HIGH COURT OF AUSTRALIA
FILED
- 9 MAR 2012
THE REGISTRY SYDNEY

IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No.S46 of 2012

BETWEEN: **NATALIE BURNS** Appellant

AND

THE QUEEN Respondent

APPELLANT'S OUTLINE OF SUBMISSIONS

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PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that this submission is suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF ISSUES

2. In a case of manslaughter by criminal negligence, does a drug supplier owe a duty of care to a drug recipient? If so, what is the scope and content of the duty?
3. Were the directions on causation for both limbs of involuntary manslaughter correct? What is the test of causation in a case of criminal negligence by omission?

PART III: NOTICES UNDER S78B OF THE *JUDICIARY ACT* 1903 (CTH)

4. The appellant certifies that there is not thought to be any need to give any notice
20 under s78B *Judiciary Act* 1903 (Cth).

PART IV: CITATION OF THE REASONS FOR JUDGMENT

5. The citation of the authorised report of the reasons for judgment of the Court of Criminal Appeal is *Burns v R* (2011) 205 A Crim R 240.

PART V: NARRATIVE STATEMENT OF FACTS

6. On 9 February 2007 sometime after 5pm, the deceased, a 32 year old man, attended the unit where the appellant lived with her husband (Burns), to obtain methadone. The appellant and Burns were prescribed methadone and were permitted to take several daily doses away from the clinic for their own consumption. They also sold their methadone to others. The deceased was a friend of Burns but only an
30 acquaintance of the appellant: Summing Up (SU) 34.10; CCA [26].

Dated: 8 March 2012

Filed on behalf of the Appellant
THE APPELLANT'S SOLICITOR IS: Brian Sandland, Legal Aid Commission of NSW
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7. Ms Felicity Malouf attended the unit on 9 February 2007 to purchase methadone. When she arrived the deceased was there with Burns. The appellant was in another room. There were no indicia of ingestion of methadone by injection. Ms Malouf saw that the deceased was *'out of it'* or *'on the nod'*. (Dr Roberts gave evidence that *"on the nod"* was *"a colloquialism which means that someone is observably sleepy. That they are tired...a slight degree of drowsiness"*)[1]. Burns told Ms Malouf that the deceased had either *'wanted'* or *'had taken'* some methadone. There was no evidence that the appellant was present when this may have occurred: CCA [77], [78].

8. Ms Malouf and Burns got the deceased up and assisted him to walk in a circle five or six times: SU36. The appellant was still in another room. Burns told the deceased *'We're going to call an ambulance'* but the deceased said *'No, no I'm right'* and *'I'm alright....I don't need an ambulance, I'm alright.':* SU36; CCA [78]. No ambulance was called.

9. The appellant then came into the room. The deceased was still *'out of it'* or *'on the nod':* CCA [78] [79], Ex N. The appellant said *'he can't be here like that.'* She spoke to Burns in an angry tone. Burns said *'Come on mate, it's time to go.....'*: SU36. Burns said he would put the deceased outside and keep an eye on him: CCA [79]. The deceased got up without assistance and left. Burns followed him out: SU36; CCA [80]. The period during which the appellant and the deceased were in the same room was approximately 3-4 minutes[2].

10. Ms Malouf and the appellant remained in the unit: CCA [80]–[91]. Ms Malouf saw nothing to suggest the deceased had consumed methadone in the unit. She did not consider it unusual for someone to be sleepy after consuming methadone, was not overly concerned about his condition and did not consider he required an ambulance: SU38.

11. Burns discovered the deceased in a toilet block at the rear of the unit the following day: CCA [11]. To access the toilet block the deceased must have walked down a number of stairs, crossed a yard and walked up more stairs: Ex K. No syringes or drug paraphernalia were found in the area of the back toilet on the day the deceased was located: CCA [12].

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[1] Dr Roberts T343.14-.15.
[2] Ms Malouf T121.48-122.2.

12. Several weeks later police installed a listening device in the appellant's home. Discussions were recorded between the appellant and Burns referring to the deceased having overdosed and the deceased being *"out of it"*. The appellant was recorded saying they had to *"get rid of those things"*, that the deceased had *"told them nothing"*, that *"he had the best outfit, no less"* and he had assured them *"no I'm all right. I'm all right I'm ok"*. There was also a conversation where the appellant had said *"mixing two things"* was *"exactly what happened"*. She said to Burns: *"I told you not to do him no more, you had to do it again..."* and he replied: *"I said to you Natalie, its all right, I will look after him, I'll watch him."* In another conversation she asked Burns *"...and you got to look after him, you did it again didn't you..."*: CCA [17]–[25], [29].

13. When interviewed by police, the appellant said that the deceased was either drunk or *'out of it'* when he was at her unit. *'He kept nodding off. His eyes would close'*: SU 34-35; CCA [27][28]. She told police that Ms Malouf was present when the deceased had arrived and that Ms Malouf had suggested they call an ambulance but the deceased had refused: SU34. The appellant said she had told Burns to ask the deceased to leave their unit. Burns had asked him to go, saying *'It's not right you coming over like this.'* The deceased said: *"Don't worry about me, I'll be right"*, got up and walked out with Burns: CCA [27] [28].

14. A search of the appellant's premises a month after the deceased's death found syringes and tubes known as *"butterfly clips"* which could be used to inject methadone: CCA [31].

15. On the day of his death, the deceased had attended his psychiatrist, Dr Roberts, leaving between 4.30pm and 5pm. He was noticeably drowsy and told Dr Roberts that he had consumed Endone[3]: CCA [38]–[40]. A side effect of Endone is drowsiness[4].

16. Toxicology results confirmed the deceased had consumed clonazepam[5], cannabis, fluoxetine[6], methadone and Olanzapine[7]. Endone was not detected[8].

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[3] Endone is a form of oxycodeine, which is a strong opiate: Mr Farrar T386.49-.50

[4] Endone had been prescribed to the deceased by his general practitioner Dr Mai: T292.20-.24, 293.21-.22.

