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

BETWEEN

GRAEME STEPHEN REEVES
Applicant

And

THE QUEEN
Respondent

APPLICANT'S REPLY

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Part I: Certification.

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

Part II: Reply.

Factual matters

2. Paragraph 4.1 of the respondent's submissions ('RS') is correct. RS 4.2 is more complex and the Court is referred to the Applicant's Submissions ('AS') at 21. The concession as to 'staged procedures' (RS 4.3) is dealt with below at 14(v).

20 Conviction.

3. The respondent fails to appreciate or acknowledge the extent to which the directions to the jury, and the approach of the CCA, departed from what the respondent now concedes (RS 6.58) to be the correct legal test. In doing so, it fails to confront the difficulties in applying the proviso in the circumstances of this case. The respondent attempts to convert a complex trial involving alternative bases of liability and a number of disputed factual issues into a single-issue trial. Contrary to the respondent's submissions, the application for special leave is not limited to the particular circumstances of the case. It raises questions of general importance concerning the concept of consent in criminal cases, the criminal liability of doctors,
30 the correct operation of the proviso and the proper approach to prosecution appeals against sentence.

4. Contrary to RS 6.2, Bathurst CJ did not 'expressly' hold (at [63], [83]) that the test in *Rogers v Whittaker* (1992) 175 CLR 479 was correct. At [63] (AB 1351), his Honour was merely stating the applicant's submission. At [83] (AB 1358), his Honour noted that the reasoning of the three torts cases referred to had not been challenged in the countries in which they were decided. Bathurst CJ did not endorse the principle for which the cases are authority as representing the correct test (and jury direction) in criminal cases where there were live issues of unlawfulness and
40 consent arising in the context of surgery or other medical procedures. The test put '3 paragraphs later' (at [86]) is a different test, and the omission of the words 'in broad terms' is of real significance in the context of a jury direction. This is so even if it is accepted that 'nature' and 'extent' are often connected. Further, [86] must be read with [88] (AB 1360) where there was a failure clearly to eschew the introduction of

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'informed' consent into the criminal context and in which it was held that a direction which referred to the 'full extent' (as opposed to the 'nature' 'in broad terms') 'may not have constituted a misdirection'.

5. The respondent asserts (RS 6.8) that the fundamental issue at the trial was whether the operation was unwarranted. Self evidently, that was a significant issue in the trial. However, the respondent goes on to assert (RS 6.7) that the issue of consent only became an issue on appeal because the 'sentencing Judge found that the Crown had not established malice'. This submission is wrong for a variety of reasons and on a number of levels.

6. The finding of the sentencing Judge was more than a rejection of malice. It was a rejection of one of the two bases upon which the prosecution put its case to the jury. The sentencing Judge said (AB 963) that he was 'not satisfied beyond reasonable doubt that the [applicant] deliberately intended to perform an unnecessary and unjustified operation': see AS at [36].

7. The Crown elected to put its case to the jury on alternative bases, which (in shorthand) were that the applicant (1) performed an unwarranted operation knowing it was unwarranted, or (2) knowingly failed to obtain [informed] consent ('the consent case'). The consent case was never confined to an allegation that the applicant had failed to obtain consent to the removal of her external genitalia (as suggested at RS 6.10), albeit that this was obviously the most significant omission alleged against him. The issue of informed consent was part of the trial from beginning to end:

(i) The Crown Prosecutor opened on it: AB 50-51.
(ii) The complainant was asked questions directed to it: AB 59-60, 61, 66.
(iii) The expert witnesses provided opinions on it: AB 215, 258-259, 312, 321-2.
(iv) The accused was cross-examined on it: AB 462-463, 503, 516, 526.
(v) The Crown Prosecutor addressed the jury on the evidence going to the issue: AB 720-721, 750-751, 754.
(vi) The written directions and summing up focused on the issue: AB 814, 828.
(vii) The single question asked by the jury in the course of its deliberations was directed to the issue: AB 890, 893-894.

8. The respondent's submission ignores the fact that the three CCA Judges either made or acted on the same finding[1]. This means that the only basis upon which the CCA applied the proviso was on the Crown's consent case.

9. The question asked by the jury (AB 890) suggests that it (or one or more of its number) reasoned in a similar fashion. This is one of the reasons why it cannot be said that there was no substantial miscarriage of justice. It cannot be said that the misdirection did not affect the result by denying the applicant the chance of acquittal that was reasonably open to him.

