IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M102 of 2013

BETWEEN:

SAMUEL JAMES

Appellant

- and -

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION ON THE INTERNET

1.1 The Respondent certifies that this submission is in a form suitable for publication on the internet.

PART II: STATEMENT OF THE ISSUES PRESENTED IN THIS APPEAL

2.1 Special leave to appeal was granted by this Court on 16 August 2013 on the following two related grounds:

A. The Court of Appeal erred in holding that, in trials other than for the offence of murder, a trial judge's duty to leave to a jury for its consideration lesser alternative verdicts – which are realistically, or fairly and practically open on the evidence – does not transcend the forensic decisions of trial counsel.

B. The Court of Appeal erred in holding that the trial judge was not bound to leave to the jury for its consideration the lesser alternatives of causing injury intentionally (as an alternative to causing serious injury intentionally), and causing injury recklessly (as an alternative to causing serious injury recklessly).

2.2 As to **ground A**, the Respondent submits that there is well-settled authority which establishes that forensic decisions of trial counsel are relevant (but not decisive) to the question of whether an accused has suffered a miscarriage of justice in circumstances where a lesser alternative offence is not left in a non-homicide case.

2.3 As to the purported tension between the approach adopted in Victoria and other states on this topic, the Respondent submits that all appellate courts insist that an alternative offence is only to be left where it is in the "interests of justice" to do so.

2.4 A fundamental precept of any criminal trial is that a jury will follow instructions from a trial judge. Apart from an important exception recognised in relation to homicide trials (a trial judge is bound to leave the alternative verdict of manslaughter where it is open on the evidence irrespective of the wishes of the parties), there is no compelling reason to permit any further derogation.

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2.5 Furthermore, whilst it is correct to observe that the right to a fair trial involves an obligation on the part of a trial judge to leave any defence fairly raised on the evidence irrespective of the wishes of the parties, that principle has hitherto not been extended to include a blanket obligation upon a trial judge to leave all alternative offences to a jury as possible verdicts.

2.6 Thus, in a trial involving the offence of causing serious injury intentionally, a trial judge is not bound to leave the alternative offence of causing injury intentionally as a possible verdict unless the interests of justice dictate such a course – for example, where there is a "viable" case for the alternative offence on the evidence and either the accused requests it to be left, or the jury makes such an inquiry, or where the issues at trial plainly raise it. And in circumstances where such an alternative is not left for consideration, there is no reason to speculate that a jury may fail to heed judicial instruction and not return a true verdict.

2.7 As to **ground B**, the Respondent submits that the Appellant has not suffered a miscarriage of justice as there was no "viable" case for the lesser alternative offences to the charged counts on the evidence led at trial.

2.8 In short, counsel in not pursuing a defence that the Appellant struck the victim only with an intention to cause injury *simplicter*, did not make a "forensic decision" in the true sense because counsel accepted (and properly so) that there was no evidential foundation (or a very tenuous one at best) for such a defence in light of the weapon used, the proximity of the two men involved and the nature of the injuries inflicted. Alternatively, on any view the evidence supporting the alternative verdicts was weak; if it was indeed open, counsel made a tactical decision not to expose the Appellant to the risk of being convicted of an alternative lesser offence (such a decision made as an incident of an accused's right to a fair trial).

2.9 Finally, the Respondent notes that the common law requirement in Victoria has now been modified by section 16(a) of the *Juries Directions Act 2013* which provides that the common law rule requiring a trial judge to direct the jury about alternative offences open on the evidence but which have not been raised by the parties is abolished.

PART III: NOTICE UNDER SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3.1 The Respondent certifies that the question of whether any notice should be given under section 78B of the *Judiciary Act 1903 (Cth)* has been considered and it has been determined that such notice is not thought to be necessary.

PART IV: CONTESTED FACTS

4.1 The Respondent does not contest any of the relevant facts set out in the Appellant's Facts (at Part V) and the Appellant's Chronology.

4.2 In addition, the Respondent refers to the summary of evidence recounted by Williams J in her charge to the jury at 634 – 678 of the Trial Transcript and at [5] – [15] in her Reasons for Sentence.