[5] A benzodiazepine that is used as an anti-convulsant: Mr Farrar T368.26-.27.

[6] An antidepressant: Mr Farrar T369.14-.16.

[7] Sold under the brand name 'Zyprexa'. The deceased had been prescribed this medication. He was to take two tablets each night. An empty packet previously containing 60 tablets was found in his hotel room: SU 40; CCA [15].

[8] Mr Farrar T386.48-387.10.

17. Dr Duflou, a forensic pathologist, was of the opinion that the deceased died from the effects of a combination of methadone and Olanzapine. Dr Duflou considered it a 'remote possibility' that Olanzapine alone caused death: SU43. Toxicology revealed Olanzapine at a high but not lethal level[9]. Neither dosage, as detected by the toxicology results was necessarily fatal but they had an additive effect on each other: SU41;CCA [54]. In combination the two drugs can cause unconsciousness and respiratory depression: CCA [59]. Both Dr Duflou and Mr Farrar, a pharmacologist, stressed that different people have different reactions to methadone. Even if methadone was injected, respiratory depression could have occurred slowly over a period of time. The risk was greater if the deceased was not tolerant to methadone and if the methadone was injected. Dr Duflou said it was possible that the methadone had been injected. There was no obvious needle puncture mark, however upon dissection, he observed bleeding indicative of an injury sustained within 8 to 12 hours prior to death: CCA [14]. The level of methadone was not extremely high[10] and *"neither of the drugs on their own were necessarily fatal":* CCA [54] [60]. The CCA found that the deceased had consumed methadone either orally or by injection: CCA [58], [61], [67], [68], [157].

18. Dr Duflou observed evidence of earlier pneumonia that could have been present before the drugs were ingested or caused by the deceased's inability to breath because of the ingestion of drugs: CCA [56]. At autopsy evidence of a prior head injury with significant brain damage was observed: CCA [55]. There was no evidence the appellant knew the deceased was an inexperienced methadone user, had suffered brain damage, had pneumonia or the nature of any other substances he had consumed.

19. Mr Farrar considered it 'very likely' that the combination of methadone and Olanzapine caused death, although he could not rule out that Olanzapine caused death alone: CCA [71]. He considered this to be *'most unlikely':* SU 43. He did not believe it was possible to establish whether either the methadone or the Olanzapine alone or solely would have been sufficient to cause death[11]. The adverse affects of methadone are readily reversible with the administration of Narcan by an ambulance officer: CCA [72]. If it was swallowed, the methadone was a therapeutic quantity, not a toxic

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[9] Olanzapine had been found at a level of 0.5mg/L, about twenty times the expected dose. A fatal dose would be expected to be in excess of 1mg/L: CCA [59].

[10] The methadone level observed in the deceased was 0.2mg/L, was below the documented toxic range of 0.4 to 1.8mg/L where death could be attributed purely to methadone toxicity: Dr Duflou 320.49-.50, 321.21-.23.

quantity[12]. Even assuming injection, it was not possible, in Mr Farrar's opinion, to calculate what the methadone concentration would have been at the time it was administered[13]. The Olanzapine in the deceased's blood was consistent with a much larger dose than prescribed and could have caused drowsiness[14].

20. The prosecution called evidence from clinic staff that clients were advised of the dangers of sharing methadone and that it was not to be injected or used in conjunction with prescription medication or sleeping medication.

21. On 14 August 2009 a jury convicted the appellant of both supplying the deceased with methadone and of his manslaughter. Burns, who had been tried separately, was also convicted. Burns died in custody shortly after his conviction.

PART VI: APPELLANT'S ARGUMENT

Statutory and common law requirements for offence of manslaughter

22. The crime of manslaughter is referred to in s18 *Crimes Act* 1900 (NSW)[15], by excluding from the category of murder any form of punishable homicide which does not satisfy s18(1)(a)[16]. Section 18 does *"not alter the common law of unlawful homicide by involuntary manslaughter"*[17]. The crime of battery manslaughter is unknown to the common law in Australia[18]. There are two categories of involuntary manslaughter: manslaughter by unlawful and dangerous act and manslaughter by gross criminal negligence. In this case, both were left to the jury.

Trial directions on bases of manslaughter

23. Manslaughter was left to the jury on both the basis of unlawful and dangerous act, to wit the supply of methadone to the deceased[19] and the basis of manslaughter by criminal negligence.

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[11] Mr Farrar T382.10-.15.
[12] Summing Up (SU) 49.
[13] Mr Farrar T376.5-.12.
[14] It was the prosecution case that this had been consumed prior to his attendance on the Burns and that it explained the deceased's drowsiness when he attended Dr Roberts' rooms earlier that afternoon.
[15] The common law also applies in the ACT, NT, Victoria and SA: s15 *Crimes Act* 1900 (ACT); s160 *Criminal Code Act* (NT); s5 *Crimes Act* 1958 (Vic); ss.13, 14 *Criminal Law Consolidation Act* 1935 (SA). In WA, Tas and Qld, both the duties relating to the preservation of human life and the offence of manslaughter are relevant: Chapters 17 and 28 (s280) *The Criminal Code* (WA); Chapters 16 and 17 (s156, 159) *The Criminal Code* 1924 (Tas); Chapters 27-28 *The Criminal Code* 1899 (Qld).
[16] *R v Lavender* (2005) 222 CLR 67 at 79 [30].
[17] *R v Lavender* (2005) 222 CLR 67 at 86 [55].
[18] *Wilson v The Queen* (1992) 174 CLR 313 per Mason CJ, Toohey, Gaudron and McHugh JJ at 328-334.
[19] SU 9, Written Directions (WD) p.4-5; CCA [162]; cf SU 57 where a Crown submission is summarised: *"if the Burns', acting jointly, injected it into him or assisted him to inject it, providing him with the butterfly needle and so on, then manslaughter by unlawful and dangerous act is proven"*. In opening the Crown relied

24. The trial judge directed the jury in relation to criminal negligence that:

"it may be manslaughter where the accused voluntarily assumes a duty of care towards another person and by a grossly negligent omission breaches that duty of care causing death"[20].

