegation that the accused did not correctly ascertain Mr Morris's fitness. A much wider range of evidence would be admissible than would be admissible on the basis expressly particularised. In my judgment the terms of para 7a of the particulars have the potential to disrupt the trial or even to cause a mistrial. If such a duty and breach were to be alleged, they should have been expressly particularised. That has not been done.

### **Diagnostic procedures and investigations**

- [19] The second thread relates to the performance of procedures and investigations necessary to diagnose the cause and site of rectal bleeding. Apparently it is uncontested that Mr Morris was suffering from rectal bleeding. The Crown has particularised:
- (a) it was the duty of the accused under s 588, prior to conducting any operation on Mr Morris, to perform the procedures and investigations necessary to correctly diagnose the cause and site of the rectal bleeding;<sup>26</sup>

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<sup>18</sup> [\[2001\] QCA 105.](#)

<sup>19</sup> [\[1977\] VicRep 50](#); [1977] VR 430.

<sup>20</sup> (1925) 19 Cr App R 8; (1925) 41 TLR 557.

<sup>21</sup> [1921] 3 KB 560.

<sup>22</sup> [\[1966\] UKPC 1](#); (1967) 1 AC 617.

<sup>23</sup> [1990] 1 Qd R 456.

<sup>24</sup> Paragraph 5a.

<sup>25</sup> Paragraph 6.

<sup>26</sup> Paragraph 4b.

- (b) between 1 April and 23 May 2003 the accused undertook to diagnose the cause of rectal bleeding;<sup>27</sup>
- (c) the accused failed to do the necessary procedures and investigations in that he did not do *any one or all of*:
  - (i) a further barium enema;
  - (ii) a further colonoscopy;
  - (iii) a proctoscopy;
  - (iv) a rigid sigmoidoscopy;
  - (v) investigate Mr Morris's history of prostate cancer, radiation treatment and rectal bleeding contained in the medical records at the Bundaberg Base Hospital;<sup>28</sup>
- (d) those omissions were criminally negligent;<sup>29</sup>
- (e) on 23 May 2003 the accused performed a sigmoid colectomy and colostomy on Mr Morris;<sup>30</sup>
- (f) on 14 June 2003 Mr Morris died; and his death was caused by cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicæmia;<sup>31</sup>
- (g) each of those conditions was substantially caused by the sigmoid colectomy and colostomy;<sup>32</sup>
- (h) each of those conditions was a consequence of (ie caused by) the failure to do the necessary procedures and investigations;<sup>33</sup> and
- (i) the death was also a consequence of (ie caused by) the accused's failure to diagnose the cause and site of the bleeding.<sup>34</sup>

*Paragraphs 4b and 5b*

- [20] The first submission of the accused in relation to these paragraphs was the same as his submission in relation to paras 4a and 5a.<sup>35</sup> My conclusion on the submission is the same as my conclusion on that submission: it fails for the same reasons.<sup>36</sup>
- [21] Next, the accused submitted that he was entitled to particulars of when the further barium enema (and, it seems, the other investigations referred to in paras 5b(ii) to (iv) should have been done. The Crown has specified that the procedures should have been done before any operation (which includes a sigmoid colectomy and colostomy) was performed on Mr Morris. On a fair reading that means at any time before the operation. I was not referred to anything in the evidence which would make that reading embarrassing. The submission fails. So does the similar submission that the Crown should specify how and in what manner the investigations referred to in para 5b(v) should have been conducted and what particular part of the records should have been investigated.<sup>37</sup>

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<sup>27</sup> Paragraph 3b.

<sup>28</sup> Paragraph 5b.

<sup>29</sup> Paragraph 13.

<sup>30</sup> Paragraph 3d.

<sup>31</sup> Paragraph 6.

<sup>32</sup> Paragraphs 9c and 9d.

<sup>33</sup> Paragraph 6.

<sup>34</sup> Paragraph 7b.

<sup>35</sup> Paragraph [8].

<sup>36</sup> Paragraph [9].

<sup>37</sup> In any event, the Crown has agreed to prepare and deliver to the defence typescripts of those parts of the records which it alleges are specifically relevant.

