ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No S46 of 2012

NATALIE BURNS
Appellant

AND

THE QUEEN
Respondent

10 **APPELLANT'S REPLY**

1. The appellant certifies that this reply is in a suitable form for internet publication.

2. The issues set out in the respondent's submissions (RS [1]]-[3]) were not issues in the appellant's trial. The issues for consideration in this appeal are those in the appellant's submissions (AS [2]-[3]).

3. There was no direction at all in the trial that unlawful and dangerous act manslaughter was based on an act contrary to ss12-14 (administration or self administration of a prohibited substance) *Drug Misuse and Trafficking Act* 1985 (*DMT Act*). Administration is defined in the *DMT* Act as including ingestion or injection: s.5 (cf. RS [1]-[3]). There was no direction in the trial that the principles of complicity
20 (engaged by s19 *DMT* Act) in an act of administration, applied. The unlawful and dangerous act upon which the jury was directed was the supply simpliciter of a prohibited drug, to wit, methadone (s.25 *DMT* Act): **AB759** [162], **AB606.15-.38, 627.50-628.38.** Despite the closing address of the Crown (which was objected to), the written and oral directions that supply simpliciter constituted the unlawful and dangerous act were given without objection in the trial. In the intermediate court of appeal (CCA), the Court noted, in conclusion: *"In the present case it was accepted that the unlawful act for the purposes of the charged offence was the supply of methadone to the deceased without a medical prescription"*: *Burns v R* (2010) 205 A Crim R 240 **AB759** [162]. (Emphasis added)

30 **4.** The respondent's arguments based on assertions of the appellant's *"act of injection"* (of which there was no evidence) or on principal or derivative liability based on *"an act of injection"* by either her husband Burns or the deceased (RS [6.2], [6.12]-[6.17]) were not issues on the directions at trial in this case[1]. It is not appropriate that this Court consider for the first time on this appeal a different unlawful and dangerous act.

5. The third question relating to duty of care again introduces an issue of administration and does not reflect the directions given in the appellant's trial based as they were on a duty said to arise from a voluntary assumption of care and omission: **AB606.38-608.50**.

6. The facts stated in the appellant's submissions are accurate (cf. RS [4.1]-[4.7]). The
40 reference at RS [4.7] to a concession referred to by the CCA at [160] **AB758**, was not of the nature suggested by the respondent. It was a concession as to Count 2 of the indictment in the following terms: *"it was open to the jury to be satisfied beyond reasonable doubt that the appellant was involved in a joint criminal enterprise with Burns to supply methadone to the deceased"* **AB713[9].** This was not a concession that the appellant administered or assisted to administer methadone to the deceased or that she supplied *"by injection"* or acted in concert with Burns to do the same.

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[1] At AS footnote 19 the various positions taken by the Crown are summarized. The Crown's closing address involved an attempt to impermissibly split the 'unlawful and dangerous act' to cover both supply and administration. There was immediate complaint by defence counsel **AB555-559.**

7. There was no evidence, direct or circumstantial that the appellant either generally *"provides ...equipment for injection, prepares the syringe and assists in the administration of the drug and remains with the recipient to the point where the recipient's life is endangered"* (RS [6.39]) or that she supplied *"the apparatus for injection and most likely prepared the syringe...the appellant had remained with the deceased and was aware that he had overdosed and that the situation was dangerous"* (RS [6.47] cf. RS 4.7, **AB758 [160]**).

8. The incorrect statement of the case actually left to the jury by the trial judge continues throughout and is used as the foundation of the respondent's arguments. At RS [6.30] and [6.31] the respondent suggests that in relation to the unlawful and dangerous act: *"It may have been more accurate to have described the act as the injection of the methadone, however...the Crown case was not based on supply but on the conduct of the appellant in either injecting the deceased or assisting him to inject. In the present case, it was apparent at all stages that the Crown case was that the appellant and her husband had actually injected the deceased or assisted him to inject"* (emphasis added). The directions given by the trial judge had been circulated to the parties and were given without objection by the prosecutor either prior to or in the course of the summing up: **AB593-600.** The directions were based on the act of supply simpliciter (**AB606.15-.38627.50-628.38**). It is also not correct to describe manslaughter by gross criminal negligence as an alternative case only arising if the jury were not satisfied that injection had occurred (cf. RS [6.31], see directions at **AB605**).