25. The trial judge directed the jury in relation to what was said to be a voluntary assumption of a duty of care by the appellant:

"If a person voluntarily invites or permits potential recipients to attend his or her home for the purpose of a prohibited drug supply transaction, where the drugs are to be consumed on the premises and where such a recipient may be or become seriously affected by drugs to the point where his or her life may be endangered, the drug supplier has a duty to conduct himself towards the drug recipient without being grossly or criminally neglectful"[21].

He declined to include the element of seclusion referred to in *R v Taktak* (1988) 14 NSWLR 226 at 236, even though this had been left in the case presented against Burns[22].

26. The breach of an asserted voluntary assumption of a duty of care owed to the deceased, was said to be by omissions, to wit, the appellant failed to call an ambulance or obtain other medical assistance to protect his life and expelled him from the unit while he was in what was alleged to be a *"grossly vulnerable position"*[23]. The omission was later described as *"failing to call for medical aid"*[24].

27. In relation to both forms of involuntary manslaughter, the jury were directed that if the deceased made a *"rational"*, *"voluntary"* and *"informed"* decision to take the methadone, they might think that was the true cause of his death; however if the deceased did not know about methadone and its effects, he had brain damage (as discovered by autopsy) and was already affected by another drug, they might think that he could *"not be regarded as a person acting as a rational adult making an informed voluntary choice about taking methadone on 9 February 2007"*[25]. The Crown conceded that its case against the appellant ended when the deceased left the

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on *"that they supplied the drug, methadone, which is an unlawful act, knowing that David Hay would take on board either by injection or orally and that for him, for David Hay, that was a dangerous thing to do, it was a dangerous action"* (T9.15-.18). During the no case submission the Crown stated for the first time that the unlawful and dangerous act *"included that he was assisted in injecting or was injected"*(T448.26). This was put in his closing address to the jury (T3.46-4.9). However there was no evidence to support the "injection" proposition: see Crown address at T4.6-.36, which establishes no more than an enterprise to supply.

[20] SU10, WD p6.

[21] SU11.34, WD p6

[22] Judgment of Judge Woods QC declining to direct a verdict of not guilty of manslaughter, 10/08/09 p.8.

[23] SU 13, WD pp.6-7.

[24] SU14, 57, WD p.6.

flat with Burns, however there was no direction to the jury as to the legal effect of this[26].

Ground 1: The Court of Criminal Appeal erred in holding that the circumstances that arose in this case were capable of giving rise to a duty of care.

Ground 2:The Court of Criminal Appeal should have held that the directions of the trial judge as to duty of care and breach were erroneous.

28. It is submitted that here is no duty of care arising between a drug supplier and the voluntary recipient of the drug. The statutory provision governing manslaughter[27] does not vitiate consent of a drug taker who is either not intoxicated or already intoxicated at the time of supply, or for whom cognitive incapacity has not been established by the prosecution (cf. provisions in relation to sexual intercourse: s61HA *Crimes Act* 1900). The *Drugs Misuse and Trafficking Act* 1985 (NSW) distinguishes between an offence of supply and offences of administration, and self-administration of prohibited substances. The jury was directed that the appellant could be convicted of manslaughter by gross criminal negligence on the basis of there being a voluntary assumption of a duty of care by a person who allows his/her home to be used for the supply of a prohibited drug to the person supplied the drugs.

29. The CCA held that *'a person owes a duty of care having "created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening"'*: CCA [106], [118] paraphrasing and quoting from Lord Judge CJ in *R v Evans* [2009] 1 WLR 1999 at 2007 [31]. The CCA also held that: "*In our opinion the directions in the Bench Book correctly reflect the law*"[28]. In the Bench Book, the voluntary assumption of a duty of care is said to arise:

> *"where the accused has voluntarily assumed the care of the victim who is unable to help [himself/herself] and the accused has so secluded the victim as to prevent others from rendering aid (the situation considered in R v Taktak* (1988) 14 NSWLR 226."

However, neither the direction given in *Evans,* nor the direction suggested in *Taktak* was given in the appellant's trial.

30. The common law as it related to categories of duty of care and in particular, voluntary assumption of care of a helpless person, and omission as it applies to manslaughter by

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[25] SU 19-20, WD p.9.
[26] SU 52.45, 58.25, Crown Prosecutor 11/08/09 T719.5-.8.
[27] s18 *Crimes Act* 1900.
[28] CCA [119].

criminal negligence was reviewed by Yeldham J in *R v Taktak* (1988) 14 NSWLR 226 at 236C-245E. Broadly speaking, the common law of criminal negligence recognises four categories of duty of care. The first is duty imposed by statute. The second is duty imposed by contract. The third is a common law duty where there is a recognised legal relationship between two persons of guardian or protector[29], that is, one having the custody, care and control of another, such as between parent and child, and is also referred to as a duty to provide the necessaries of life. The fourth is the voluntary assumption of care of a helpless person of special relation to the accused, described by Professor Glanville Williams as *"a duty to prevent death...in respect of the neglect of helpless persons, where the circumstances disclose some special relationship between the parties"*[30]. In relation to this category, it has been suggested that *"someone who has undertaken the duty can probably divest himself of it only by passing it on to some responsible authority or other person"*[31].

