

**THE UNIVERSITY OF
NOTRE DAME AUSTRALIA
LAW REVIEW**

Volume 15

December 2013

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THE COVER: Fremantle's third courthouse situated on Marine Terrace in Fremantle's historic West End, was opened in early July 1884 and operated as a court of summary jurisdiction until 1899. It was probably among the last buildings designed by Richard Roach Jewell (1810-1891), a prominent colonial architect. The building is part of the University's School of Law and is used for advocacy training, mock trials, moots and other University purposes.

CITATION

This volume of *The University of Notre Dame Australia Law Review* ('UNDALR') may be cited as (2013) 15 *UNDALR*.

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Prospective contributors should submit their manuscripts to the Editor in electronic form by email attachment in Microsoft word. An abstract of about 100 words summarising the article should be included. Submissions should comply with the *Australian Guide to Legal Citation* (3rd ed, 2010) (which may be viewed at <http://mulr.law.unimelb.edu.au/go/aglc>). References and citations should be in the form of footnotes. It is the author's responsibility to ensure that all references and citations are correct. It is the author's responsibility to ensure that material submitted is not defamatory or litigious. Language used should be direct, concise and gender neutral. Autobiographical details of the contributor (such as name, academic/professional qualifications) should be included. This should be noted following an asterisk above the first footnote in the footnote area.

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ACKNOWLEDGMENTS

The Editorial Committee would like to thank the foundation sponsor, Mr Bruno Camarri, staff of the School of Law and referees for their support and assistance.

SUBSCRIPTION

UNDALR is available for subscription. The form printed at the back can be used. Further information regarding subscription can be obtained from its website.

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ISSN 1441-9769

Design, Layout and Printing: ApplePi Design and Print Solutions

School of Law Prayer

May Almighty God bless us and strengthen us in His service, that we may honour Him, show courtesy to all, protect the weak and serve Christ in the downtrodden and the poor.

In the name of the Father and of the Son
and of the Holy Spirit.

Amen

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NOTRE DAME AUSTRALIA
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The icon of St Thomas More was painted by Marice Sariola, a noted iconographer of Busselton, Western Australia.

It differs from the classic depiction of St Thomas by Holbein, in that it shows More as martyr, imprisoned in the Tower, unshaven and in rags. The red background of the icon reflects More's fate as martyr, while in the right-hand corner, More's fellow martyr, Cardinal John Fisher, accompanies the figure of Christ. The words, "Give me good Lord, a longing to be with Thee", are taken from a prayer written by More.

The icon was commissioned for the establishment of the School of Law, and was blessed at the opening of the School of Law by the Most Reverend Bishop Robert Healy on 2 August 1997.

FOREWORD

The fifteenth issue of the *University of Notre Dame Australia Law Review (UNDALR)* contains an interesting selection of articles.

In the first article on the constitutionality of same-sex marriage, James McLean examines the constitutional issues associated with a legislative extension of marriage nomenclature to homosexual unions. Through an application of the established principles of constitutional interpretation, the article explains why same-sex marriage lies beyond the competence of the Commonwealth Parliament, and argues that s 109 of the *Constitution* would render inoperative for inconsistency with the *Commonwealth Marriage Act* any same-sex marriage law enacted by the Parliament of a state.

In the next article on the subject of intervening causation law in a medical context, Douglas Hodgson adopts a comparative law perspective to examine the judicial approaches and tests adopted by the courts of the United Kingdom, Canada, the USA and Australia to resolve the intervening causation issues. The article suggests that the current approach of classifying the degree of negligence may be problematic in some circumstances and that an assessment of the degree of causal potency of the negligent medical treatment vis-à-vis the harm sustained may be more appropriate.

In an article which raises the question as to when a judge should stop a criminal trial, Andrew Hemming uses two recent cases, *Wood v R* and *Patel v The Queen*, as the vehicle for carrying out such analysis.

Alexis Henry-Comley's article considers the common law principle of legality and the human rights protection afforded under the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It compares the interpretive obligations placed on the courts by the principle of legality and the current Australian human rights legislation to determine whether there is any weight to the proposition that the principle of legality is a common law bill of rights in Australia.

As appears from the title of his article 'Litigating Human Rights in Western Australia: Lessons from the Past' Peter Johnston surveys cases and litigation involving civil liberties and human rights issues in Western Australia over a period of time to reflect upon what lessons may be learnt from the past.

In a case note on the High Court's recent decision in *Google v ACCC*, Rosanne Sands examines the liability of internet intermediaries for misleading and deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth).

It is with great pleasure and pride that I commend this issue of the *UNDALR* to our readership.

PROFESSOR DOUGLAS HODGSON

Editor, *The University of Notre Dame Australia Law Review*

Dean, School of Law (Fremantle)

WHEN SHOULD A JUDGE STOP A TRIAL?

ANDREW HEMMING*

Abstract

This article is focused on what should happen in a criminal trial when the trial judge has serious reservations about the strength of the prosecution's case as the evidence unfolds, or mid-trial the prosecution changes its case against the accused. Two recent cases are used as the vehicle for the analysis. In *Wood v R*, the New South Wales Court of Criminal Appeal demolished the prosecution case and attacked the Crown prosecutor for failing to put the case fairly to the jury by resorting to fiction, impermissible reasoning and innuendo. In *Patel v The Queen*, the High Court found that a miscarriage of justice had occurred because on the 43rd day of a 58 day trial, the prosecution had radically changed its case in a way that rendered irrelevant much of the evidence that had been admitted. Such appellate court criticism invites the question: when should a trial judge stop a trial?

I INTRODUCTION

The process leading to a criminal trial in higher courts is a familiar one. Essentially, if at the committal hearing a magistrate determines there is a *prima facie*¹ case to be answered, then the accused will be put on trial.² Under the standard trial process, the Crown will present the evidence against the accused seeking to prove all the elements of the offence as well as negating beyond reasonable doubt any defences raised where there is an evidential onus only on the defence.³ The

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1 The test is whether a reasonable jury properly directed could convict: *Doney v The Queen* (1990) 171 CLR 207. See for example s 66 of the *Criminal Procedure Act 1986* (NSW): 'If the Magistrate is not of the opinion that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence, the Magistrate must immediately order the accused person to be discharged in relation to the offence'.

2 Western Australia has abolished the committal hearing and replaced it with a statutory regime of disclosure: see *Criminal Procedure Act 2004* (WA).

3 A legal onus on the defence (on the balance of probabilities) applies to pleas of insanity, diminished responsibility, and, in Queensland only, to provocation (see s 304(7) *Criminal Code 1899* (Qld)). There are also some statutory reverse onus provisions such as s 29 of the *Drug Misuse and Trafficking Act 1985* (NSW) relating to a 'deemed supply' charge.

arbiter of fact⁴ will then convict or acquit. Occasionally, the Crown may present a *nolle prosequi*⁵ when the prosecution elects not to proceed with its case. The trial judge may refuse to accept a *nolle prosequi* if doing so would be unfair to the accused on the grounds of continued uncertainty as to whether there might be a further trial.⁶

However, it is an uncommon situation, given the prima facie case requirement at committal, for a trial judge to be faced with circumstances as the evidence unfolds which raise serious doubts as to whether the Crown case is sufficiently strong to continue with the trial. Such a circumstance may also involve the question of whether the prosecutor is fulfilling his or her responsibility to the court to put the case against the accused fairly.⁷

This article explores the dilemma faced by a trial judge, doubtless conscious of the cost and dislocation of stopping a trial, when the trial judge entertains grave reservations as to the strength and/or direction of the Crown case. Matters may come to a head if the defence, following receipt of revised particulars, seeks to have the jury discharged. This raises the question of the powers available to a trial judge to either invite or direct a jury to acquit the accused. Two recent cases are used as the vehicle for the analysis. In *Wood v R*,⁸ the New South Wales Court of Criminal Appeal demolished the prosecution case and attacked the Crown prosecutor for failing to put the case fairly to the jury by resorting to fiction, impermissible reasoning and innuendo. In *Patel v The Queen*,⁹ the High Court found that a miscarriage of justice had occurred because on the 43rd day of a 58 day trial, the prosecution had radically changed its case in a way that rendered irrelevant much of the evidence that had been admitted.

4 The arbiter of fact may be a jury or a judge sitting alone. For example, under s 614 of the *Criminal Code 1899* (Qld) and ss 117-120 of the *Criminal Procedure Act 2004* (WA), either the Crown or the defence may apply for a trial by judge alone.