### *Causation*

- [22] The accused made the same submission in relation to causation as was made in respect of the first thread. This is not a case where the Crown alleges that Mr Morris died from the absence of that part of the colon which was removed or from the effects of untreated radiation proctitis. The prosecution has particularised the performance of the operation as an essential link in the chain of causation, but has not identified how the performance of the operation was causally linked to the breaches (failing to do diagnostic procedures and investigations). One might suspect that the prosecution intends to prove that no operation, or at least no sigmoid colectomy and colostomy, should have been performed until as many of the procedures specified had been performed as were necessary to make the diagnosis. Unfortunately, that is not what is alleged. The use of the words “any one or all of”<sup>38</sup> adds to the confusion. There are no particulars of what the investigations and procedures would have disclosed or excluded, individually or collectively, nor do the particulars identify whether the Crown case is that the results of the investigations and procedures would or ought to have led the accused not to perform the operation. In short the diagnostic procedures and investigations are not causally linked to the operation.
- [23] In my judgment the defence submission is correct. The particulars are deficient.
- [24] Any application for leave to deliver further or amended particulars might also encounter the difficulties referred to above.<sup>39</sup>
- [25] A difficulty about causation not dissimilar to that referred to in relation to the first thread also arises in the present context. Again the prosecution has not alleged that it was part of the accused’s duty under s 288 to diagnose the cause and site of Mr Morris’s rectal bleeding *correctly*, nor has it in the paragraphs so far referred to alleged breach of any such duty. It has particularised only a duty to perform the necessary procedures and investigations. Breach is alleged as a failure to do the procedures and investigations necessary to correctly diagnose the cause and site of Mr Morris’s bleeding. The failure to do the procedures and investigations particularised<sup>40</sup> is alleged to have caused the death (“consequence of the breach of duty”).<sup>41</sup> This time the particulars under the heading “Causation” are consistent with that, as there is no use of the word “correctly” in para 7b of the particulars. However difficulty in this thread arises by reason of paras 5b(vi) and (vii).
- [26] The difficulty appears most clearly if those provisions are set out. They assert that the accused
- “b. Failed prior to conducting any operation to do procedures and investigations necessary to correctly diagnose the cause and site of the rectal bleeding because he failed to do any one or all of:
- ...
- Correct diagnosis**
- vi. On or about 23 May 2003 he incorrectly diagnosed diverticulitis as the source of the bleeding when the site of the bleeding was not known and there was no radiological

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<sup>38</sup> Emphasized in para [19](c) above.

<sup>39</sup> Paragraph [16].

<sup>40</sup> Paragraph 5b.

<sup>41</sup> Paragraph 6.

or other evidence to found a diagnosis that Mr Morris was bleeding from diverticula in the sigmoid colon;

- vii. He failed to diagnose or exclude radiation proctitis in Mr Morris' rectum as the cause of the bleeding".

[27] Read in isolation, sub-paras vi and vii make sense. However they do not exist in isolation. They appear under, and are governed by, the chapeau of para 5b. The function of that paragraph is to particularise a breach of duty alleged against the accused, namely failure to carry out necessary procedures and investigations. The first five sub-paragraphs list procedures and investigations allegedly not performed. They are, in other words, an enunciation of the specific failures referred to in the concluding clause of the chapeau. The conjunction introducing that clause, "because", would have better been rendered "in that", but that does not obscure the intended meaning. It is otherwise with sub-paras vi and vii. They plainly do not form part of a list of omitted investigations or procedures. The problem is to work out what function they do perform.

[28] One possible reading is that it is intended to assert that the accused failed to do the procedures and investigations necessary to diagnose the cause and site of the bleeding correctly *because* he incorrectly diagnosed diverticulitis and failed to diagnose or exclude radiation proctitis. On that reading, "because" would not mean "in that". The major difficulty with that reading is to understand why the reason for the failure to do the procedures and investigations has any place in or relevance to the particularisation of the conduct constituting breach. It would be surplusage in that context. Another difficulty is that the reading results in the allegation of little more than a truism: the accused failed to do procedures and investigations necessary to correctly diagnose because he incorrectly diagnosed diverticulitis and failed to diagnose or exclude radiation proctitis. Even that reading requires a departure from the literal meaning of the words, since it could hardly have been intended to assert that the accused ought to have incorrectly diagnosed diverticulitis and ought to have failed to diagnose radiation proctitis.

[29] In my judgment sub-paras vi and vii are embarrassing and have the potential to disrupt the trial.

### **The recommendation and performance of the operation**

[30] The third thread relates to the assertion that the accused recommended and performed the sigmoid colectomy and colostomy. Here the Crown has particularised:

- (a) it was the duty of the accused under s 588 not to recommend or perform that operation if it should not have been performed;<sup>42</sup>
- (b) between 20 May and 23 May 2003 the accused recommended to Mr Morris that the operation be performed<sup>43</sup> and on 23 May he performed it<sup>44</sup>;
- (c) the operation should not have been performed because:
  - (i) the site of the bleeding was not known and was not in the part of the sigmoid colon removed in the operation;
  - (ii) the operation was inappropriate to treat radiation proctitis;

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<sup>42</sup> Paragraph 4c.