31. In England, the Court of Appeal held in *R v Sinclair, Johnson and Smith* (1998) WL 1044437; 148 NLJ 1353 at p.6:

> *"...there is no English authority in which a duty of care has been held to arise, over a period of hours, on the part of a medically unqualified stranger. Beardsley and Taktak are both persuasive authorities pointing away from the existence of any such duty... ".*

In *Sinclair,* it was the relationship between the two parties that informed whether a duty of care arose to provide the deceased with the necessaries of life. In the case of Sinclair, who had been a friend of the deceased for 13 or 14 years, lived with him for close to 2 years and was *"like a brother"* to him, the Court held that there was a case to answer as to voluntary assumption of care. However, the relationship with Johnson was such that there was no duty of care:

> *"Johnson did not know the deceased. His only connection with him was that he had come to his house and there taken methadone and remained until he died. Others were coming and going in the meantime. The fact that Johnson had prepared and administered to the deceased saline solutions does not, as it seems to us, demonstrate on his part a voluntary assumption of a legal duty of care rather than a desultory attempt to be of assistance. In our judgment, the facts in relation to Johnson were not*

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[29] *People v Beardsley* 113 NW 1128 (1907) per McAlvay CJ at 1129-1130.

[30] Williams, G *Criminal Law* (2nd ed), Ch.1: The Criminal Act, When a Duty is Imposed p.5; see also *Marriott* (1938) 8 C and P 425; *R v Nicholls* (1874) 13 Cox CC 75; *R v Stone and Dobinson* [1977] QB354; *R v Sinclair, Johnson and Smith* (1998) WL 1044437; 148 NLJ 1353.

[31] Ormerod, D *Smith and Hogan's Criminal Law* (13th ed) 2011 "Chapter 4. The Elements of a Crime: Actus Reus; 4.4 Omissions; 4.4.2.2 Who owes a duty?", p.72

capable of giving rise to a legal duty of care and the judge should have withdrawn his case from the jury for this further reason"[32]: (cf. CCA [108]).

32. In *R v Wacker* [2003] QB 1207 at [38], the Court of Appeal held that there had been a voluntary assumption of the care and control by a truck driver of the illegal immigrant passengers he was transporting secreted in his truck, including a duty to take care of their safety (cf.CCA [110]).

33. In *Evans* at [12], the facts described as *"not in dispute"* were set out as: Evans and her mother had remained at their premises with Evans' half sister from the time when she injected herself with a lethal dose of heroin until the time she was found dead in the morning; they had witnessed obvious signs of effect of the drug, appreciated that her condition was very serious and indicative of an overdose; and believed they were responsible for the care of the half sister after she had taken the heroin. The relationship between the appellant Sinclair and the deceased in *Sinclair,* including being close friends, living together, almost like brothers, supplying the methadone, remaining with the deceased throughout unconsciousness and for a long time being the only person with him was said to *"accord with the present case"* of *Evans*[33]. A five judge bench of the Court of Appeal held (at [31]) that:

> *"...when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise"* (emphasis added).

However they went on to hold that only if Evans was involved with the supply of the heroin *"that fact, taken with the other undisputed facts would...and did give rise to a duty on the appellant to act"*[34] (emphasis added). They added that, although voluntary assumption of risk had not been left to the jury in the case of *Evans,* a duty to act may arise where there has been a voluntary assumption of risk leading a victim, or others, to become dependent on a defendant to act[35]. The admission by Ms Evans that she, together with her mother, had recognised the condition indicative of an overdose and had assumed responsibility for the care of her half-sister[36] distinguishes that case from the appellant's: cf. CCA [106].

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[32] *R v Sinclair, Johnson and Smith* (1998) WL 1044437; 148 NLJ 1353 at p.6.
[33] *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2007 [28].
[34] *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2009 [35].
[35] *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2009 [36].
[36] *R v Evans (Gemma)* [2009] 1 WLR 1999 at 2003 [12]. 2009 [35].

34. The jury in the appellant's case, were directed in relation to duty of care to consider whether the appellant did *"voluntarily take upon herself"* a duty of care for the deceased. There was no direction that the appellant had created a state of affairs which she *"knows or ought reasonably to know has become life threatening": cf. Evans* at [31]. The direction was that a duty arose *"where such a recipient may be or become seriously affected by drugs to the point where his or her life may be endangered..."* (emphasis added). The scope of the duty[37] was undefined[38]. The duty was stated to be *"to conduct himself towards the drug recipient without being grossly or criminally neglectful"*. There is no such duty of care known to the common law. Moreover the duty of care was said to extend to an omission (later described as a failure to prevent a death) as opposed to an act.

35. There are important differences between omissions and acts in involuntary manslaughter. In *The Queen v Phillips* (1971) 45 ALJR 467, where a girl had been rendered unconscious and moved to the shoreline on an incoming tide and later drowned, Barwick CJ, Menzies and Owen JJ were of the opinion that there was no duty under Chapter 16 Tasmanian Criminal Code whereby omission could amount to culpable negligence to perform a duty tending to the preservation of human life: s156 (2)(b), s144. Rather, manslaughter was available on the basis of unlawful and dangerous act. In his reasons, Windeyer J, considered that s144, which concerns the duty of a person having the charge of another to provide the necessities of life (including medical aid) was consistent with the common law,[39] but concluded that the conduct in question was *"far away from that field"*.

36. In *R v Lawford*; *R v Van de Wiel* (1993) 61 SASR 452, the deceased had been rendered unconscious by the appellant's acts of either beating him senseless with a steel bar or a subsequent attempt to strangle him. In dicta, in relation to liability for failure to act in a murder by omission case, Duggan J (Bollen and Mullighan JJ agreeing) referred to the Criminal Law Revision Committee 14th Report (UK) par 252, where it was said, without reference to any authority: *"(vi) where the defendant has himself put a person in danger by a wrongful act, he is probably under a duty not*

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[37] cf. *Rogers v Whittaker* (1992) 175 CLR 479 at 487; *Sullivan v Moody* (2001) 207 CLR 562 at 579-580 [50]; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 per Gummow J at 448-449 [78]-[79]; Hayne J at 459 [116]-[118]; Callinan and Heydon JJ at 481-482 [216]-[217].

[38] cf. Observations of French CJ, Gummow, Kiefel and Bell JJ in *CDPP v Ponitowska* [2011] HCA 43; 282 ALR 200 at 212 [44] in the context of omissions under the *Criminal Code* (Cth).