9. The time frame during which the deceased was in the apartment is now put differently than at trial (RS [4.4]-[4.5]) in order to sustain an assertion that the appellant was with the deceased for fifteen minutes before Ms Malouf arrived, apparently to allow time for the further suggestion (again without foundation) that the appellant not only supplied but *"prepared the syringe, injected him or assisted him to inject and cleared away all trace of what had happened so that when Ms Malouf arrived 15 minutes later she saw no signs that the deceased had injected"* (RS [4.5], [6.60]). However, the respondent has not accounted for the *"10 or 15 minute walk"* from the station to the Burns' home that must be included in the timeframe (**AB277, AB539.45**). At trial the prosecutor stated in closing that *"he was there in that apartment by about 5 o'clock"* and *"...by the time Malouf, on her account, got to the apartment at about 5 o'clock, David Hay was out of it"*: **AB539.45-.48.** On the evidence at trial, the deceased and Ms Malouf, who arrived very shortly after him were in the apartment for only about 10-15 minutes in total **AB539.45-AB540.26**, and the appellant was in the same room for probably less than five minutes **AB112.38**.

10. Ms Malouf's evidence, relied on by the respondent at trial, was that the deceased was *"out of it"* or *"on the nod"* at the time that Burns suggested an ambulance be called but they got him up and *"he just walked with us"* and said *"I'm alright"*: **AB646-7,653-5.** This is the point of time at which the appellant came out of her bedroom and saw him. She also described him as *"out of it"* or *"nodding off"*: **AB398.** The prosecutor described this condition in his closing address as *"too out of it or on the nod, however you like to describe it"*: **AB538.** Crown assertions as to *"unconsciousness or semi-consciousness"* or *"lapsing into unconsciousness"* (RS [4.3], [6.58]) relate to this evidence. It was not the Crown case at trial that the deceased consumed methadone after being observed to be *"on the nod"* (cf. RS [4.2]-[4.3]). The respondent does not assert that the methadone was consumed after Ms Malouf's arrival (RS [4.5]).

Duty of Care

11. Implicit in the respondent's submissions is a concession that there was no voluntary assumption of care by the appellant of the deceased (*"this was not a case of voluntary assumption of care, quite the contrary, the appellant had refused any responsibility..."* RS [6.50]), although that is the basis upon which the jury were directed they could find there was a duty of care (**AB607, AB628-630** cf. RS [6.50]). This is an error of law and the CCA should have so held.

12. The respondent contends, quite apart from the directions in this trial, that a duty of care arises where a person has *"created a dangerous situation"* and for a drug supplier *"arises only where the supplier remains with the recipient and becomes aware that the recipient has overdosed and is in danger"* (RS [6.46]). This is not reflected in the *Crimes Act* or the *DMT Act*, is not the statement of principle in *R v Evans* [2009] 1 WLR 1999, is not found in *Stephen's Digest*, and was not the direction given in the appellant's trial (see also AS [35]-[38]). It should be rejected by this Court. Further, should it be necessary to determine the question, this Court should hold that *Evans* and *R v Miller* [1983] 2 AC 161 do not reflect the common law of Australia and did not reflect the law to be applied in the appellant's case.

13. The respondent dismisses as a *"grammatical nuance"* the difference between actual and possible endangerment of life (*cf. Evans* at [31]). However the importance of the distinction is borne out by the fact that the respondent repeatedly casts the case at actual endangerment, that is, higher than the directions actually given in the appellant's trial: eg RS [6.39], [6.45], [6.67], [6.47], [6.58] eg. *"the recipient's life is endangered"; "life was threatened"; "the life-threatening situation"*. These statements are different to the lower threshold direction in the appellant's trial *"where his or her life may be endangered"*. The direction given encompasses every case where a person takes illicit drugs. Secondly, the additional words in the direction allowed an assumption of care by the appellant *"where such recipient may be or become seriously affected by drugs"*. This direction did not limit the said duty to any possible danger created by the appellant's supply of a drug, but encompassed a duty arising from the deceased's action consuming methadone and additionally his own prior or subsequent consumption of *other* drugs. Such a direction was contrary to law and the CCA should have so held.