Part V: STATEMENT REGARDING APPLICABLE PROVISIONS

5.1 The Respondent accepts the Appellant's Relevant Statutes (at Part VII).

Part VI: STATEMENT OF ARGUMENT IN RESPONSE

The presentment charges

6.1 The Appellant was charged on presentment with the following counts:

Count 1 The Director of Public Prosecutions presents that **SAMUEL JAMES** at Maribyrnong in the said State on the 26th day of April 2007 without lawful excuse intentionally caused serious injury to KHADR SLEIMAN.

Count 2 AND the Director of Public Prosecutions further presents that **SAMUEL JAMES** at Maribyrnong in the said State on the 26th day of April 2007 without lawful excuse recklessly caused serious injury to KHADR SLEIMAN.

The governing law

6.2 Count 1 was laid pursuant to section 16 of the *Crimes Act 1958* which reads:[1]

A person who, without lawful excuse, intentionally causes serious injury to another person is guilty of an indictable offence.
Penalty: Level 3 imprisonment (20 years maximum).

And count 2 was laid pursuant to section 17 of the *Crimes Act 1958* which reads:

A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.
Penalty: Level 4 imprisonment (15 years maximum).

6.3 The terms "injury" and "serious injury" are defined in section 15 of the *Crimes Act 1958* as follows:

"injury" includes unconsciousness, hysteria, pain and any substantial impairment of bodily function;

"serious injury" includes a combination of injuries.

6.4 In order to make out a charge of causing serious injury intentionally (count 1), the prosecution must prove that an offender did an act with an intention to cause serious injury to the victim; it is not sufficient that an offender did an act that in fact caused serious injury.[2] Likewise, it is not sufficient for an offender to have intended only to cause injury in order to sustain a conviction (however a conviction for intentionally causing injury would follow where that offence is left to the jury).[3] Importantly, the nature of the offender's acts may provide cogent and probative evidence of the requisite intention.[4]

6.5 It is for the jury to determine, as a question of fact, whether the victim's injuries are sufficient to qualify as "serious". However, a jury is not restricted to considering physical injuries; it may also include, for example, pain. For example, in ***R v Welsh & Flynn***,[5] the Victorian Court of Criminal Appeal held that where a victim had suffered "cuts, a swollen inner lip, bruising of both eyes, bruising of the left forearm and ... a broken upper left tooth" that was sufficient to constitute a serious injury. And in ***R v Ferrari***,[6] the Victorian Court of Appeal held that a jury may properly find that to punch a person in the face "causing two

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[1] See Version 191 as at 23 April 2007
[2] See *R v Wilson & Jenkins* [1984] AC 242; *Maxwell v R* [1988] 1 WLR 1265; *R v Westaway* (1991) 52 A Crim R 336; *R v Liewes*, unreported, Vic CA, 10/4/1997; *LLW v R* [2012] VSCA 54
[3] See *DPP v Fevaleaki* [2006] VSCA 212
[4] See *R v McKnoulty* (1995) 77 A Crim R 333
[5] Unreported, Vic CCA, 16/10/1987
[6] [2002] VSCA 186

significant black eyes to the victim, together with grazes around the top of the head and face" constitutes the infliction of serious injury.

6.6 Importantly, "serious injury" as defined in the Act need not be permanent, life-threatening or catastrophic;[7] in other words, the term "serious injury" is not to be equated with "really serious injury" (which is required for murder).[8] That there is a low threshold for proof of "serious injury" has been recently recognised by the Victorian Parliament in amending the definition of "serious injury" for criminal offences committed after 1 July 2013.[9]

10 ***Brief history of proceedings***

6.7 On 29 August 2011 the Appellant was arraigned in the Supreme Court and entered a plea of "Not Guilty" to both counts. A jury was empanelled and the trial proceeded before Williams J. On 8 September 2011 the jury returned verdict of guilty to count 1; as a consequence, no verdict was taken on count 2 as this was an alternative count.

6.8 On 22 November 2011 the Appellant was sentenced to 8 years 6 months imprisonment with a non-parole period of 6 years 6 months imprisonment fixed.[10]

20 6.9 On 19 March 2013 the Court of Appeal (Victoria) dismissed, by majority, an appeal against conviction.[11]

Issues at trial

6.10 On 26 April 2007 the Appellant struck the victim with the vehicle he was driving. The prosecution case was that the Appellant struck the victim with the intention of causing him serious injury, or in the alternative, he was reckless as to causing the victim serious injury.[12] The defence case was that the Appellant did not intend to cause serious injury by striking him with his vehicle; alternatively, the Appellant acted in self-defence because he was
30 fearful that the victim wanted to stab him with a knife he was carrying. Importantly, the defence case involved a concession that the victim had suffered serious injuries and that the Appellant had caused those injuries.[13]