[39] *The Queen v Phillips* (1971) 45 ALJR 467 at 478.

to leave that person in danger"[40]. This category was not voluntary assumption of care. It was not based upon a relationship between the parties, but on a duty arising from a violent act of one on the other. His Honour noted that this category had been questioned in the UK[41]. He was of the opinion that, as "*one aspect of liability*" establishing *causation* for the offence of murder, on the basis of *Taktak,* a duty could arise if Lawford was responsible for the deceased *"being rendered unconscious and placed in a dangerous situation as a consequence..."* [42] (emphasis added).

37. The only other authority in Australia referring to this suggested "unlawful act" category is the judgment of Barr J in *R v Taber; R v Styman; R v Styman* (2002) 56 NSWLR 443 at 451 [22], 452 [28] *(Taber)*. In *Taber,* the deceased had been bound, gagged and abandoned by the accused. In the course of a trial for murder, in considering trial directions, Barr J held that any person who deliberately puts another in danger comes under a legal duty to take steps to remove that danger and that any failure to do so may constitute an omission causing death. There is conflicting authority to *Taber* in the ACT. In *R v Rao* [1999] ACTSC 132 (Crispin J), both the suggestion of the existence of the voluntary assumption of a duty of care to an acquaintance and a duty of care arising from an unlawful act was rejected. His Honour considered *Lawford* and held (at [142]-[143]):

> *"I do not understand their Honours to have intended to lay down any general principle that a person who does any act which has the effect of creating any danger for another person ipso facto acquires a duty to intervene to protect that person.*
>
> *"Nonetheless, if the Crown could establish beyond reasonable doubt that the accused caused Mr Cinque to lapse into unconsciousness and that he was consequently placed in real danger then I would have little hesitation in finding that she had a duty of care. However, for reasons which have already been discussed, I am not satisfied that she was responsible for him being rendered unconscious. Accordingly, the basis upon which a duty of care was recognised in R v Lawford & Van de Weil does not apply in the present circumstances."*

Crispin J considered that a duty would arise if the Crown could establish that the accused had caused the deceased to lapse into unconsciousness and that he was consequently placed in real danger.

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[40] *R v Lawford; R v Van de Wiel* (1993) 61 SASR 452 at 547-8.

[41] C Wells "Reports of Committees" (1980) 43 MLR 681 at 685-6 "Omissions", citing a *"dissent"* from Prof Glanville Williams including *"...it should be for Parliament, not the judges, to decide the occasions when people are legally required to bestir themselves on behalf of others".*

[42] *R v Lawford; R v Van de Wiel* (1993) 61 SASR 452 at 548.

38. The trial judge relied on the cases of *Lawford* and *Evans* where an act of an accused (rather than an omission) rendered the accused under a duty of care to another person to *"state the law of NSW"* in relation to the duty between a *"drug supplier"* and a *"drug recipient"* to not be *"grossly or criminally neglectful"*[43]. It is submitted that to do so was an error of law and that the CCA should have so held.

39. In the appellant's case, there was no suggestion that the appellant by her act had rendered the deceased unconscious, secluded or abandoned. To the contrary, the evidence was that the deceased walked from the apartment, with Burns, *"under his own steam"*. There was no dispute that the Crown case ended when the deceased left the apartment with Burns[44]. Even if there were a duty of care from voluntary assumption of care or continuous act (which is denied), it ended upon either the deceased's exit of the unit or upon Burns' assumption of any such duty when he left the unit with the deceased. However, the jury in the appellant's case were directed that she could be found to have breached the duty by omitting to call for medical care and *"expelled him from the flat while he was in a grossly vulnerable position"*[45].

40. The true situation is that the appellant, as joint supplier of the drug, did not owe a duty of care to an adult person she had no familial or relationship of friendship with; had not assumed care or control over; had no guardianship of; no statutory or contractual duty towards; and whom she had not secluded.

41. There was also no analysis undertaken by the trial judge or the CCA of another important factor distinguishing the cases of *Lawford* and *Styman,* namely that the deceased, in this case, was voluntarily engaged in a prohibited risk taking venture. This is relevant when an examination of the content or scope of any duty is considered[46].

42. The common law in crime and particularly in criminal negligence should be coherent[47] with the civil law (for example, contracts, trusts and statutory duty) and the tort of negligence. The voluntary assumption of risk by an adult deceased, may

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[43] Judgment of Judge Woods QC declining to direct a verdict of not guilty of manslaughter, 10/08/09 p.7.
[44] SU52.45, SU58.25, Crown Prosecutor 11/08/09 T719.5-.8
[45] SU13, Written directions p.6
[46] cf. *Vairy v Wyong Shire Council* (2005) 223 CLR 422 per Gummow J at 448 [77]-[79], Hayne J at 459 [118], Callinan and Heydon JJ at 481 [216]; *Miller v Miller* (2011) 242 CLR 446 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 472-473 [70]-[74]; *CAL No 14 Pty Ltd and Another v Motor Accidents Insurance Board; CAL No 14 Pty Ltd and Another v Scott* (2009) 239 CLR 390 at 413-415 [52]-[55].

negate or confine any so-called duty arising between two persons engaged in an illegal drug supply transaction. There is no expectation between a drug supplier and drug recipient that the supplier will care for the recipient. The very nature of the transaction between them is one of lack of responsibility and lack of care. There is no such thing as the "reasonable" drug supplier, as opposed to the "reasonable doctor" or the "reasonable parent". In *Miller v Miller* (2011) 242 CLR 446, the plurality held that *"A duty of care arises from the 'relations, juxtapositions, situations or conduct or activities' in question. All aspects of the relations between the parties must be considered"*[48]. It would be incongruous to hold that when two people (the drug supplier and the recipient) are engaged in the activities of supply and possession of a prohibited substance, that one owed a duty to the other to take reasonable care to supply a substance that would not harm the person, when the very activities are prohibited in order to guard against the risk of seriously endangering health or safety[49].