10. The underlying theme and basic thrust of the respondent's submission is the assertion that the only relevant issue before the jury on the consent case was whether

[1] The Chief Justice acted on the sentencing Judge's finding ([92]; AB 1362). Hall J ([169] AB 1385) and Hulme J ([285] AB 1415) each made a specific finding that the prosecution had not established that the applicant performed the operation knowing that it was not necessary.

the respondent had advised CDW that her external genitalia would be removed in the operation: see, for example, RS 6.10. This is not the way the prosecutor put the case at trial. It is true that there was a stark conflict in the evidence on that issue. It is also true that resolution of that conflict was an important part of the jury's function. However, the jury was not obliged to take an all or nothing approach to the conflicts in the evidence. It was open to the jury to accept parts of the evidence of each of the principal witnesses. The jury was so directed: AB 819.23, 816.32. It was open to the jury to find that the applicant believed that he had explained (by reference to diagrams) the tissue or organs to be removed but had failed to explain the consequences.

11. If, as the respondent now submits (RS 6.10), the only issue in the prosecution's consent case was whether the applicant '*mentioned anything even remotely indicating the complete removal of her vulva*', one would expect the jury to have been so directed. It was not. On the contrary, it was directed that the surgeon must 'at least explain to the patient the purpose of the operation, the part or parts of the body to be cut or removed, the possible major consequences of the operation **and** any options or alternative treatments which may be reasonably available': AB 828. The underlined portions of the above passage demonstrate the extent to which the case, as put to the jury, went far beyond the simple case that the respondent now says the jury was called upon to decide. The CCA failed to take this into account in its assessment of whether there had been a substantial miscarriage of justice.

12. The respondent goes on to suggest (for example, RS 6.22) that where evidence of the failure of the applicant to advise CDW of consequences (such as the impact on her sexual function or difficulties in urination), this was merely '*evidence that the complainant was not told the extent of the procedure proposed, as she claimed, not that liability might accrue for failure to explain*'. The record of the trial proceedings does not support this suggestion. The Crown Prosecutor at trial did not confine the case in that way. The trial Judge did not direct the jury that the failure to explain the consequence could only be used in support of the case that the complainant had not been told of the extent of the procedure. The parties did not seek such directions from the trial Judge. If such emotionally charged evidence[2] was to be given on the basis that it could only be used in the limited manner now suggested, the jury ought to have received clear and careful directions and warnings.

13. The respondent's submission (RS 6.28) should be rejected. The applicant's point (AS 52) is not that the submission was not addressed, but that the wrong test was applied. There is a significant difference between a conclusion that there is no possibility that a jury made a particular finding and a conclusion that this was not a 'real likelihood'.

14. As to some of the respondent's specific submissions on the evidence:

(i) RS 6.9 and 6.41 refer to the applicant's evidence concerning his observations of dystrophy. However, it quotes only part of the evidence (e.g. 'the whole vulva was abnormal'; 'all over the vulva'). Thus, the respondent argues, it is unlikely that the dystrophy would be missed on pathological examination. However, the

[2] See, for example, AB 59.20-30; AB 462-464 especially at 464.10 and 464.28; AB 512.48; AB 526.13-26; AB 570.20.

respondent has not referred to the applicant's evidence that he was not surprised that it had been missed on pathology because 'it is a very patchy disease' (AB 387.42) and 'it [the vulva] wasn't uniform, it was patchy' (AB 402.32).

(ii) On the same subject, the respondent contends (RS 6.9, 6.41-6.42) that it 'must have seemed particularly fortuitous that the pathologist missed it in all 13 test sites' and (at 6.42) cites Dr Dalrymple[3] for the proposition that the samples were not random but 'systematic'. However, Dr Dalrymple's evidence was that the 'systematic slices' were taken from the area of disease on the left side (clearly a reference to the VIN III). The remaining samples (from the right side) were random. The pathologist who examined the sample and made the sections (Dr Edwards) acknowledged this. In relation to the apparently 'healthy part of the vagina', she said (AB 184.36) that 'we just broadly take intermittent samples'. She performed no microscopic examination and acknowledged (AB 185.30) that 'cancers can be microscopic, sub-clinical' and (AB 187.40ff) that 'you may not see that in the laboratory' (ie on macroscopic examination). Dr Edwards also said that the sections taken were 'very, very thin...less than 0.1 of a millimetre': AB 186.34. Ex M (AB 640) provides a (not to scale) representation of the location of the sections taken from the sample[4]. Overwhelmingly they are from the left side, the location of the VIN III.