5 *Nolle prosequi* means 'unwilling to proceed': see, for example, s 563 of the *Criminal Code 1899* (Qld).

6 See *R v Saunders* [1983] 2 Qd R 270; *R v Jell; Ex parte Attorney-General (Qld)* [1991] 1 Qd R 48; *DPP (SA) v B* (1998) 194 CLR 566, 600 (Kirby J).

7 For example, *Criminal Code 1899* (Qld), s 590AB(1) states that: "This chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth".

8 [2012] NSWCCA 21 (24 February 2012).

9 (2012) 290 ALR 189; [2012] HCA 29.

II GROUNDS FOR STOPPING A TRIAL

The leading case as to the circumstances under which a trial judge may direct a jury to return a verdict of not guilty is *Doney v The Queen*.¹⁰ In *Doney*, the High Court stated:

It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.¹¹

As to the evidence being ‘taken at its highest’, King CJ explained the appropriate test in *The Queen v Bilick and Starke*:

The question of law is whether on the evidence as it stands the defendant *could* lawfully be convicted. He *could* lawfully be convicted on that evidence only if it is capable of producing in the minds of a reasonable jury satisfaction beyond reasonable doubt.¹²

King CJ had five years previously in *R v Prasad*,¹³ addressed the question of whether a trial judge possessed the discretion to direct an acquittal if he or she considered the evidence so unsatisfactory that it would be unsafe for a jury to convict upon it:

It is within the discretion of the judge to inform the jury of this right [to bring in a verdict of not guilty], and if he decides to do so he usually tells them at the close of the case for the prosecution that they may do so then or at any later stage of the proceedings.¹⁴ He may undoubtedly, if he sees fit, advise them to stop the case and bring in a verdict of not guilty. But a verdict by direction is quite another matter. Where there is evidence which, if accepted, is capable in law of proving the charge, a direction to bring in a verdict of not guilty would be, in my view, a usurpation of the rights and the function of the jury.¹⁵

Thus, the weight of authority in Australia supports the proposition that a judge who entertains strong doubts as to the strength of the Crown’s case is permitted to advise the jury to return a verdict of not guilty, but may not direct them to do so unless the evidence taken at its highest could not sustain a guilty verdict beyond reasonable doubt.

10 (1990) 171 CLR 207.

11 *Doney v The Queen* (1990) 171 CLR 207, 214-5 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

12 (1984) 36 SASR 321, 335 (emphasis in original).

13 (1979) 23 SASR 161.

14 Citing Archbold, *Criminal Pleading and Practice* (39th ed, 1976) 332.

15 *R v Prasad* (1979) 23 SASR 161, 163.

In this context, it is significant that the law in Australia differs with the English position, as Mohr J, the dissenting judge in *R v Prasad*, observed: ‘In England, there is clear authority not only for the existence of the discretion but further that the trial Judge is, in certain circumstances under a duty to direct an acquittal’.¹⁶ Mohr J cited Roskill LJ in *R v Joan Falconer-Atlee* in support.¹⁷ Roskill LJ had pointed out that s 2 of the *Criminal Appeal Act 1968* (UK) changed the basis for allowing an appeal in a criminal case: ‘The Court was no longer to be concerned with the problem whether there was evidence on which a reasonable jury could convict but with whether the verdict was unsafe or unsatisfactory’.¹⁸ Section 2 above was amended by the *Criminal Appeal Act 1995* (UK) to allow an appeal against conviction solely on the grounds that ‘the conviction is unsafe’.

As will be discussed in Part V of this article, which deals with the need for reform of the law in this area, it may be time for Australia to follow the English approach, and statutorily overrule *Doney v The Queen*.¹⁹

III WOOD v R

A *Background to the Appeal*

Mr Gordon Wood was convicted in December 2008 of the murder of Ms Caroline Byrne whose body was found on the rocks at the Gap at Watsons Bay in Sydney on the morning of 8 June 1995.²⁰ The Gap is a notorious place for suicides and the Coroner returned an open finding in February 1998. For some years, the police were unable to establish the manner in which Ms Byrne left the cliff top and her body came to be lodged on the rocks below. The issue was complicated due to the absence of any photographs at the scene and no contemporaneous record was made of the exact spot where the body was found. This left only the memory of the police officer, Sgt Powderly, who located the body and who subsequently changed his mind in 2004 as to the location of the body.

The case against Mr Wood only gained traction with the involvement of Associate Professor Cross (‘A/Prof Cross’). A/Prof Cross developed the theory that Ms Byrne could have been ‘spear thrown’ by a strong man using the assumed four metre run up from the ‘northern ledge’, a point

16 Ibid 175.

17 (1973) 58 Cr App R 348, 357.

18 *R v Joan Falconer-Atlee* (1973) 58 Cr App R 348, 357.

19 (1990) 171 CLR 207.

20 For some of the salient facts see *Wood v R* [2012] NSWCCA 21 (24 February 2012) [1]-[21] (McClellan CJ at CL).

near the bend in the safety fence, from which Sgt Powderly believed Ms Byrne left the cliff top. Essentially, the Crown's case was that Ms Byrne could not have committed suicide because, even with a running jump, she could not have reached 'hole A' which was the revised location where Sgt Powderly believed he had found the body. However, the Crown alleged that Mr Wood, who was in a relationship with Ms Byrne, could have 'spear thrown' Ms Byrne to 'hole A' using the four metre run up without himself falling over the cliff face, notwithstanding the agreed time of death was 11.30 pm on a cold, pitch black night.

The case against Mr Wood was circumstantial. The Crown sought to adduce supporting evidence to A/Prof Cross's theory as to how the body came to be at 'hole A'. One strand of evidence went to motive. The hypothesis was that Mr Wood killed Ms Byrne in order to protect his employer, Mr Rivkin, who was at the time the subject of speculation concerning share dealings in Offset Alpine Printing. The Crown hypothesis was that Mr Wood believed Ms Byrne knew the details about the share dealings and if she disclosed them would cause Mr Wood to lose his job. Another strand of evidence was that given by a local resident, Mr Doherty, which the Crown suggested indicated that Mr Wood, in company with another man, was at the Gap with Ms Byrne during the evening when she died, contrary to Mr Wood's account of his movements.

B *The Grounds of Appeal*

There were nine grounds of appeal, all of which are listed below²¹ because the fact that the appellant succeeded on no less than five of these grounds, with criticism on an additional two other grounds, marks the depth of concern expressed by the appellate court at the manner in which the trial was conducted:

- Ground 1: The verdict is unreasonable and cannot be supported by the evidence.
- Ground 2: A miscarriage of justice was occasioned by the directions given by the learned trial judge in relation to:
 - a. The positive identification evidence of Martin and Melbourne relied on as day time sightings of the applicant and Ms Byrne at Watsons Bay; and/or
 - b. The evidence of Mr Doherty and Miss Kingston relied on by the prosecution as night time sightings of the applicant and Miss Byrne.
- Ground 3: The evidence and the opinions of A/Prof Cross caused the trial to miscarry.

21 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [48] (McClellan CJ at CL).

- Ground 4: His Honour erred in rejecting evidence showing rocks at the base of the Gap being covered in water, and movement of water over the rocks, as being irrelevant to the trial.
- Ground 5: His Honour erred in law in declining to identify for the jury and direct as to the intermediate facts requiring proof beyond reasonable doubt in accordance with *Shepherd v The Queen* (1990) 170 CLR 573.
- Ground 6: The trial miscarried by reason of the prejudice occasioned by the Crown Prosecutor.
- Ground 7: The trial judge erred both in leaving murder on the basis of joint criminal enterprise to the jury and in failing to identify properly the basis upon which any such verdict should be reached.
- Ground 8: The learned trial judge erred in allowing the Crown to present evidence and make submissions suggesting that the deceased's knowledge of details relating to the Offset Alpine fire was a motive for the offence of murder.
- Ground 9: There has been a miscarriage of justice in the trial of the applicant on account of fresh evidence and evidence undisclosed at the trial.