43. A duty of care from one person to another who chooses to consume a substance which may seriously harm them would also be incongruous with the principle of individual autonomy. The CCA should have held that the decision of the plurality in *CAL No 14 Pty Ltd and Another v Motor Accidents Insurance Board; CAL No 14 Pty Ltd and Another v Scott* (2009) 239 CLR 390 (*CAL*) at [52]-[55] did *"require a different conclusion"* to its own (cf. CCA [112], [114]). Individual autonomy, coherence with legal norms and the difficulty in an observer assessing whether a consumer has reached the point of *"risk of serious injury"* were all relevant to the determination of whether there was a duty of care, but were not considered by the CCA. There were relevant observations made in *CAL* in relation to the observer having no means of knowing how much the drinker ingested before arrival. This Court also rejected notions of "vulnerability" relied on by the intermediate court of appeal applying to an adult man of age forty one who was likely to be conscious of his own capacity under the influence of the substance consumed and who had assured the licensee he was fine (at [33], cf. CCA at [114]). The dilemma between individual

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[47] Coherence of the law has recently been emphasised by this Court in the negligence cases of *Miller v Miller* (2011) 242 CLR 446 (eg. at 454 [15]) and *CAL No 14 Pty Ltd and Another v Motor Accidents Insurance Board; CAL No 14 Pty Ltd and Another v Scott* (2009) 239 CLR 390 at 406-410 [39]-[42], 413 [52], 415 [55].
[48] *Miller v Miller* (2011) 242 CLR 446 at 470 [64]
[49] *Gedeon v Commissioner of the New South Wales Crime Commission; Dowe v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at 142 [57].

autonomy as to the choice to leave premises and the torts of false imprisonment and battery were specifically adverted to by this Court in *CAL*, but not recognised by the CCA in this case.

44. Coherence with the common law as it applies to duties between doctors and patients should also be observed, as it would be incongruous if a higher duty were imposed on a drug supplier to her recipient. The common law there recognises the principle of individual autonomy in the context of the right to refuse treatment[50]. To detain and administer medical treatment against the will of a conscious, non-consenting adult would constitute false imprisonment and battery at common law[51]. A patient can refuse medical treatment for any reason, *"rational or irrational, or for no reason"*[52]. In this case, the deceased communicated his will that no call for an ambulance be made. It is difficult to see how a duty to call for one arose subsequent to such an expression of autonomous will.

45. Coherence with cases of engaging in recreational activities where there are obvious risks and dangers is also achieved by holding that there is no duty of care between persons such as the appellant and the deceased. Just as a ski resort has no obligation to post signs at everyplace where there is a known danger and there is an expectation that persons take reasonable care of themselves, for their own safety and in relation to a range of hazards naturally encountered in such an exercise, so too, the drug recipient by choosing to engage in the (prohibited) activity assumes the multitude of risks that arise from the activity itself. As the plurality held in *Miller v Miller*:

> *"The cases in which a court should hold that there is no duty of care may be identified by reference to what Mason J described (in Jackson v Harrison (1978) 138 CLR 438 at 465) as "the character and incidents of the enterprise and to the hazards which are necessarily inherent in its execution"*[53].

Ground 3: The Court of Criminal Appeal should have held that the directions of the trial judge as to causation were erroneous

Ground 4: The Court of Criminal Appeal should have held that causation could not be established on either limb of involuntary manslaughter

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[50] *Airedale NHS Trust v Bland* [1993] AC 789 at 857; *Rogers v Whittaker* (1992) 175 CLR 479 at 489.
[51] *Airedale NHS Trust v Bland* [1993] AC 789 at 857; *CAL No 14 Pty Ltd and Another v Motor Accidents Insurance Board; CAL No 14 Pty Ltd and Another v Scott* (2009) 239 CLR 390 at 415 [55].
[52] *Sidaway v Board of Governors of the Bethlam Royal Hospital* [1985] AC 871 per Lord Templeman at pp.904-5; *Airedale NHS Trust v Bland* [1993] AC 789 at 808F-G, 816 F-H.
[53] *Miller v Miller* (2011) 242 CLR 446 at 467 [56]

46. Complaint about the directions on causation concerns both manslaughter by unlawful and dangerous act and manslaughter by gross criminal negligence. Although causation is not necessarily the same for each there is commonality in respect of the directions given on this subject (and it is submitted, error) particularly, those concerning the making of a "rational, voluntary and informed decision to take the methadone". This aspect of the directions is discussed further below.

47. The unlawful and dangerous act was said to be the supply of methadone, simpliciter[54] and it is to this causation must apply.

48. In gross criminal negligence the breach of duty was said to be an omission to call an ambulance or to *"call an ambulance or obtain other medical assistance"* and, it was said, that the appellant *"expelled him from that flat while he was in a grossly vulnerable position"* [55].

49. In relation to unlawful and dangerous act, the direction erroneously tied causation not to "supply" but to the actual consumption of the drug, that is *"that the drug substantially contributed to"* the deceased's death[56]. This conflation erroneously made it much easier for the Crown to establish causation on this basis of manslaughter. It took out of play the true and more difficult question of whether the actus reus of supply, ie, physical provision or handing over of methadone to the deceased, was a substantial cause of his death. The true question was: was it the supply itself that caused harm and was dangerous or the subsequent use of the drugs in a dangerous form or combination and/or quantity? In *R v Dalby* (1982) 74 Cr App R 348 at 351, it was held that *"In all the reported cases, the physical act has been one which inevitably would subject the other person to the risk of some harm from the act itself. In this case, the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous"*.

50. Rather than this question, the jury were asked whether they were satisfied that the taking of the drug was a *"rational, voluntary and informed decision"* by the deceased. The decision was said to be able to be vitiated by not having been informed of *"methadone and its effects"*, some brain damage revealed by post-mortem reports,

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[54] WD pp.3-5, SU 10,18.
[55] WD pp.6-8, SU13, 18.
[56] WD p.8, SU 18.

and the possible effects of other drugs he had taken revealed by toxicology reports and expert evidence in the trial[57]. This is addressed further below.