6.11 As to the primary defence at trial, the issue in controversy as to intention was not as to the severity of the injury intended, but rather whether the Appellant intended to cause any injury at all – in his record of interview, the Appellant claimed that he had been taking evasive action and was not even aware of making contact with the victim. In short, the Appellant claimed that any contact was not deliberate but rather accidental.[14]

40 6.12 The Respondent takes issue with the Appellant's argument at paras 6.3 – 6.7 of the Amended Submissions as the exchange cited in support must be read in its full context:[15]

HER HONOUR: I just want to clarify what the issues are....
...

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[7] See *R v Cogley* [1989] VR 799; *R v Ferrari* [2002] VSCA 186
[8] See *R v Welsh & Flynn*, unreported, Vic CCA, 16/10/1987
[9] See section 15 of the *Crimes Amendment (Gross Violence Offences) Act 2013* – **serious injury** means – (a) an injury ... that – (i) endangers life; or (ii) is substantial and protracted ...
[10] See *R v James* [2011] VSC 596
[11] See *James v R* [2013] VSCA 55
[12] See *James v R* [2013] VSCA 55, at [25], [124]
[13] See *James v R* [2013] VSCA 55, at [27], [37], [38], [39], [50], [123], [125], [151]
[14] See Trial Transcript, at 490-493; *James v R* [2013] VSCA 55, at [44], [46], [47], [48], [51], [52]
[15] See Trial Transcript, at 57

MR SHEALES: The two issues are intent, in that the jury will need to be satisfied he had an intention in relation to his actions, and obviously the intention to cause serious injury, but also they will then need, if they get to that stage, which is obviously the first step, and if they didn't get to that stage, the verdicts would be not guilty. They will need to be satisfied beyond reasonable doubt there was no lawful excuse in relation to those actions, if they're satisfied that the requisite intent was formed to do the actions and to cause a serious injury.

Thus, in his opening response, counsel for the Appellant identified the two issues as an intention in relation to driving his vehicle into the victim and self-defence.

6.13 Furthermore, in his closing address, counsel for the Appellant stated:[16]

It's common sense and beyond argument that the car struck Sleiman in a meaningful way. But it doesn't know James knew that. He's hitting the kerbs. He's driving through hedges. He's got - he's going backwards and forwards. It does not follow at all that he knew he had struck him. This all took place in a matter of seconds.

...

And what he maintains, he says, "I tried to avoid him". Well, that would be human nature. He says he didn't know he was injured. There is no evidence at all, and it's not advanced other than by the complete bootstraps argument, that he did know he was injured. None at all.... Because what he says is, "I didn't know he was injured". He says, "This is all news to me".

...

So it's central because "intention" is a word which will crop up a number of times in Her Honour's charge to you and, firstly, do not confuse the intention to drive the car the way that he did, i.e. putting it in reverse, putting it back in drive.... The swinging on the steering wheel, whatever he was doing, and eventually driving out over and through the hedge, they are intended acts. So don't get confused about this with intended acts, i.e. moving my hands in this manner and moving my legs in this manner to propel the car in the way in which it was driven, with an intention to strike him or an intention to cause any form of jury. Don't confuse those things. They're different intentions.

...

Now, here do not confuse an intention to drive the car in a manner to try and remove himself from the danger and get away with an intention to cause injury of any description without lawful excuse.

6.14 In response to defence counsel's closing address, the following exchanges occurred:[17]

MR SHEALES: ... It is the Crown [which] must prove beyond reasonable doubt it was deliberate.
HER HONOUR: What was deliberate?
MR SHEALES: The striking of him with the car.
HER HONOUR: Yes, that's right, that he hit him with the car deliberately and not accidentally and it's that hitting that caused the injury and then there's a question of, well, with what intent did he deliberately hit him? Did he have an intent that was to cause him serious injury or did he have an intent that was to hit him deliberately knowing that it was probable that that would cause him serious injury? They're the next steps.
MR SHEALES: And then the last step is ...
HER HONOUR: Yes.
MR SHEALES: ... without lawful excuse.

...

MR SHEALES: ... but my case is he is not aware of him striking him. That's my case. Now, ... I'm just saying my case is that he self-evidently, he did strike him, but it is a circumstance where what he says in the interview is that he's not aware he struck him ...