<sup>43</sup> Paragraph 3c.

<sup>44</sup> Paragraph 3d.

- (iii) the bleeding could have been treated conservatively by the specified nonoperative procedures and therapies;
- (iv) Mr Morris's age and specified comorbidities meant he had a high risk of dying as a result of the operation and was therefore not fit for it;<sup>45</sup>
- (d) the recommendation and performance of the operation were criminally negligent;<sup>46</sup>
- (e) on 14 June 2003 Mr Morris died; and his death was caused by cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicemia;<sup>47</sup>
- (f) each of those conditions was substantially caused by the sigmoid colectomy and colostomy;<sup>48</sup>
- (g) each of those conditions was a consequence of (ie caused by) the recommendation and performance of the operation.<sup>49</sup>

*Paragraph 5c(iv)*

- [31] The accused submits that the prosecution should furnish particulars of the comorbidities identified in this subparagraph. He seeks the identity of the heart disease and the liver condition referred to, how they related to a high chance of dying and what is a high chance of dying. These matters may be dealt with shortly.
- [32] The Crown ought to identify the liver disease and the history of heart disease referred to in this subparagraph. In the unlikely event that it is unable to do so, it should state that fact and particularise the facts from which it alleges the history of heart disease and the liver disease are to be inferred.
- [33] How those matters related to Mr Morris's chance of dying is a matter for evidence and need not be particularised. The same is true of the issue of what his chance of dying was.

*Causation*

- [34] The accused submits that there remains no satisfactory causative link particularised between the fact of the operation and his alleged acts and omissions. In the context of the present thread, that can only relate to the recommendation; the performance of the operation is clearly linked to the death in the particulars.
- [35] Somewhat curiously the accused has not sought particulars of where and in what terms the recommendation was made, nor whether it was made orally, in writing or partly in both. That may be because the matter is uncontroversial and well known to him. This is, after all, a retrial. If that is not the case, those matters should be particularised.
- [36] Technically, the accused's submission that there is no causal link particularised between his conduct (the alleged recommendation) and the performance of the operation is correct. That is, however, a very technical point. One might have thought that unless there were some extraordinary circumstances, the operation

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<sup>45</sup> Paragraph 5c.

<sup>46</sup> Paragraph 13.

<sup>47</sup> Paragraph 6.

<sup>48</sup> Paragraph 10b.

<sup>49</sup> Paragraphs 6 and 7c.

would not have been performed had the alleged recommendation not been made and relied on by Mr Morris. In the absence of any specific request for particulars of causation in relation to this conduct, I shall assume that counsel did not intend the general submission to apply to it.

### **Post-operative care**

- [37] The remaining two threads concern Mr Morris's care between the time of the operation and his death. The accused's third general submission did not relate to these threads. In oral submissions his counsel abandoned reliance on the first general submission in this connection. It is therefore unnecessary to discuss these threads further.

### **Orders**

- [38] In oral submissions counsel for the accused conceded that having regard to the withdrawal of criticisms relating to the post-operative care threads, the indictment (or rather, count 9 of it) could neither be stayed nor quashed. Instead, he sought orders striking out defective particulars. Counsel for the Crown submitted that in the event that any particulars were found defective, they should not be struck out, but the Crown should be given leave to amend in accordance with the reasons for judgment.
- [39] In my judgment so much of the particulars as I have found to be deficient should be struck out. At this late stage the Crown should not have leave to amend them without first formulating the amendments. Having regard to the history of the matter (this is the fourth set of particulars admitted or found to be defective since the case was remitted to this court for retrial) I have no confidence that the Crown is in a position to reformulate them acceptably. If there are to be any further amendments, they must be formulated and made the subject of an application for leave.
- [40] I shall order that the following provisions of the particulars filed on 11 January 2013 be struck out:
- (a) paras 3a and 3b;
  - (b) paras 4a and 4b;
  - (c) paras 5a and 5b;
  - (d) paras 7a and 7b;
  - (e) para 8;
  - (f) para 9; and
  - (g) so much of paras 10-12 as refers to the foregoing paragraphs.
- [41] I shall further order that the Crown provide further particulars of the liver disease and the history of heart disease referred to in para 5c(iv) of the particulars. In the latter case that may be done by delivering typescripts of the relevant history, identifying their source.