The New South Wales Court of Criminal Appeal ('NSWCCA') was unanimous in upholding the appeal. The leading judgment was given by McClellan CJ at CL, with whom Latham and Rothman JJ agreed. One striking feature of the appeal judgment was the number of grounds of appeal that were upheld. The NSWCCA upheld Grounds 1, 6, 7, 8, and 9.²²

Furthermore, even on some of the remaining four grounds of appeal, there was strong criticism falling short of justifying a new trial, particularly on the identification evidence. For example, on Ground 2(a), McClellan CJ at CL stated that 'the evidence of both Martin and Melbourne suffered from every problem which has previously been considered in relation to identification evidence'.²³ His Honour went on to reach '[t]he irresistible conclusion ... that the evidence of Martin and Melbourne was so compromised and their recollection so unsure that little or no weight could be given to it'.²⁴ Again, on Ground 2(b), whilst acknowledging the trial judge's direction complied with the *Domican* warning on the dangers of relying primarily upon identification evidence,²⁵ McClellan CJ at CL was not satisfied Doherty saw either Mr Wood or Ms Byrne on the evening in question as his evidence may have been contaminated by viewing the 'Witness' program.²⁶

22 See, *ibid* [388] relating to Ground 1; [659] relating to Ground 6; [672] relating to Ground 7; [705] relating to Ground 8; [809] relating to Ground 9.

23 *Ibid* [409].

24 *Ibid* [434].

25 *Domican v The Queen* (1992) 173 CLR 555, 561-562.

26 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [460] (McClellan CJ at CL).

As to Ground 4, the trial judge had accepted a Crown objection to the defence tendering evidence of a photograph which showed water covering all the rocks at the base of the cliff on the grounds it was irrelevant to the conditions when Ms Byrne died.²⁷ McClellan CJ at CL was troubled by the evidence of Dr Duflou, a defence witness, as to the potential for the ocean to move Ms Byrne's body. 'The opportunity to explore the water conditions at the time Ms Byrne was presumed to have left the cliff top was excluded by the trial judge's ruling'.²⁸ However, his Honour let the matter rest because the defence had not explored this option at trial which required 'an investigation of the tide and wave movement and an analysis of the injuries to her body'.²⁹

For present purposes, the focus will be upon Ground 1: The verdict is unreasonable and cannot be supported by the evidence. The reasons for concentrating on Ground 1 are twofold: first, McClellan CJ at CL covers a large amount of material which overlaps with other grounds,³⁰ and, secondly, his Honour gives details of an exchange between the Crown prosecutor and the trial judge (in the absence of the jury) from the transcript of the trial where the trial judge states the position of the Crown 'is utterly without logic'.³¹

From the outset of his Honour's judgment, McClellan CJ at CL evinces grave misgivings as to the strength of the Crown case. In discussing the need for a circumstantial case to be considered holistically,³² his Honour did not accept the Crown argument that the applicant (Wood) was ignoring the cumulative force of the evidence as the applicant had pointed to a number of factors consistent with his innocence. His Honour stated:

Among these were the unreliability of the identification evidence; the deceased's depression and previously attempted suicide; the ambivalence of the expert evidence with respect to whether Ms Byrne could have jumped from the cliff top or been thrown from there to where she landed; the illogicality of the prosecution's argument that the applicant had 'esoteric knowledge' of the circumstances surrounding Ms Byrne's death; and, finally, evidence which gave rise to the reasonable possibility that, if Ms Byrne was thrown to her death, the applicant was not the person responsible (either alone or jointly) for the act causing her death.³³

27 *Ibid* [541]-[543].

28 *Ibid* [552].

29 *Ibid* [554].

30 *Ibid* [49]-[388].

31 *Ibid* [289].

32 *Ibid* [53] citing *R v Hillier* (2007) 228 CLR 618 648-9 [48]-[49] (Gummow, Hayne and Crennan JJ).

33 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [55] (McClellan CJ at CL).

The critical passage from this part of the judgment is as follows: ‘this is a case where doubts about each piece of circumstantial evidence are reinforced, rather than resolved, by the rest of the prosecution’s case’.³⁴ His Honour continued in the same vein a few paragraphs later in stating, ‘the Crown has not excluded as a reasonable possibility open on all the evidence that Ms Byrne did not commit suicide’,³⁵ which the Crown accepted was an essential element of the Crown case.

In a later section of his judgment, under a heading entitled ‘The physics of the issue’, McClellan CJ at CL deals with expert and scientific evidence. His Honour considered that ‘all of this experimental analysis must be approached with considerable reservation’.³⁶ His Honour contrasted the test conditions being in daylight and without any fear for personal safety, with the circumstances of Ms Byrne’s death on a pitch black, cold night with moist surface areas and a sheer drop of 30 metres at the northern ledge.³⁷ The Crown’s version of events became virtually impossible if Ms Byrne was conscious and therefore struggling, as Professor Elliot, a Crown witness, seriously doubted whether any great velocity could be achieved at all, ‘certainly not with the velocity required to get from the ledge to hole A’.³⁸ McClellan CJ at CL then delivered the coup de grâce on this point with the following telling observation:

Because of the problem of Ms Byrne struggling if she was conscious, the prosecutor changed tack during the trial and suggested that she may have been unconscious or incapacitated. However, no effective experiments were done to ascertain whether an unconscious Ms Byrne could have been thrown the required distance.³⁹

McClellan CJ at CL then moved to consider the Crown’s ‘bottom line’ or ‘killer point, an irrefutable point’.⁴⁰ This point was the evidence which suggested that Mr Wood was able to identify Ms Byrne’s body on the rock ledge in the dark early on the morning of 8 June, some two hours after she died. The Crown submission was that the only way Mr Wood could have known the location of the body and that her feet were up was if he had been there at the time when she went over the cliff.⁴¹ The defence line was that the Crown argument led nowhere: either Mr Wood could see on both occasions or he could not see on either occasion. In his summing up, the trial judge, Barr J, made the following comment:

34 Ibid [56].

35 Ibid [63].

36 Ibid [275].

37 Ibid [275]-[276].

38 Ibid [276].

39 Ibid [277].

40 Ibid [287].

41 Ibid [283].

If he couldn't see from the top - if he couldn't see from where he was saying - well, from where he was speaking next to Peter Byrne and next to the police, he could not have seen from where he threw the deceased off The Gap, if that is what he did. And the answer may simply be that he could see; he was describing what he could see, or what he thought he could see.⁴²

The Crown prosecutor was unhappy with Barr J's observation above, and, in the absence of the jury, the following exchange took place:

CROWN PROSECUTOR: Thank you, your Honour. Your Honour, on what has been identified as the Crown's 'bottom line' point, your Honour said, 'The answer might simply be that he could see'. Your Honour, that is not only contrary to the position that the Crown has taken, but it is contrary to every version that the accused-

HIS HONOUR: Mr Crown, your position is utterly without logic.

CROWN PROSECUTOR: Your Honour, the logic-

HIS HONOUR: There must be an explanation.

CROWN PROSECUTOR: The explanation is this, your Honour: that if the accused threw the deceased head first from the top of The Gap-

HIS HONOUR: He aimed for hole A, did he, or for hole B?

CROWN PROSECUTOR: He may well have assumed she landed head first.

HIS HONOUR: Oh, come on, Mr Crown, I am not putting that. Is there anything else?

CROWN PROSECUTOR: Yes, your Honour. Your Honour said that there were lights waving around.

HIS HONOUR: Yes.

CROWN PROSECUTOR: That was certainly the case when the police were there, particularly once the helicopter and the police rescue were there. But it was not the case, of course, when he was there with Peter Byrne.

HIS HONOUR: So he couldn't see?

CROWN PROSECUTOR: Yes.

HIS HONOUR: And couldn't have known.

CROWN PROSECUTOR: That's his account as well, your Honour, on every version he gives.

HIS HONOUR: That's the problem with this, Mr Crown. With respect, it is an utterly illogical submission you have made and it deserves to be destroyed.

CROWN PROSECUTOR: Your Honour, with respect, we don't accept that.

HIS HONOUR: You don't have to, but you have got it.⁴³

42 Ibid [288] citing paragraph [939] of the original trial.

43 Ibid [289] citing paragraph [950] of the original trial.

Notwithstanding Barr J's expressed determination to 'destroy' the Crown's 'killer point', Mr Wood was convicted of Ms Byrne's murder and served three years in prison before his appeal was successful. So what is to be made of the above exchange? On one view, Barr J was effectively saying 'you have no case, Mr Crown', in which case his Honour could have summed up inviting the jury to acquit as the evidence was insufficient to put a charge of murder to the jury. On another view, Barr J was inviting defence counsel, Mr Terracini SC, to apply for a 'Prasad direction' (whereby a trial judge can invite the jury to enter a verdict of acquittal at any time following the close of the prosecution case where the Crown case is found to be lacking in weight and reliability such that it would be unsafe for a jury to convict upon it).