51. As to manslaughter by gross criminal negligence, the alleged breach was said to consist in an omission to do something, namely, call an ambulance. The crime of manslaughter is, however, an offence involving a "result", namely, death. If the breach is the failure to call an ambulance then this would have to amount to the relevant cause of death. In order to achieve coherence with principles on causation in tort, it would be necessary to establish that the deceased would have been treated by an ambulance if called[58].

52. According to the evidence of Ms Malouf, and recorded conversations between the appellant and Burns, the deceased declined an offer of an ambulance made by Mr Burns. Unless the deceased is deprived altogether of his autonomy then his answer to the offer should be taken as terminating the appellant's failure to call an ambulance as a cause of death.

53. On the Crown case, as put, the duty to call an ambulance was not a continuing one, but confined only to the period until the deceased left the flat which means that causation would have to be tied to a breach occurring in that very confined time frame. This is also incongruous when one has regard to the fact that part of the breach was also said to consist in ejecting the deceased from the premises.

54. As said above the direction that causation was broken only if the deceased made a *"rational voluntary and informed decision to take the methadone"* related both to unlawful and dangerous act and gross criminal negligence. Such a finding was said to be capable of "negating" a conclusion that the "act or omission" of the appellant "substantially contributed to the death" of the deceased[59].

55. The language of "substantial contribution", comes from *Royall v R* (1990) 172 CLR 379. However, it should be noted that even on *Royall*, questions of causation are not purely objective and are not necessarily to be wholly answered by reference to notions of "substantial contribution"[60].

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[57] WD p.9, SU 19.

[58] *Rosenberg v Percival* (2001) 205 CLR 434 per Gummow J at 460 [83]; *Chappel v Hart* (1998) 195 CLR 232 per McHugh J at 246 [32], 247 [34].

[59] WD p.9, SU 19.

[60] In the judgment of Mason CJ (at 389) the "natural consequences" test was accepted as linked to the concept of foreseeability, but his Honour said that in most circumstances that phrase was apt to confuse. Brennan J adopted the "substantial contribution" test (at 398) but thought that "foresight or reasonable foreseeability"

56. When it came to the directions concerning "rational, voluntary and fully informed" decision making by the deceased, the absence of a "rational" reason and the absence of an understanding by the deceased about the effects of methadone in the context of taking Olanzapine was said to deprive him of the ability to make a "fully informed" decision "about taking methadone"[61]. This means that causation is not broken if consequences of the deceased's own actions occurred which the deceased himself did not, and apparently could not, have foreseen. The Court of Criminal Appeal intended this. According to the joint judgment it was the fact that "*the deceased* would not have anticipated the outcome" that meant that causation was not broken: CCA at [155]-[156].

57. Although the Court may have had some reservations about the decision of the House of Lords in *R v Kennedy (No.2)* [2008] 1 AC 269 (see discussion in *Burns* at [149]-[152]), nevertheless, the test adopted was said to be taken from that decision. *Kennedy* is a case of unlawful and dangerous act manslaughter and it involved administration, not supply, as the foundational alleged offence. Curiously, when it came to consideration of the ultimate question Lord Bingham dealt with it on the basis that the accused "supplied" but did not physically administer the drug: *Kennedy (No 2)* at [24]. That actually accorded with the reserved question: at [2]. The answer to the reserved question was *"in the case of a fully informed and responsible adult, never"*: at [24]. Thus the appellant, in that case, was absolved of criminal responsibility.

58. When it came to *Burns, Kennedy* was being used in a different way. The requirements of the *"fully informed"* drug taker were elevated, to include being, somehow, *"fully informed"* about the effects of drugs he, himself, had already taken. Such effects were not known by anyone (including the appellant) until the autopsy was performed and opinions expressed about the toxicology results.

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marked the limit of the consequences of conduct for which an accused person may be held criminally responsible (398-400). Deane and Dawson JJ (at 412) thought that in a case of "fright" directions were best given avoiding references to foresight but they did not exclude its relevance to questions of causation. Toohey and Gaurdon JJ (at 424) observed that "in ordinary circumstances" that it might be "easier" if the jury were asked to determine first the cause of death "rather than inquire whether an act of the applicant caused the death". Their Honours accepted that the test was an objective one (at 424-425) but did not think that reasonable proportionality of the victim's response was material on the question of a break in causation. McHugh J gave lengthy consideration to the question of causation (at 441-451). His Honour ultimately thought a test of reasonable foreseeability appropriate (at 451).

[61] WD p.9, SU 19; CCA [154]-[155].

59. It is submitted that, properly understood, *Kennedy (No.2)* points in a different direction. What lies at the heart of the decision in *Kennedy* is an affirmation of *novus actus interveniens* as a basal working principle in criminal law and what Glanville Williams in his article *Finis for Novus Actus* called "the autonomy doctrine" which *"teaches that the individual's will is the autonomous (self regulatory) prime cause of his behaviour"*[62]. This article was cited extensively, with approval, in *Kennedy (No.2)* (see particularly at [14], [17]). The same approach can be seen in the House's approval of the Court of Appeal's decision in *R v Dias* [2002] 2 Crim App R 96[63], a decision which itself was heavily based on Glanville Williams' views on the subject, namely:

> *"What a person does if he has reached adult years, is of sound mind and is not acting under mistake, intimidation or other similar pressure, is his own responsibility and is not regarded as having been caused by other people. An intervening act of this kind, therefore, breaks the causal connection that would otherwise have been perceived between previous acts and the forbidden consequence"* [64].