**Annexure A**

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: BRISBANE**

**NUMBER: 387/09**

**THE QUEEN**

**- against -**

**JAYANT MUKUNDRAY PATEL**

**NEW PARTICULARS**

**MERVYN JOHN MORRIS**

**DUTY**

1. The accused undertook to administer surgical and medical treatment to Mr Morris at Bundaberg Base Hospital.
2. The accused was under a duty to use reasonable care and have reasonable skill in administering the surgical and medical treatment to Mr Morris.

**SURGICAL AND MEDICAL TREATMENT ADMINISTERED**

3. The surgical and medical treatment which was administered at Bundaberg Base Hospital by the accused was:
  - a. The determination between 1 April 2003 and 23 May 2003 of Mr Morris' fitness for the operation defined in 3c below;
  - b. The diagnosis of the cause of rectal bleeding between 1 April 2003 and 23 May 2003;
  - c. The recommendation to Mr Morris made between 20 May and 23 May 2003 that a surgical operation be performed, namely a sigmoid colectomy and colostomy ("the operation");
  - d. The act of performing the operation on 23 May 2003;
  - e. The post-operative care of Mr Morris from 23 May to 14 June 2003.

**REASONABLE CARE AND REASONABLE SKILL**

4. A person using reasonable care and having reasonable skill would:
  - a. Prior to conducting any operation, perform the procedures and investigations necessary to ascertain Mr Morris' fitness for the operation;

- b. Prior to conducting any operation, perform the procedures and investigations necessary to correctly diagnose the cause and site of the rectal bleeding;
- c. Not recommend and perform the operation if it should not be performed;
- d. Not allow the bowel to be or remain partially obstructed in the period after the operation;
- e. Ensure that Mr Morris' nutrition was sufficient to recover from the operation.

#### **BREACH OF DUTY**

- 5. The accused failed to use reasonable care and skill in administering the above surgical and medical treatment to Mr Morris because he:
  - a. Failed, prior to conducting any operation, to do procedures and investigations necessary to correctly ascertain Mr Morris' fitness for the operation. He failed to do any one or all of:
    - i. Consult a physician to assess Mr Morris' cardiological condition;
    - ii. Investigate the condition of Mr Morris' liver namely perform a further CT scan and then refer Mr Morris to either a physician or gastroenterologist to advise on the status of liver disease, the cause of the disease and the risk of surgery;
  - b. Failed prior to conducting any operation to do procedures and investigations necessary to correctly diagnose the cause and site of the rectal bleeding because he failed to do any one or all of:
    - i. A further barium enema;
    - ii. A further colonoscopy;
    - iii. A proctoscopy;
    - iv. A rigid sigmoidoscopy;

- v. Investigate Mr Morris' history of prostate cancer, radiation treatment and rectal bleeding contained in the medical records at the Bundaberg Base Hospital;

### **Correct diagnosis**

- vi. On or about 23 May 2003 he incorrectly diagnosed diverticulitis as the source of the bleeding when the site of the bleeding was not known and there was no radiological or other evidence to found a diagnosis that Mr Morris was bleeding from diverticula in the sigmoid colon;
- vii. He failed to diagnose or exclude radiation proctitis in Mr Morris' rectum as the cause of the bleeding;

### **Recommendation and performance of the operation**

- c. Recommended and performed the operation when it should not have been performed because:
  - i. The site of the bleeding was not known (and was not in the part of the sigmoid colon removed in the operation);
  - ii. The operation was not an appropriate operation to treat radiation proctitis;
  - iii. The bleeding could be treated conservatively by using embolization in the case of diverticular bleeding and by transfusion, steroid application, laser therapy or oxygen therapy in the case of radiation proctitis;
  - iv. Mr Morris' health was such that because of his age (75 years old) and co-morbidities (a history of heart disease; a liver condition; recent significant weight loss and malnutrition; hypertension) he had a high chance of dying as a result of the operation and was therefore not fit for the operation;

### **Post-operative care**

- d. Between 23 May 2003 and 14 June 2003 allowed the bowel to become and remain partially obstructed after the operation because:
  - i. He did not ensure the stoma was working correctly;

- ii. He did not relieve the partial bowel obstruction during the wound dehiscence operation on 30 May 2003 by widening the stoma hole and bringing up more bowel;
- e. Failed to ensure Mr Morris' nutrition was sufficient for him to recover from the operation because he did not order parenteral feeding shortly after the operation.

#### **CONSEQUENCE**

- 6. Mr Morris died on 14 June 2003 after the operation, bowel obstruction and reoperation, from cardio respiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia, all and each were a substantial cause of his death and all and each were a consequence of the breach of duty.