On a further view, given Barr J had concluded that he had 'destroyed' the Crown's 'killer point', his Honour believed his meaning would be plain to the jury, and that combined with all the other contentious evidence the jury would be bound to acquit the defendant. In this, of course, his Honour was in error, which in turn leads to the next pertinent question of how, on a very weak circumstantial case which arguably should never have passed the prima facie case to answer test at the committal stage, did the jury convict Mr Wood? The irresistible conclusion is that the jury convicted predominantly because the Crown prosecutor, Mr Mark Tedeschi QC, failed in one of his basic obligations, namely, to put the case against Mr Wood fairly to the jury. The corollary is that Barr J was ineffective in reining in Mr Tedeschi QC. Arguably, Barr J contributed to the very outcome which his Honour was apparently seeking to avoid, given the exchange (in the absence of the jury) above. A further corollary is that the accused's defence team consistently failed to object to the Crown's approach and line of questioning, thereby unnecessarily placing the onus on the trial judge.

McClellan CJ at CL makes numerous critical references to the approach taken by Mr Tedeschi QC, during the trial, and crucially upheld appeal Ground 6: The trial miscarried by reason of the prejudice occasioned by the Crown Prosecutor. What follows is a veritable litany of examples designed to demonstrate that the Crown prosecutor breached his duties on numerous occasions. The purpose of pointing to such an extensive use of impermissible reasoning and speculation is to underline the fact that the trial judge was given ample opportunity to intervene given the weakness of the Crown's case and the manner in which the trial was being conducted by the Crown, especially when it came to the fifty questions the Crown prosecutor sought to put to the jury.

The first example occurred where the Crown was seeking to establish that the relationship between Ms Byrne and Mr Wood was deteriorating, and that Mr Wood had become very aggressive and abusive towards Ms

Byrne. In support of this submission, the Crown prosecutor referred to the evidence of Ms McVeigh about an alleged incident in a gym on the Friday night before Ms Byrne died. Ms McVeigh was asked to recall the events in 2006, eleven years after Ms Byrne died. Her evidence about the date was denied by two people alleged to have been present, and there was no doubt Ms Byrne was unwell on that Friday making her presence at the gym unlikely. McClellan CJ at CL severely criticises the use made by the Crown prosecutor of Ms McVeigh's contested evidence:

Having raised this incident with the jury, the prosecutor then used it in an entirely *impermissible manner*. He told the jury that the Crown submission was that:

'This argument must have been something very serious, and it must have had something to do with the accused's employment with Rene Rivkin. That's why Gary Redding was standing next to him. I mean, would you have a rip roaring row with your spouse or partner with one of your fellow employees from your work standing next to you? Of course you wouldn't. Neither would the accused if it was something purely personal. It must have had something to do with Rene Rivkin for Gary Redding to be there'.

This submission was entirely *speculative*. If an argument did occur it could have been as a consequence of trouble in the relationship, which had nothing to do with the applicant's employment with Rivkin. Redding was a friend of the applicant's. The fact that he was present (if he was) may have had nothing to do with Rivkin. It is plain that the prosecutor introduced the prospect that the event was related to Rivkin in order to support his theory as to the applicant's motive. It was a *speculative smear*.⁴⁴

There can be no mistaking the strength of his Honour's censorship of the Crown prosecutor with the use of words such as 'impermissible manner' and 'speculative smear', with similar words being used in other passages in his Honour's judgment.⁴⁵ Indeed, McClellan CJ at CL goes even further a few paragraphs later in his judgment when dealing with the Crown suggestion that Ms Byrne was aware of the details of Mr Rivkin's share dealings in Offset Alpine Printing:

The suggestion that Rivkin was upset and that his concern was sufficient to motivate the applicant to kill Ms Byrne was *entirely without foundation*. The submission should not have been made. The exploitation of public rumour and the use of *mere innuendo* to compensate for inadequate evidence of motive is *not consistent with the obligations of a prosecutor* to press the Crown case 'to its legitimate strength' by reliance upon credible evidence.⁴⁶

⁴⁴ Ibid [294]-[295] (emphasis added).

⁴⁵ For example, *ibid* [615]: 'The prosecutor unfairly invited the jury to be suspicious of the applicant's dealings with Rivkin in a manner which was clearly intended to smear his character'. Again *ibid* [616]: 'The prosecutor also asked whether the evidence of the descriptions by Martin and Melbourne of the people whom they saw was "an amazing coincidence". This question reversed the onus of proof and was no doubt designed to bolster the evidence of these witnesses. It invited the jury to engage in impermissible reasoning with respect to identification evidence'.

⁴⁶ *Ibid* [305] (emphasis added) citing *Boucher v The Queen* (1954) 110 CCC 263 (9 December 1954) 275 (Rand J).

The castigation of the Crown prosecutor continues almost at every turn of the page of his Honour's judgment. Thus, when considering the evidence of A/Prof Cross and having noted that this evidence was challenged by Professor Pandy, an expert witness for the defence, McClellan CJ at CL launched the following judicial exocet missile at the Crown Prosecutor:

The submission that followed was *extraordinary and should never have been made*. The prosecutor submitted that Ms Byrne was thrown by the sort of throw that shot putters do:

'where they hold the ball right close to their shoulders and then go round and round and finally throw the ball from the shoulders using not just their arm's strength but their body strength, all their body strength - their upper shoulders, their body, their lower body, even their legs and feet - to propel that shot put out as far as they can. So that is the sort of action that we are talking rather than a spear. But let's call it a spear throw for the purposes of argument'.

This submission was *entirely unsupported by any evidence*. The evidence of A/Prof Cross described the throw as a spear throw with the applicant (or another person) lifting Ms Byrne above his or her head and throwing Ms Byrne like a spear. The video of the tests which A/Prof Cross conducted did not include an action of throwing anything like that which the prosecutor described. The tests which A/Prof Cross conducted had the thrower holding the woman above his head with his arms apart so as to throw the body using the force of both hands, one near the head and the other near the groin. The suggestion of a shot put action was *an invention of the prosecutor* during the course of submissions for which there was *absolutely no support in the evidence*.⁴⁷

McClellan CJ at CL does not let up in his attack on the Crown prosecutor. Mr Doherty's evidence that he may have seen Mr Wood and Ms Byrne together on the night she died was crucial to the Crown case. The difficulty for the Crown was that Mr Doherty had described the woman he saw as affected by drugs or alcohol or both, whereas the autopsy confirmed neither were present in Ms Byrne's blood:

Ultimately, all that Doherty is able to say in relation to the applicant was that after observing him on the 'Witness' program he thought that he was similar to the person he saw in the street who emerged from under an awning. He does not identify the applicant as that person.

The prosecutor sought to explain away Doherty's description of the woman he observed as being affected by drugs or alcohol by saying:

'Of course, he would, because he had seen numerous people in that area who were drunk or affected by drugs having arguments like that. That of course is likely'.

The prosecutor continued:

⁴⁷ Ibid [319]-[320] (emphasis added).

‘That doesn’t mean that that woman was actually drugged or drunk. We submit to you that Caroline Byrne at that stage had been subjected to the most concerted attempt by the accused to convince her to stay in her relationship; they were arguing and arguing and arguing and continued to argue until the time of her death. You might think that she had been so harangued in such a vociferous way by the accused that she was just totally and utterly distressed, not wanting to go, not wanting to be there, wanting to be out of the relationship, not knowing how to cleanly end it, as she told Angelo Georgiou, and that is why she was slurring her words and sobbing’.

This submission is almost *entirely without foundation*. It is a *fiction* which the prosecutor was not entitled to advance to the jury. The evidence of Doherty was clear that the person he saw was drunk or affected by drugs. There was no evidence that there had been continuous argument during the day or that the source of that argument was that Ms Byrne had on that day said she was to terminate the relationship and the applicant was attempting to convince her to stay.⁴⁸

After further references to the Crown prosecutor’s submissions on other aspects of the case as ‘mere speculation’, ‘nothing more than speculation’ and ‘nothing more than conjecture’,⁴⁹ his Honour sums up on the impermissible use of speculation and conjecture to draw an inference: ‘The drawing of an inference is not a matter of conjecture. An inference must be logically based, that is, it must bear some logical relationship to the evidence from which it proceeds’.⁵⁰

As previously mentioned,⁵¹ McClellan CJ at CL upheld the appeal on Ground 1, and ordered that a verdict of acquittal be entered. His Honour went on to deal with the other grounds of appeal.⁵² For the present purpose of developing his Honour’s attack on the Crown Prosecutor, attention will be confined to Ground 6: The trial miscarried by reason of the prejudice occasioned by the Crown Prosecutor. In particular, his Honour’s damning conclusion on the fifty questions that Mr Tedeschi QC, put to the jury in the course of his summing up of the case against Mr Wood will be highlighted.