(iii) RS 6.36 refers to the reference to 'extensive in situ cancers' in the letter to the GP (Ex J, AB 586) but fails to refer to the reference to 'multi genital cancers' which arguably supports the sighting of dystrophy.

(iv) RS 6.46 misses or misstates the point made in AS 59. Dr Dalyrmple's evidence, in the question and answer immediately before the evidence quoted by the respondent, clearly showed that he believed that the area of irritation left untreated was the area of the VIN III lesion: see AB 228.21. Even if that was an assumption on his part, the point is that the history as he understood it was the same as the history noted by the applicant in his notes ('lesion on vulva noticed in past two years'): AB 588.50, AB 648.43. As the trial Judge noted in his charge to the jury (AB 867.15ff) this was a significant point in an assessment of the prosecutor's submission that this part of the note was forged. It was not considered by the CCA. It was also relevant to the accuracy of the complainant's memory of the critical consultation.

(v) As noted in RS 4.3, the applicant concedes that there was no evidence that the applicant advised the complainant about 'staged procedures': *contra* AS 13. The applicant's evidence was that the complainant was 'not prepared to undergo follow up at intervals' (AB 390.18) and wanted the procedure 'done in one go' (AB 367.38)[5]. CDW agreed (AB 97.36) that she had said that she wanted the operation to be 'done in one go' and (AB 61.30) wanted 'the quickest most complete treatment'.

(vi) The respondent attempts to place some reliance (RS 6.53-6.55) on a comment made by a nurse in the course of the operation. However, that comment could have no bearing on the consent case because CDW was not conscious at the time

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[3] Dr Dalrymple is a gynecological oncologist, not a pathologist. He reviewed the pathology results but played no part in the examination of the specimen or samples.

[4] Dr Edwards drew the diagram; Dr Jain shaded the area of 'high grade dysplasia' (VIN II): AB 175.

[5] The applicant referred to her gynaecological history, 'her experience in Wagga' and assumed there had been a 'series of consultations': AB AB 367.40. Her history included a cone biopsy and a hysterectomy: AB 361.15ff; Ex P AB 588-9; Ex 11, AB 648-9.

it was made[6]. RS 6.55 asserts that part of the conversation (which was denied) showed that the applicant 'seemed out of touch with current medical practice'. That may be a good submission in a negligence suit but it goes no way to establishing the specific intention to cause grievous bodily harm required under s. 33 *Crimes Act* 1900 (NSW).

15. The respondent (like the CCA) has not addressed matters going to the reliability of CDW's recollection or explained how the proviso can properly be applied in the absence of any consideration of those matters.

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16. Neither the respondent (nor the CCA) considered the lack of any cogent evidence of motive. If the applicant did not believe that he had seen the more widespread dystrophy, what possible motivation could he have had to proceed with the simple vulvectomy? The decision to undertake that procedure was made in the first consultation on 5 July 2002 (Ex A, AB 579). The jury was correctly directed (AB 821-822) that the Crown did not have to prove motive but, as the trial Judge pointed out, 'absence of motive may be very relevant'.

17. Many of the matters raised in the respondent's submissions were not
20 considered or relied on by the CCA. It is no answer to the applicant's complaint to say that there was evidence that might have supported the CCA's approach. It was for the CCA, not the respondent or this Court, to undertake a comprehensive review of the evidence to determine whether no substantial miscarriage of justice occurred in spite of the fact that the jury was fundamentally misdirected as to an element of the offence and the applicant's defence.

18. The respondent has not addressed the general and important question of whether a doctor can be criminally liable in circumstances where they believe that the operation was necessary for the well-being of the patient.

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Sentence

19. The respondent has not addressed, or attempted to refute, the arguments under grounds 2.3 (failure to address the residual discretion and evidence on Crown appeal), 2.4[7] (interference with the sentencing Judge's approach to the applicant's psychiatric condition) or 2.5[8] (substituting its own sentence for that of the sentencing Judge). The failure to address these grounds and the suggestion (RS 6.67) that the matter might be remitted for consideration of further evidence, is a tacit concession that the applicant has made good his appeal against the decision of the CCA in relation to the Crown's sentence appeal. The applicant submits that, in the
40 circumstances of this case, rather than remitting the matter to the CCA, the Court should allow the appeal, quash the orders of the CCA and order that the Crown appeal to the CCA be dismissed.

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[6] The same point was made in submissions on the special leave application: AB 1489.13.
[7] Incorrectly referred to as 2.5 in the applicant's submissions.
[8] Incorrectly referred to as 2.6 in the applicant's submissions.