#### **CAUSATION**

- 7. Mr Morris' death was a consequence of the breach of duty by:
  - a. Not correctly ascertaining the fitness of Mr Morris for any operation;
  - b. Not diagnosing the cause and site of the bleeding and/or alternatively;
  - c. Recommending and performing the surgery that should not have been performed on Mr Morris; and/or alternatively,
  - d. Allowing the bowel to be and remain obstructed after the surgery; and/or alternatively;
  - e. Not ensuring Mr Morris' nutrition was sufficient to recover from the operation.

#### **FURTHER PARTICULARS OF CAUSATION**

- 8. As to the breach of duty by not correctly ascertaining the fitness of Mr Morris for any operation:
  - a. No reasonable surgeon would have conducted any operation upon Mr Morris as treatment for rectal bleeding without firstly determining his fitness for the operation (as alleged in paragraphs 3(a), 4(a) and 5(a)). He failed to do that;
  - b. He proceeded with the operation in breach of the duties as alleged in paragraphs 3(a), 4(a) and 5(a);

- c. The operation was a substantial cause of the cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia, from which Mr Morris died;
    - d. For the sake of clarity, it is conceded that a necessary link in the chain of causation from the breach of duty of not correctly ascertaining the fitness of Mr Morris for any operation and the death is the performance of the operation;
9. As to the breach of duty to diagnose the cause and site of the rectal bleeding:
  - a. No reasonable surgeon would have conducted any operation upon Mr Morris as treatment for rectal bleeding without firstly determining the cause and site of the bleeding (as alleged in paragraphs 3(b), 4(b) and 5(b)). He failed to do that and misdiagnosed the cause and site of the bleeding (as alleged in “*Correct Diagnosis*” in paragraph 5(b)(vi) and (vii));
  - b. He proceeded with the operation in breach of the duties as alleged in paragraphs 3(b), 4(b) and 5(b);
  - c. The operation was a substantial cause of the cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia, from which Mr Morris died;
  - d. For the sake of clarity, it is conceded that a necessary link in the chain of causation from the breach of duty of not correctly investigating and diagnosing the cause and site of the bleeding and the death is the performance of the operation;
10. As to the breach of duty by recommending and performing the surgery that should not have been performed on Mr Morris:
  - a. He recommended and performed the surgery in breach of the duties as alleged in paragraphs 3(c), 3(d), 4(c) and 5(c);
  - b. The surgery was a substantial cause of the cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia, from which Mr Morris died;

- c. For the sake of clarity, if the Crown proved any of the allegations in paragraph 5(c)(i)-(iv) and proved that the operation was a substantial cause of death, then the Crown could succeed even if it did not prove the breach of duties alleged in 3(a), 3(b), 4(a), 4(b), 5(a) and 5(b).
11. As to the breach of duty of allowing the bowel to be and remain obstructed after surgery:
  - a. He allowed the bowel to be and remain obstructed after surgery in breach of the duties as alleged in paragraphs 3(e), 4(d) and 5(d);
  - b. The bowel blockage was a substantial cause of the cardiorespiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia, from which Mr Morris died;
  - c. For the sake of clarity, if the Crown proved this breach of duty, and proved that this (or those) breaches of duty was a substantial cause of death, then the Crown would succeed even if it did not prove the breaches of duty in paragraphs 3(a), 4(a), 5(a), or 3(b), 4(b), 5(b), or 3(c), 4(c), 5(c), or 3(d), 4(c), 5(c) (note: 4(c) and 5(c) relate to both 3(c) and 3(d)).
12. As to the breach of duty of not ensuring that Mr Morris' nutrition was sufficient to recover from the operation:
  - a. He did not order parenteral feeding in breach of the duties as alleged in paragraphs 3(e), 4(e) and 5(e)
  - b. The failure was a substantial cause of malnutrition, from which Mr Morris died;
  - c. For the sake of clarity, if the Crown proved this breach of duty, and/or the duty in 3(e), 4(d) and 5(d), and proved that this (or those) breach(es) of duty was a substantial cause of death, then the Crown would succeed even if it did not prove the breaches of duty in 3(a), 4(a), 5(a) or 3(b), 4(b), 5(b) or 3(c), 4(c), 5(c) or 3(d), 4(c), 5(c) (note: 4(c) and 5(c) relate to both 3(c) and 3(d)).

**CRIMINAL NEGLIGENCE**

13. The accused's breach of duty involved such a great falling short of the standard to have been expected, and showed such serious disregard for the patient's welfare, that the conduct merits criminal punishment.