In this regard, it should be stressed that the part of McClellan CJ at CL’s judgment which deals with prosecutorial fair play provides a counterweight to the observation of Hunter and Cronin below:

48 Ibid [332]–[335] (emphasis added).

49 Ibid [367], [371].

50 Ibid [372] citing *Holloway v Mc Feeters* (1956) 94 CLR 470; *Peacock v The King* (1911) 13 CLR 619, 661.

51 See above n 22.

52 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [388] citing *Cornwell v The Queen* (2007) 231 CLR 260, 300 [105].

Australian appeal courts subscribe to the rhetoric of prosecutorial fair play but to date [1995], they have also endorsed the adversarial ‘play hard’ tactics of prosecutors and have undercut the preconditions for full disclosure. Such admonitions are as much an encouragement to do battle as a warning against unfair play.⁵³

At the outset of the part of the judgment dealing with Ground 6, his Honour traversed the authorities covering the duties of a Crown prosecutor.⁵⁴ His Honour commenced with Hayne J’s reference in *Libke v the Queen*⁵⁵ as to whether submissions made by the Crown Prosecutor were ‘comments that suggested (whether directly or indirectly by appealing to prejudice or passion) that the jury should follow some impermissible path of reasoning’,⁵⁶ and then continued with a discussion of s 13 of the *Director of Public Prosecutions Act 1986* (NSW) which empowers the Director to furnish guidelines for prosecutions, particularly the content of those guidelines. For example, guideline 2 sets out that a prosecutor is a ‘minister of justice’, whose role is to assist the court to arrive at the truth and that ‘the purpose of a criminal prosecution is not to obtain a conviction’.⁵⁷ Further authority to similar effect is then cited, such as the Crown prosecutor acting with ‘fairness and detachment’,⁵⁸ and the impermissibility of a Crown prosecutor embarking ‘upon a course of conduct calculated to persuade the jury to a point of view by the introduction of factors of prejudice or emotion’.⁵⁹

McClellan CJ at CL, having established the relevant principles for assessing the appropriate standards for a Crown prosecutor, then applied these principles to the fifty questions Mr Tedeschi QC, put to the jury at the end of his oral address to the jury. His Honour, building on his comments under Ground 1, immediately signalled that Ground 6 would be upheld because the Crown prosecutor reversed the onus of proof:

The difficulties which the prosecutor’s conduct created are so significant that I am satisfied it caused the trial to miscarry occasioning a miscarriage of justice.

53 J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Butterworths, 1995) 207.

54 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [572]–[581].

55 (2007) 230 CLR 559, 589 [83].

56 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [575] citing *Libke v The Queen* (2007) 230 CLR 559, 589 [83] (Hayne J) (which referred to *R v DDR* (1999) 99 A Crim R 327, 340–343).

57 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [577] citing *Boucher v The Queen* (1954) 110 CCC 263, 270 (Rand J).

58 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [577] citing *Whiteborn v The Queen* (1983) 152 CLR 657, 663 (Deane J).

59 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [578] citing *Livermore v The Queen* (2006) 67 NSWLR 659, 665 [24] (which approved the dicta in *McCullough v The Queen* [1982] Tas R 43, 57).

The fundamental problem with the course taken by the prosecutor was that both generally and with respect to particular questions the prosecutor reversed the onus of proof. Asking questions, even in a rhetorical manner, and inviting the jury when considering its verdict to consider whether the applicant had provided satisfactory answers to the questions was an impermissible course for the prosecutor to follow.⁶⁰

Given the title of this article and the question it seeks to address, the following passage is highly significant, which raises the role played by both the trial judge, Barr J, and the defence counsel, Mr Winston Terracini SC:

The trial judge gave the appropriate directions to the jury in relation to the applicant remaining silent in his case. However, his Honour did not refer at all to the 50 questions. The jury were not told to ignore any of them.

As I have previously indicated, senior counsel for the applicant objected to the 50 questions being placed before the jury in a document: see *Libke* at [133] (Heydon J). However, the prosecutor proceeded to put them to the jury orally in a careful and deliberate manner. He also invited the jury to take notes and indicated that he would pause to allow them to take notes.

In his closing address, counsel for the applicant attempted to deal with the questions. However, by so doing he gave prominence to them and left the jury to ponder whether the Crown's challenge had been met. He was wrong to take this course. He should have again sought to have the questions excluded and once the prosecutor had spoken to them he should have applied for the jury to be discharged.⁶¹

The clear implication of the above passage is that (a) the defence counsel should have objected to the fifty questions being put orally by the Crown prosecutor; (b) once the Crown prosecutor had spoken to the jury about the fifty questions, the defence counsel should have applied for the jury to be discharged; and (c) the trial judge should have granted the application and discharged the jury, or, at the very least, instructed the jury to ignore the fifty questions.

The sheer number of questions and their rhetorical nature (for example, question1: How did the accused know exactly where Caroline's body was located before it was found by the police?) should have alerted the trial judge to all the authorities cited above by McClellan CJ at CL. Possibly, the trial judge was guided by the lack of objection by defence counsel to the fifty questions being put to the jury orally. However, it would seem perverse for the trial judge to instruct the jury to ignore the fifty questions having allowed them to be put in the first place. The key decision for the trial judge was whether to allow the fifty questions or their continuance once the tenor of the questions had been established.

60 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [604]-[605] citing at [606] *R v Rugari* [2001] NSWCCA 64 [35]-[36].

61 *Wood v R* [2012] NSWCCA 21 (24 February 2012) [619]-[621].

Arguably, the trial judge should not have been surprised as to the speculative and prejudicial nature of the fifty questions given the manner in which the Crown prosecutor had led the evidence, as detailed above by McClellan CJ at CL when dealing with Ground 1. This came to a head with the exchange detailed above between the Crown prosecutor and the trial judge over the logic of the Crown's case on the 'bottom line' point. Certainly, after this exchange, the trial judge should have reconsidered his decision not to instruct the jury as to how they should treat the fifty questions.

In this context, it is illuminating to examine the *Queensland Benchbook* and some extracts from the entry entitled 'General Summing Up Directions':

What is not evidence

A few things you have heard are not evidence. This summing-up is not evidence. And statements, arguments, questions and comments by the lawyers are not evidence either.

Primary facts and inferences

You may only draw reasonable inferences; and your inferences must be based on facts you find proved by the evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

In a circumstantial case, consider adding, for example: Importantly, if there is an inference reasonably open which is adverse to the defendant (ie one pointing to his guilt) and an inference in his favour (ie one consistent with innocence), you may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.⁶²

Thus, at a minimum, Barr J could have pointed out that the Crown prosecutor's fifty questions were not evidence. Furthermore, given the exchange on the 'bottom line' point, the evidence that Ms Byrne was very depressed at the time of her death, and the disputed expert evidence on the 'spear throw', it would have been open to Barr J in such a circumstantial case to invite the jury to return a verdict of 'not guilty' as the Crown had not excluded the possibility of suicide.

Whilst it should be acknowledged that '[t]he feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another',⁶³ it is apparent that the Crown prosecutor,

62 Department of Justice and Attorney-General, *Supreme and District Court Benchbook* (Queensland: The Department 2008) s 24.3- 24.4. For the equivalent summing up directions in New South Wales, see *Criminal Trial Courts Bench Book* (Judicial Commission of New South Wales, 2002) [7-000]-[7.040].

63 *R v McCullough* (1982) 6A Crim R 274, 285.

Mr Tedeschi QC, was fighting for a conviction in breach of the DPP's own guidelines. In fairness to Barr J, all trial judges are in the hands of the counsel that appear before them as regards the evidence presented. However, a trial judge is in control of his or her court, and the law has jealously guarded the right of an accused to a fair trial.⁶⁴

In light of the number of grounds of appeal upheld (five in total), as well as the strength of the criticism of the Crown prosecutor, are the courts in need of legislation as to the criteria for deciding when the Crown is not fulfilling its duties to the court? Or is the outcome in this case an aberration, able to be promptly corrected by the DPP enforcing its own guidelines? Or is it rather a case of trial judges having to be more assertive, mindful of the likelihood of a successful appeal if they are too passive? The answers to these questions may become clearer following an examination of another successful appeal based on the conduct of the Crown case.