14. This Court should also reject the submission that any duty on the appellant could be cast as low as a *"duty to render assistance"*: RS [6.52]. On this rendition of the case, the appellant is said to be guilty of manslaughter by even failing to *"keep the deceased talking"* or a failure to prevent the deceased *"from being 'on the nod'"* (RS [6.52]).

15. The duty of care in seclusion cases is not the same as the duty of care proposed for a category of creation of a dangerous situation for which the respondent contends, said to stem from *Stephen's Digest* (cf. RS [6.36]-[6.37], [6.44]). The duty Stephen attaches to doing dangerous acts cited by the respondent is a duty to take precautions in doing the act (here 'supply'). The duty attaching to voluntary assumption of care by seclusion (or taking charge or control over a person) is a duty to provide necessaries if the person is unable to withdraw himself from control owing to age, helplessness, health, insanity. The law as stated in *R v Taktak* (1988) 14 NSWLR 226 at 245E, including as it does the necessity for an element of seclusion so as to prevent others from rendering aid, should be affirmed as the law in Australia on voluntary assumption of care of an adult acquaintance or stranger rendering it an omission to obtain medical care. This coheres with the development of the common law of duties of care and their scope and principles of individual autonomy in Australia (See AS [42]-[45]).

16. The only voluntary assumption of care and seclusion that occurred in this case was when Burns willingly took the deceased outside and said he would look after him: **AB112, 119, 137** (RS [6.58]). After his closing address, the prosecutor said: *"the Crown does not claim that the seclusion by Brian Burns of the deceased was in any way the responsibility of this accused"*: **AB583.15.** This left a matter of minutes for any said duty on the appellant to arise and be breached by omission.

Causation

17. It is no answer to the appellant's submissions on causation on either limb of manslaughter, to now invoke an entirely different legal concept (not relied on at trial or appeal) to establish liability, namely the law of complicity (RS [6.7]) and specifically reliance on a joint criminal enterprise between the appellant and the deceased, to commit manslaughter by an unlawful and dangerous act not charged, that act being the *"act of administration"* (RS [6.9]), *"act of injection"* (RS [6.17]), *"act as the injection of methadone"*, *"conduct of the appellant and her husband in either injecting the deceased or assisting him to inject"* RS [6.30]-[6.31]. There was no evidence of any agreement between the appellant and the deceased (or the appellant and Burns) as to any act of administration. The appellant's conviction cannot be sustained on this basis[2]. The respondent states: *"There was no suggestion that mere supply would have been sufficient"* (RS [6.31]). This amounts to a concession that the appellant's conviction is contrary to law. This is not a case like *Kennedy (No 2)* where there was a failure to particularise the unlawful act said to cause death (cf RS [6.2]).

18. Even if administration could be relied on, the reasoning of the respondent, based on the English decision of *Environmental Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 *"Empress Car"* was expressly not followed by the House of Lords in relation to *"the wholly different context of causing a noxious thing to be administered to or taken by another person"* in *Kennedy (No 2)* at [16] (see also comment on the similar analysis in *R v Finlay* [2003] EWCA Crim 3868 as "wrong": *Kennedy (No 2)* at [16]). Such reasoning is incongruous with the decisions of this Court in *CAL No 14 and Another v Motor Accidents Insurance Board; CAL No 14 Pty Ltd and Another v Scott* (2009) 239 CLR 390 *(CAL)* at [52]-[55] and *O'Sullivan v Truth and Sportsman Ltd* (1957) 96 CLR 220[3]. *MacAngus and Anor v HM Advocate* [2009] HCJAC, 2009 SLT 137 was determined on a pre-trial application amounting to a demurrer and involved "reckless manslaughter" and a stricter test on causation and does not reflect the common law in Australia.