6.15 Further, the following exchange occurred on the topic of "intention":[18]

MR SHEALES: In fact, three, Your Honour, I distinguished; the intention to drive, the intention to strike and the intending to cause serious injury at the time of striking.
HER HONOUR: And which do you say was unintentional?
MR SHEALES: We say the only intended one was the first one of those three.
HER HONOUR: Didn't intend to hit, it must have been an accident - it wasn't deliberate.
MR SHEALES: Yes.
HER HONOUR: It was deliberate as opposed to accidental.

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[16] See Trial Transcript, at 465, 467, 470, 471
[17] See Trial Transcript, at 483-484
[18] See Trial Transcript, at 488

MR SHEALES: Yes.

Charge to jury

6.16 In her charge, Williams J gave the following direction to the jury before they retired:[19]

> What is in dispute in this case in relation to the principal charge of intentionally causing serious injury is Mr James' state of mind; that's the issue there. The prosecution, as I told, must prove beyond reasonable doubt that, at the time Mr James did the acts that you find caused Mr Sleiman's injury, he intended to seriously injure Mr Sleiman. So this element will not be satisfied if he only intended to injure Mr Sleiman, but happened to seriously injure him. He has to have intended to seriously injure him.

6.17 After the jury had retired to consider their verdict, they returned with three questions; the third question related to the difference between the elements "intentionally" and "recklessly" (third element to be proved for each count).

6.18 In discussing the above jury questions, counsel for the Appellant again expressed the "live" issue in the trial as follows:[20]

> The issue is not did he intend to drive his car, did he intend to drive his car into Mr Sleiman.

6.19 That the issue at trial was <u>not</u> whether the relevant intention was one of causing injury or serious injury is confirmed by the following exchanges:[21]

> HER HONOUR: What does that mean? "Intention to propel the vehicle as he did", that means drive as he did, drive forwards as he did, at the speed he did, in the direction he did.
> MR SHEALES: Yes. That is different to the intention which needs to be inferred that he did those acts with the intention of striking Mr Sleiman.
> HER HONOUR: No, not with the intention of striking, with the intention of causing him really serious injury.
> MR SHEALES: <u>Yes, but it must follow in the context of this case that he intended to strike him, in the context of this case, and he had when he intended to strike him the intention to cause serious injury.</u>
> HER HONOUR: Yes.
> MR SHEALES: Yes. <u>That's the three aspects.</u> [emphasis added]
> ...
> HER HONOUR: It's the act of driving in the circumstances that causes the injury, isn't it? It's the driving, it's the driving he does, that causes the injury because driving as he does, he hits Mr Sleiman and there are two things; he can either intend, if you like, to hit him and cause him really serious injury, which is the principal charge, that's what is said the jury should infer, that he's got a man in front of him and he intentionally drives the car forward in those circumstances. Well, the prosecution says he's got to have intended to cause him really serious injury.
> MR SHEALES: I agree with that.

6.20 After re-direction, the topic of <u>alternative</u> verdicts (to counts 1 and 2) was raised for the first time by the prosecutor. The following exchange occurred between the parties:[22]

> MR HORGAN: Your Honour, the other thing is, because there has now been a further direction on this particular point, and we have now spoken about - Your Honour's taken the jury directly to foreseeing the probability of serious injury and intentionally causing serious injury, it's a bit late in the day, but of course there is the alternative that the jury is always capable of finding in charges of this sort, of foreseeing, intending injury as an alternative to intending serious injury.
> HER HONOUR: Oh, I don't think so, Mr Horgan. Not realistically in this case. Look at his ankle. He had bones sticking out of his ankle. I don't think anybody is going to say that's not a serious injury.
> MR HORGAN: No, no, I don't mean that, Your Honour, but as we have been speaking of <u>the two intentions</u>, the first intention is to cause the act, the second intention is to cause the serious injury. Your Honour has highlighted that he must intend to cause the serious injury. If they thought he was intending to cause injury, but