IV PATEL v THE QUEEN

A *Background to the Appeal*

In June 2010, Mr Patel was convicted by a jury of three counts of manslaughter (of Mr Morris, Mr Phillips and Mr Kemps) and one count of unlawfully doing grievous bodily harm (to Mr Vowles).⁶⁵ At the relevant time, Mr Patel was employed as a surgeon at the Bundaberg Base Hospital, and subsequently his competence as a surgeon had been the subject of considerable media attention. The general tenor of the Crown case was that 'the appellant [Mr Patel] was generally incompetent and grossly negligent in: recommending the surgical procedures; the manner in which he carried out each of them; and the post-operative treatment which he supervised.'⁶⁶ Particulars of the prosecution case were only provided on the 6th day into the trial and only for Mr Morris. On this basis, the defence applied on the 10th day to have the jury discharged without giving a verdict under s 60 of the *Jury Act 1995* (Qld). The trial judge, Byrne SJA, refused the application but, as will be discussed later,⁶⁷ not without expressing reservations as to the breadth of the Crown case.

On the 43rd day of the trial, the prosecution provided revised particulars which narrowed the case against Mr Patel because the focus was now

64 *Dietrich v The Queen* (1992) 177 CLR 292.

65 See *Patel v The Queen* (2012) 290 ALR 189, 189-190 for summary of some salient facts.

66 *Ibid* 191 [2] (French CJ, Hayne, Kiefel and Bell JJ).

67 See below n 83.

on whether the surgical procedure in each of the four cases should have been undertaken. The following day, the defence failed in a second attempt to have the jury discharged on the grounds that a considerable body of prejudicial and now irrelevant (as against the revised particulars) evidence had previously been admitted over the preceding six weeks of what ended up as a 58-day trial. The Queensland Court of Appeal dismissed Mr Patel's appeal holding that with one exception all the previous evidence admitted before day 43 remained relevant.⁶⁸

B *The Grounds of Appeal to the High Court*

The grounds of appeal to the High Court were twofold. The first ground, that s 288 of the *Criminal Code 1899* (Qld) did not encompass the decision to operate, was dismissed and is not pertinent for present purposes. The second ground, that there was a miscarriage of justice in the conduct of the trial due to the trial judge's refusal to discharge the jury on day 44 because evidence 'that was highly prejudicial and now largely irrelevant had been admitted and it was not possible to ameliorate its effects on the jury by directions',⁶⁹ was upheld and a new trial ordered. The focus here will be upon the decisions the trial judge, Byrne SJA, made and the options open to his Honour.

The essential feature of the trial that is required to be kept in mind is the absence and then the change in the particulars of the charges against Mr Patel. In his judgment, Heydon J emphasised the fundamental requirement for the accused to be provided with particulars of the charges against him or her,⁷⁰ citing both Dixon J and Evatt J in *Johnson v Miller*.⁷¹ Heydon J drew attention to the absence of particulars prior to the trial and the lack of orders pursuant to s 573 of the *Criminal Code 1899* (Qld):

573 Particulars

The court may, in any case, if it thinks fit, direct particulars to be delivered to the accused person of any matter alleged in the indictment, and may adjourn the trial for the purpose of such delivery.⁷²

As pointed out by Heydon J at a hearing on 20 March 2010, two days before the trial commenced, the trial judge had 'expressed surprise at

68 *R v Patel; ex parte A-G (Qld)* [2011] QCA 81 (21 April 2011) (McMurdo P, Muir and Fraser JJA).

69 *Patel v The Queen* (2012) 290 ALR 189, 192 [6]. The High Court's decision was unanimous (5-0). French CJ, Hayne, Kiefel and Bell JJ gave a joint judgment, while Heydon J gave a separate judgment.

70 *Patel v The Queen* (2012) 290 ALR 189, 226-7 [167]-[169].

71 (1937) 59 CLR 467, 489 (Dixon J), 497-8 (Evatt J).

72 *Patel v The Queen* (2012) 290 ALR 189, 227 [170].

the lack of particulars',⁷³ and at the end of the first day of the trial, after releasing the jury, hoped that 'at some stage ... not too far away - the particulars ... will need to be reduced into writing'.⁷⁴ The following revealing exchange, had also taken place thereafter between the Crown prosecutor and the trial judge:

The trial judge pointed out the need for the prosecution to isolate instances where it claimed that the appellant had exhibited a lack of care which allegedly caused death. Prosecution counsel then said: 'the Crown is not inclined to leave itself in the position where the defence can say, "Well, you pick one and we'll pick the other", and that's why - and it's really a consequence of the generally substandard treatment of this patient'. The trial judge then replied: 'It can't be left to the jury on the basis that there's a litany of things that went wrong and then leave it to the jury to pick and choose which of them might matter to a case of unlawful killing'. Prosecution counsel answered: 'Well, that's a consequence not of the Crown's choosing, but of what he did'. The trial judge responded: 'We shall see'.⁷⁵

The question that has to be asked at this juncture is: why did the trial judge not adjourn the trial until the particulars had been supplied in all four cases? His Honour could rely both on s 573 above and binding High Court authority in *Johnson v Miller*.⁷⁶ Furthermore, Byrne SJA had already foreseen the 'troubles which would later plague the trial'.⁷⁷ The question of why there was no adjournment is thrown into starker relief when before the start of the 6th day of the trial, particulars in relation to Mr Morris were finally provided to the defence. Byrne SJA was critical of the particulars:

The trial judge said that judging by the particulars, the trial 'is about to become considerably more difficult'. His Honour said that if the particulars for the other patients were going to be like those for Mr Morris, the trial would become 'unmanageable'.⁷⁸

There is a further reason why Byrne SJA, having perceptively identified the potential for the trial to become 'unmanageable', should have intervened under s 573. As Heydon J pointed out there were inherent problems with the trial that related to (a) the complexity of the technical and scientific evidence; (b) the charges concerned four different patients which raised cross-admissible similar fact evidence; (c) the charges were serious; and (d) the adverse publicity.⁷⁹ Heydon J drew the inference on the latter point that in light of the pre-trial publicity 'there was great

73 Ibid.

74 Ibid 227 [172] (Heydon J).

75 Ibid.

76 (1937) 59 CLR 467, 489 (Dixon J), 497 - 498 (Evatt J).

77 *Patel v The Queen* (2012) 290 ALR 189, 228 [173] (Heydon J).

78 Ibid 229 [176].

79 Ibid 224-6 [162]-[166].

pressure on the prosecution to put the case against the appellant on the widest possible basis'.⁸⁰

At the start of the 9th day Byrne SJA had correctly foreseen that the case against Mr Patel would be pared down to the decisions to operate, whilst also acknowledging defence counsel's complaint on the mud being thrown in the course of the evidence:

I grant you that it is hard for you in a case where, as you put it a little figuratively, every piece of mud that can be thrown is. And you may be right. My optimism that it will be pared back by the time it goes to the jury to a digestible case capable of rational assessment may prove to be unduly optimistic. You might still be confronted [with] a welter of additional or alternative allegations.⁸¹

Nevertheless, when at the start of the 10th day of the trial, defence counsel applied for a discharge of the jury, Byrne SJA refused the application, as Heydon J pointed out:

The application metamorphosed into an application for an adjournment. The purpose of that adjournment would have been to 'put in place a tightly controlled court managed schedule' in relation to final particulars. In argument, the trial judge opposed the complaint about particulars. His opposition flowed from the lateness with which the matter had been agitated.⁸²

Thus, the stage was set for what eventually transpired: namely, that the prosecution would change tack when it realised it would have to concentrate on Mr Patel's decisions to operate rather than on his performance of the operations and his post-operative care. As previously mentioned,⁸³ the Crown on the 43rd day of the trial provided revised particulars which narrowed the case against Mr Patel. But, by then, the die had already been cast. The time to adjourn and save the case was on the first application on the 10th day, not on the second application to discharge the jury on the 44th day of the trial, by which time all the prejudicial and now irrelevant evidence had already been admitted. The unfortunate irony is that the second application was bound to fail as the trial judge had effectively closed off that option on the 10th day, while the appeal was bound to succeed as the prejudice to Mr Patel was overwhelming.