19. The respondent does not address the appellant's contention (AS [56], [59]-[63]) that there was no sound basis for the directions or findings of the CCA (**AB637.18-638.12, AB610, AB755.45-757.43** at [154]-[156]), that in order to constitute a novus actus interviens the deceased's autonomous actions had to be *"rational"*.

20. The finding that the deceased needed to be "fully informed", said by the trial judge to involve knowing about methadone and its effects (**AB637.20-638.10**)[4] and by the

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[2] The respondent's submissions that there is a difference in the law of the UK as it pertains to complicity and principals and that in Australia (at RS [6.12]-[6.14] is not correct. There is a doctrinal difference between the English and Australian cases, but it is unlikely to have practical differences. *R v Gnango* [2011] UKSC 59 at [13], [42] [43] [45] [62] [105] [127] [128].

[3] See also AS [60] (including footnote [65]), *Smith (Department of Agriculture) v Kathleen Day* [2003] NSWCCA 159 at [20]-[31] and D Ormerod & R Forston 'Drug Suppliers as Manslaughterers (Again).' [2005] Crim L R 819 at 829.

[4] See also the Judgment on Application to direct the jury to acquit where *"informed"* is said to be *"acting ... advisedly as to the risks of the drug"* (emphasis added) (**AB 524.25**).

CCA to involve the deceased's appreciation of the outcome of the combination of the methadone with the Olanzapine already in his system (**AB757.20** [155]) were erroneous and too highly stated in the appellant's case: RS[6.19]. An examination of the text heavily relied upon by the respondent[5], supports a volitional novus actus interveniens as sufficient to break causation and makes no reference to *"informed"* (at p.330-335, cf. RS [6.4]). That author's views accord with those of Professor Williams (AS [59]), namely that only physical compulsion, duress, mistake or legal insanity or incapacity operate to negate such freedom of choice (at p.330-332, see also *R v Dias* [2002] 2 Crim App R 96; *O'Sullivan v Truth and Sportsman* (1957) 96 CLR 220 at 228 and AS[60]). The appellant submits that there is no requirement for "informed" unless "informed" in *Kennedy (No 2)* is interpreted as meaning not acting under mistake as to the general nature of the substance itself, eg. "heroin", or in this case "methadone". The respondent's submissions adopt this interpretation (RS[6.19]). There was no such mistake, intimidation or duress operating on the deceased in this case. Nor was it suggested that the deceased was legally insane or incapacitated.

21. The case against the appellant was one of *"Grossly Negligent Omission"* (**AB 607.28**), that is the failure to do something, not the doing of an act. The jury were directed *"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"* (**AB628,** emphasis added). This court should reject suggestions the case on this limb of manslaughter was one of a negligent continuous act (supply or administration or creation of danger, also stated as the creation of life-threatening danger) (cf.RS[6.36],[6.37],[6.42],[6.45],[6.46], [6.47], [6.49], [6.52]) when the omission was particularised as *"failure to call an ambulance or obtain other medical assistance..."*(**AB607.32, AB602.48**). As Professor Smith observed in his paper: *"When we have a case which plainly consists in liability for an omission, it is at least unhelpful and possibly dangerous to try to disguise the fact and to describe the occurrence of an act"*[6]. The "creation of danger" category for which the respondent contends (RS [6.38]) amounts to a restatement of a category of murder, namely reckless indifference to human life.

22. With respect to manslaughter by unlawful and dangerous act, the wilful act of the deceased, an adult with capacity, in consuming the methadone was an intervening act that broke the chain of causation. As for manslaughter by criminal negligence, aside from the asserted absence of a duty, the actions of the deceased in refusing an offer to call an ambulance and leaving the apartment, together with the actions of Burns in accompanying him, renders any omission on the part of the appellant incapable of amounting to a relevant cause of death.[7]

Dated: 17 April 2012

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[5] Kadish "Complicity, Cause and Blame" (1985) 73 California LR 323 at 334
[6] Professor Smith: Liability for Omissions in the Criminal Law (1984) 4 Legal Studies 88 at 91
[7] *R v Taktak* (1988) 14 NSWLR 226 at 242; *People v Beardsley* 113 NW 1128 (1907) at 1129-1130.