60. This accords with the requirement in the common law, including in the criminal law, where one person is said to have "caused" the act of another, that the first person must be shown to have a degree of control or authority over the other and to have given a command or direction to the person doing the act[65]. What is involved is closer to the idea of "capacity" than an elevated form of decision making, which can be seen as entirely inapposite when applied to the risky activity of illegal drug taking. This is particularly so when inserted into the direction is a requirement for the making of a *"rational"* decision by the deceased drug recipient. Non illegal drug takers in the community might well think that there is nothing particularly rational about the illegal possession and taking of methadone, full stop, particularly when a drug taker is already under the influence of other substances. That, however, has little to do with causation.

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[62] Williams, G, *Finis for Novus Actus* [1989] Camb L.J. 391 at 392.

[63] *Kennedy (No.2)* at [22]-[24], see *R v Dias* [2002] 2 Cr App R 96 at [8]; Williams, G *Textbook of Criminal Law* (2nd ed), p.39.

[64] As to *R v Dias,* see discussion in *Drug Suppliers as Manslaughter* [2005] Crim LR 819 by D. Ormerod and R. Fortson.

[65] *O'Sullivan v Truth and Sportsman Ltd* (1957) 96 CLR 220 at 228 per Dixon CJ, Williams, Webb and Fullager JJ; *Lovelace v DPP* [1954] 1 WLR 1468; [1954] 3 All ER 481; *Castle v Owen* (1985) 3 NSWLR 26 at 30; *Shave v Roasner* [1954] 2 QB 113; *Attorney General of Hong Kong v Tse Hung-lit* [1986] AC 876; *R v Wilhelm* (2010) 77 NSWLR 1; *CAL No 14 Pty Ltd and Another v Motor Accidents Insurance Board; CAL No 14 Pty Ltd and Another v Scott* (2009) 239 CLR 390 per Gummow , Heydon and Crennan JJ at 406 [38].

61. A similar problem arose in *Justins v R* (2010) 204 A Crim R 315, although there, in a slightly different context. In that case, again apparently based on *Kennedy (No.2)*, the trial judge erroneously equated *"capacity to commit suicide, with the ability to make an informed and independent decision to take his own life"*[66]. Johnson J considered a number of authorities concerned with the inappropriateness of the idea of a "*rational*", "*informed*" decision in refusal of treatment cases [67] (see also para [45] of these submissions above). He adopted the rationale of McDougall J in *Hunter and New England Area Health Service v A by his Tutor T* (2009) 74 NSWLR 88 as to the right of a capable adult to refuse medical treatment and his conclusion that:

10 *"...it does not matter if the decision seems to be unsupported by any discernible reason, so long as it was made voluntarily, and in the absence of any vitiating factor such as misrepresentation, by a capable adult"*[68].

62. Johnson J concluded the discussion in *Justins*:-

"A person possessing capacity may decide to commit suicide on a basis which is ill-informed or not supported by a reason, but it may be the reasoned choice of the person, which the law accepts will render the act of suicide the act of the person and not another person who provides the means of death. In my view, the last proposition reflects the appropriate test to be applied in a case such as this"[69].

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63. In this case the direction to the jury concerning *"rational, voluntary and informed decision to take the methadone"* stated the matter too highly. If the deceased voluntarily took the drugs, by his own decision, then it is submitted that this relevantly broke the chain of causation on both limbs of manslaughter. A similar approach would apply in manslaughter by gross criminal negligence to his further choice declining the offer of an ambulance from Mr Burns and act of leaving the premises without assistance.

64. There is another aspect to this subject which should be drawn out. In an "omission" case the cause of death has to be the omission. In a case in which the duty can be

30 clearly seen, and seen to involve a high level of care, then it can be readily seen how the omission is an operative cause. Thus, in a case of a parent who puts a very small

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[66] *Justins v R* (2010) 204 A Crim R 315 per Spigelman CJ at 332[91], [94] Simpson J at 359[269], Johnson J at 376-379[348]-[365].

[67] *Hunter and New England Area Health Service v A by his Tutor T* (2009) 74 NSWLR 88; *Airedale NHS Trust v Bland* [1993] AC 789; *Rogers v Whitaker* (1992) 175 CLR 479 at 487; *F v R* (1983) 33 SASR 189 at 193; see also *Rogers v Whittaker* (1992) 175 CLR 479 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ at 490.

[68] *Justins v R* (2010) 204 A Crim R 315 at [357]-[360]. In *Justins* the "decision" in question was the decision to take Nembutal, ie, to commit suicide.

child down near an obvious danger (beside a busy road for example) and then walks away, the relation between duty, breach and causation can be readily grasped. The lower a duty is articulated (and here it was stated very low (eg WD 6)) the more tenuous is the relation between any suggested breach and causation. If, for example, the element of "seclusion" required by *Taktak* was brought back as an element of the duty, then it can be seen more readily how breach and causation might in fact be established. This is because the element of seclusion and the adoption of a caring role over a period of time might more readily be seen as providing the basis for breach and causation given that an *omission* in such a situation would potentially operate, effectively, to prevent a person from obtaining treatment from others (which otherwise might occur), and hence be regarded as capable of being a significant contributing cause of death.

65. In this way it can also be seen that duty, breach and causation are all related to each other. The unacceptably low statement of the duty and the breach itself can work to undercut causation, and that is how it worked in this case.

PART VII: APPLICABLE LEGISLATION

64. *Criminal Appeal Act* 1912 (NSW), No 16: ss5, 6; *Crimes Act* 1900 (NSW), No 40: ss18, 24; *Drugs Misuse and Trafficking Act* 1985 (NSW), No 226: ss3, 5, 12-14, 19, 25. See Annexure.

PART VIII: ORDERS SOUGHT

65. The appellant seeks orders that:

(a) the appeal is allowed

(b) the orders of the Court of Criminal Appeal are set aside

(c) the appellant's conviction is quashed

(d) a verdict of acquittal is entered, or in the alternative a new trial is ordered.

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Dated: 8 March 2012

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[69] *Justins v R* (2010) 204 A Crim R 315 at 379 [365]