The most perplexing aspect of the trial is, arguably, the strange combination of perspicacity and inactivity on the part of the trial judge. In the course of an outstanding judgment, Heydon J, an expert in the law

80 Ibid 226 [166].

81 Ibid 229 [178].

82 Ibid 230 [180].

83 See Part IV A.

of evidence, draws out Byrne SJA's repeated misgivings at the manner in which the Crown was developing its case in the following passage of his judgment:

On the twentieth day, Thursday 22 April 2010, the trial judge declared that he was 'completely befuddled' by the prosecution case. On the twenty-first day, the trial judge challenged the prosecution to produce authorities that supported the proposition that 'you can bolster a case to characterise an act or omission as gross by reference to some other act or omission not shown to have any ... causal connection with the death'. His Honour foreshadowed the possibility that 'we may ... be confronting, 10 weeks down the track, an application to discharge without verdict because the jury will have heard so much that can't ultimately be left to them ... I remain very troubled by the idea that you can prove a case against this surgeon by finding every little criticism that can be mustered and saying, 'Things could have been done differently'.⁸⁴

Yet, despite these very significant and ongoing misgivings, Byrne SJA was content to adopt a 'wait and see' approach. Thus, after the particulars for Mr Vowles were finally handed up on the 38th day, the trial judge said: 'I'm, frankly, struggling to see how we will move past the particulars to a digestible case. Anyhow, we shall see how these things develop'.⁸⁵

It was therefore with a degree of inevitability that the trial finally reached its crucial point on the 43rd day, when the Crown narrowed its case and the following day the defence made its second application to discharge the jury. After all that had gone before, Byrne SJA's reasons for refusing the application are curious as Heydon J points out:

The primary ground of the application was that much of the evidence admitted at the trial was not admissible on the case the revised particulars propounded. The trial judge accepted a submission by the prosecution that evidence of bad surgery performed by the appellant was relevant to whether he knew he was a bad surgeon. This, in turn, went to proving that he was morally culpable in advising that he should perform surgery. The trial judge accepted defence counsel's argument that the evidence could be unfairly prejudicial. But his Honour pointed out that the defence had not objected to most of it.⁸⁶

Plainly, the trial judge was relying on his directions to the jury overcoming all the prejudicial evidence previously admitted against broader particulars, and in defending his decision to continue the trial on the basis that defence counsel had previously failed to object. Heydon J convincingly rejects such reasoning:

The trial judge had repeatedly said that the original particulars were incoherent, had permitted the deployment of every possible complaint about the appellant and had led to mud slinging. But he declined either to discharge the jury or to

84 *Patel v The Queen* (2012) 290 ALR 189, 230 [181].

85 *Ibid* 231 [185].

86 *Ibid* 232 [190].

grant an adjournment for the particulars to be regularised. ... Once the discharge application on the forty-fourth day failed, there was no point in defence counsel trying to have the objectionable evidence rejected at that late hour. It had had its impact - the 39 days of mud throwing to which the trial judge had often referred. That impact was inexpungible. Defence counsel's failures to object therefore lack determinative significance.⁸⁷

C Two Pertinent Questions

The purpose of marshalling the above extracts from Heydon J's judgment is not to review the unanimous decision of the High Court to uphold the appeal, but to focus on the decisions and options open to the trial judge in light of the purpose of this study. In this context, Heydon J posed two pertinent questions at the conclusion of his judgment:

One is: to what extent can and should judges in a criminal trial by jury intervene of their own motion to reject evidence to which a party fails to object? The other question is: when should judges in a criminal trial by jury compel the prosecution to provide particulars even though the defence has not pressed for them?⁸⁸

In setting out his first question, Heydon J referred to four authorities, which will now be considered in turn.⁸⁹

In *Seltsam Pty Ltd v McGuinness*, Spigelman CJ referred to the *Evidence Act 1995* (NSW) and the general proposition that 'not admissible' which has been interpreted as meaning 'not admissible over objection' might have to be revisited in special circumstances:

In the ordinary course, the words 'not admissible' in the *Evidence Act 1995* (NSW) means 'not admissible over objection' ... If this appeal were being conducted under the new s 32 of the *Dust Diseases Tribunal Act 1989* (NSW) and the court were concerned to identify 'a question as to the admission of evidence', it may have been necessary to consider whether the special circumstances of this trial were such as indicate that the delays involved in objecting to evidence were so inappropriate as to require a qualification of the general proposition I have advanced.⁹⁰

In *Dhanboa v The Queen*,⁹¹ Gleeson CJ and Hayne J discussed the extent to which s 116 of the *Evidence Act 1995* (NSW) contained a 'mandatory' requirement that a judge was always required to inform the jury of a special need for caution before accepting identification evidence, even where the reliability of the evidence was not disputed. Gleeson CJ and

87 Ibid 246 [243].

88 Ibid 251 [262].

89 The four authorities are *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, 287 [149]; *Dhanboa v The Queen* (2003) 217 CLR 1, 8-9 [18]-[22]; *R v Kaddour* (2005) 156 A Crim R 11 [62]; and *Gonzales v The Queen* (2007) 178 A Crim R 232, 243-4 [24]-[26].

90 (2000) 49 NSWLR 262, 287 [149].

91 (2003) 217 CLR 1.

Hayne J noted that there may be a number of reasons why counsel for an accused might not object, but ‘it is only in the most technical sense that there is any question of “accepting” the evidence’.⁹² Consequently, s 116 is to be read in the adversarial context in which the section operates, and therefore ‘the provision means that the information referred to is to be given where the reliability of the identification evidence is disputed’.⁹³

In *R v Kaddour*,⁹⁴ Hulme, Barr and Buddin JJ expressed a similar view to Spigelman CJ in *Seltsam* that the words ‘is not admissible’ should be construed as meaning ‘is not admissible over objection’, in stating that the appellant, Kaddour, was confronted by a fundamental difficulty from the failure to object to the reception of the evidence at trial.⁹⁵ This line of authority was also followed by Giles JA in *Gonzales v The Queen* in stating ‘the ground of appeal fails *in limine* because, in the absence of objection, the statement was not inadmissible and was not wrongly admitted’.⁹⁶

On the first question above, the weight of authority supports the general proposition that it is better for the trial judge not to intervene as this would interfere with the well accepted practice of allowing counsel to conduct the trial as they consider appropriate. Only Spigelman CJ in *Seltsam* appears to entertain a qualification to the general rule under special circumstances. Heydon J underlines the point that ‘a complaint on appeal that evidence not objected to at trial is inadmissible is ordinarily one that is very hard to make good’,⁹⁷ but his Honour goes on to state that the circumstances of Mr Patel’s trial were not ordinary.

A trial judge is used to having to make decisions, particularly in the *voir dire*, as to whether or not to exercise judicial discretion in admitting evidence over objection. An experienced trial judge would also be aware that a failure to object may be a tactical one such as out of fear of antagonising the jury or prompting the jury into thinking the defence has something to hide. The trial judge has an overarching duty to conduct a fair trial, and it is surely not a step too far for a judge to intervene to reject evidence without the precondition of an objection where the interests of justice require it. For example, the fifty questions the Crown prosecutor put to the jury in *Wood*, or allowing all the ‘mud slinging’ in *Patel* before the particulars had been narrowed down.

92 *Ibid* 8 - 9 [21].

93 *Ibid* 9 [22].

94 (2005) 156 A Crim R 11.

95 *Ibid* 26 [62].

96 (2007) 178 A Crim R 232, 243-4 [24]-[26].

97 *Patel v The Queen* (2012) 290 ALR 189, 245 [241].

There is authority on s 137 of the *Evidence Act 1995* (NSW), which deals with the exclusion of prejudicial evidence in criminal proceedings, that '[t]he fact that no application was made on behalf of the appellant under s 137 did not remove that obligation [the balancing act between probative value and unfair prejudice] on the part of the Court'.⁹⁸ As Beazley JA stated in *Steve v R*, s 137 'is mandatory in its terms and is not dependent upon objection being taken to the admission of the evidence'.⁹⁹ His Honour cited Heydon JA in *R v Le*¹⁰⁰ as authority:

[T]he terms of [s 137] are mandatory. They must be complied with whether or not a party who might gain from their invocation actually invokes them. It is notable that Part 3.11 (in which s 137 appears) ... [is] not listed as among the provisions which the court may, with the parties' consent, dispense with: s 190 [waiver of rules of evidence].¹⁰¹

This leads into the second question: when in a criminal trial should a judge compel the Crown to provide particulars in the absence of the defence pressing for them? Consistent with the authority of *Johnson v Miller*,¹⁰² the answer is from the start of the trial. How else can the criteria below expressed by Dixon J and Evatt J be met?

For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge.¹⁰³

It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularize the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged. Indeed the matter arises at an even earlier stage. The defendant cannot plead unless he knows what is the precise charge being preferred against him.¹⁰⁴

Section 573 of the *Criminal Code 1899* (Qld) gives statutory expression to the above criteria, but leaves the direction on particulars to the discretion of the court. It is here contended that it would be desirable to amend s 573 to make the direction on particulars mandatory. However, wider reform is necessary.

98 *Chand v R* [2011] NSWCCA 53 [82] (Hoeben J), citing in support *R v Chai* [2002] NSWCCA 512 [43].

99 [2008] NSWCCA 231 [60].

100 (2002) 130 A Crim R 44, 47.

101 *Ibid* 65 [47].

102 (1937) 59 CLR 467, 489 (Dixon J), 497-498 (Evatt J).

103 *Ibid* 489 (Dixon J).

104 *Ibid* 497- 498 (Evatt J).

V REFORM

Reform needs to be considered at two levels: first, at the pre-trial disclosure stage, and secondly during the course of a trial. The *Criminal Procedure Act 2009* (Vic) provides a comprehensive model regime for disclosure. For example, Division 2 of Part 3.2 is entitled 'Pre-hearing disclosure of prosecution case', and s 41 covers the content of the full brief. Section 41 is extensive and refers to other relevant sections of the Act, such as s 47 'Rules with respect to statements', and s 416 which deals with 'Disclosure of material by the prosecution'.

Division 2 of Part 5.5 is entitled 'Pre-trial disclosure', and s 182 *Criminal Procedure Act 2009* (Vic) requires a summary of the prosecution opening and notice of pre-trial admissions. Section 182(2) is illuminating, especially in the context of the Patel case:

- (2) The summary of the prosecution opening must outline -
 - (a) the manner in which the prosecution will put the case against the accused; and
 - (b) the acts, facts, matters and circumstances being relied on to support a finding of guilt.

Given the manner in which the Patel trial developed, it is also instructive to consider the import of s 184 *Criminal Procedure Act 2009* (Vic):

Intention to depart at trial from document filed and served

If a party intends to depart substantially at trial from a matter set out in a document served and filed by that party under this Division, the party -

- (a) must so inform the court and the other party in advance of the trial; and
- (b) if the court so orders, must inform the court and the other party of the details of the proposed departure.

In addition, under s 199 *Criminal Procedure Act 2009* (Vic), the Court is given wide powers to make orders and other decisions before trial:

Court may make orders and other decisions before trial

- (1) At any time before trial, the court may hear and decide any issue with respect to the trial that the court considers appropriate, including-
 - (a) an issue of law or procedure that arises or is anticipated to arise in the trial, including an issue as to admissibility of evidence;
 - (b) an issue of fact, or mixed law and fact, that may be determined lawfully by a judge alone without a jury, including an issue as to admissibility of evidence;
 - (c) an application for an order that may be made in relation to the trial under this or any other Act or at common law, including an application to quash a charge in the indictment;
 - (d) any other issue with respect to the trial.

Arguably, the issues that beset the Patel trial would have been minimised

if the relevant procedures outlined above in the *Criminal Procedure Act 2009* (Vic) had been the law in Queensland. However, there is also a need to consider reform of the law during the course of the trial along similar lines to the English *Criminal Appeal Act 1995* discussed earlier in Part II. This would involve a statutory overruling of *Doney v The Queen*.¹⁰⁵

Essentially, the position in England is that where technically there is evidence on which the accused could lawfully be convicted but the trial judge concludes it would be unsafe to convict on the evidence, the judge may withdraw the case from the jury.¹⁰⁶ By contrast, in Australia in such circumstances the judge could only advise the jury to return a verdict of not guilty if the evidence taken at its highest could not sustain a verdict of guilty. It would appear that Australian legal authorities are more concerned with the purported usurpation of the function of the jury than their legal brethren in England.

However, not all Australian judges have endorsed the lack of judicial discretion to direct the jury to reach a verdict of not guilty. As was mentioned in Part II above, Mohr J dissented in *R v Prasad*,¹⁰⁷ citing McGarvie J in the Victorian case of *Wilson v Kubl*.¹⁰⁸ Mohr J observed that the law in South Australia had not been altered as in England, but that in any event s 353(1) of the *Criminal Law Consolidation Act 1935* (SA) provides *inter alia* that an appeal should be allowed if the Full Court thinks ‘that on any ground there has been a miscarriage of justice’.¹⁰⁹

Mohr J concluded:

The existence of such a discretionary power would seem to accord with good sense and the proper administration of justice. The cases will be few in number where a trial judge would be minded to exercise his discretion so as to withdraw a case from the jury and as was pointed out in *Mansfield’s* case it should never be so exercised when the ultimate decision will rest on the view to be taken of a witness’s credibility. To do so would be to usurp the function of the jury.¹¹⁰

It would appear that the substitution of ‘unsafe’ for ‘miscarriage of justice’ will not secure the reform being sought. It would appear to be necessary to insert a new section in the relevant Criminal Procedure legislation to the same effect as the test used in *R v Mansfield*,¹¹¹

105 (1990) 171 CLR 207.

106 *R v Mansfield* [1977] 1 WLR 1102.

107 (1979) 23 SASR 161.

108 [1979] VR 315, 319.

109 *R v Prasad* (1979) 23 SASR 161, 176. Section 353(1) is unchanged as regards to allowing an appeal ‘on any ground there was a miscarriage of justice’.

110 *Ibid* (citations omitted).

111 [1977] 1 WLR 1102.

namely: where technically there is evidence on which the accused could lawfully be convicted but the trial judge concludes it would be unsafe to convict on the evidence, the judge may withdraw the case from the jury. This would effectively overrule *Doney v The Queen*.¹¹²

VI CONCLUSION

This article has posed the question when should a trial judge stop a trial? In the two main cases used for the purpose of examining this question, *Wood v R*¹¹³ and *Patel v The Queen*,¹¹⁴ the Crown prosecutor, in both New South Wales and Queensland respectively, proceeded against each of the accused in a manner inconsistent with the duties of a Crown prosecutor to conduct a fair trial on behalf of the State. The contention is made that it is insufficient to leave the matter to the guidelines for prosecutors issued by the respective Office of the Director of Public Prosecutions.¹¹⁵ Courts need to be more rigorous in enforcing the fundamental precepts expected of the Crown, as outlined by the authorities.¹¹⁶ In *Wood v R*,¹¹⁷ the portion of McClellan CJ at CL's judgment which deals with prosecutorial fair play provides clear guidance to trial judges.

The focus of suggested reform has been on a comprehensive regime for disclosure of the Crown case. The *Criminal Procedure Act 2009* (Vic) has been singled out as providing a comprehensive model regime for such disclosure. In addition, it has been argued that Australia should follow England's lead by enacting legislation enshrining a judicial discretion to direct a verdict of not guilty where technically there is evidence on which the accused could lawfully be convicted but the trial judge concludes it would be unsafe to convict on that evidence.

112 (1990) 171 CLR 207.

113 [2012] NSWCCA 21 (24 February 2012).

114 (2012) 290 ALR 189.

115 The enforcement of prosecutorial responsibilities is an ongoing issue which is outside the scope of this article. In the *Wood* case, Mr Mark Tedeschi QC, was the Crown prosecutor. Mr Tedeschi has a controversial history as a Crown prosecutor. See for example Gleeson CJ's judgment in *R v Anderson (Hilton Bombing Case)* (1991) 53 A Crim R 421. Presumably, Barr J would have been aware of Mr Tedeschi's history.

116 See, for example, the cases cited above at n 55 to n 59: *Libke v The Queen* (2007) 230 CLR 559, 589 [83] (Hayne J); *Boucher v The Queen* (1954) 110 CCC 263, 270 (Rand J); *Whitehorn v The Queen* (1983) 152 CLR 657, 663 (Deane J); *Livermore v The Queen* (2006) 67 NSWLR 659, 665 [24].

117 [2012] NSWCCA 21 (24 February 2012) [576]-[581].