[19] See Trial Transcript, at 697
[20] See Trial Transcript, at 707
[21] See Trial Transcript, at 706, 708-709
[22] See Trial Transcript, at 721-722

didn't think he was intending to cause serious injury ... [emphasis added]
HER HONOUR: I understand your point, but I don't - it's not been put ...
MR HORGAN: The consequence.
HER HONOUR: It's not been put, it would be adding another offence - the jury has been told that it's not enough for the offence with which he's been charged to have that intent.
MR HORGAN: It's just that when, yes, I know, the only reason I raise it now is listening to Your Honour going through in more detail the elements of the crime, I query whether it's not appropriate to say, well, of course if you weren't satisfied of that element you would return a verdict of intentionally causing injury.
HER HONOUR: Well, I don't think Mr Sheales will support that.
MR HORGAN: I am sure he won't.
HER HONOUR: At that stage and I don't think that the case hasn't been ...
MR HORGAN: And I don't either.
HER HONOUR: I am sorry, I didn't hear that but anyway it doesn't ...
MR HORGAN: No, I said I'm sure he won't support it.
HER HONOUR: The case hasn't been framed in that way, I think to introduce that at this stage would deprive the accused man of the possibility of an acquittal on that basis.
MR HORGAN: I say no more.
MR SHEALES: I agree that the "likely" ought be "probable", I know Your Honour was reading a set "tome(?)", so, but Mr Horgan did disavow those alternatives last week at the mention, last week at the mention specifically disavowed them.

6.21 The prosecutor's statement that "the jury *is always* capable of finding in charges of this sort, of foreseeing, intending injury as an alternative to intending serious injury" indicates that he was doing no more than recognising that these lesser alternatives are at least theoretically available in all "serious injury" cases. The prosecutor had also earlier indicated (immediately following the closing address of defence counsel) that he had been taken by surprise as to the parameters of the defence case – the prosecutor had, until that moment, understood intent was <u>not</u> in issue at all and that the issue was confined to self-defence.[23]

6.22 Accordingly, the prosecutor's statement did not amount to, or approach, a recognition that the lesser alternatives were realistically or practically raised in the circumstances of this case or that the interests of justice demanded they be left. Thus, Whelan JA was correct to observe that "... *the issue was raised somewhat diffidently by the prosecutor...*".[24]

6.23 The Appellant also relies upon the prosecutor's statement that "*as we have been speaking of the two intentions the first intention is to cause the act, the second intention is to cause the serious injury*" [see para 6.20 above] in support of his argument. However, defence counsel had loosely defined three "intentions" in an earlier exchange with the trial judge [see para 6. 19 above], namely:

- first, whether the Appellant intended to drive and control the vehicle in the manner in which he did – this was said to be not in issue – the case for Appellant was that he intentionally drove the car back and forth and out of the car park in an endeavour to flee from Sleiman [strictly speaking this was not intention but rather voluntariness];
- second, whether the Appellant intended to strike Sleiman with the vehicle – this was described by the counsel for the Appellant as <u>the</u> issue in the trial; and
- third, whether the Appellant, when he struck Sleiman, did so with the intention of causing serious injury (or being aware that serious injury will probably follow) – defence counsel conceded that if the Appellant did intend to strike Sleiman with the car (i.e. the second intention) then it followed in the circumstances of the case that he did so with an intention to cause serious injury (or knowing that serious injury would probably result).

[23] See Trial Transcript, at 488
[24] See *James v R* [2013] VSCA 55, at [66]

6.24 In these circumstances, the prosecutor's reference to the "two intentions" was not a recognition that if the Appellant deliberately (or, in other words, intentionally) struck the victim, it remained realistically open that he acted with something less than an intention to seriously injure (or foresight of that probability).

Judgment of Court of Appeal

6.25 The appeal against conviction in the Court of Appeal (Victoria) involved three grounds;[25] however, this appeal is now only concerned with ground 1 which was framed as:

> A substantial miscarriage of justice was occasioned by the failure to leave to the jury for their consideration the alternatives of:
>
> (a) causing injury intentionally (alternative to causing serious injury intentionally); and
> (b) causing injury recklessly (alternative to causing serious injury recklessly).

6.26 Whelan JA dismissed the appeal; in relation to ground 1, his Honour held that the Appellant had not suffered a miscarriage of justice because it was accepted at trial that once the prosecution proved that the Appellant had hit the victim deliberately it followed that the act was done with the intention of causing serious injury.[26] In short, the lesser alternatives were never perceived by any party, or the trial judge, as being realistically open.[27]

6.27 After reviewing the authorities, Whelan JA stated the relevant principle as follows:[28]

> In Victoria (in cases other than murder at least) the test to be applied in determining whether lesser alternatives are to be left is what justice requires in the particular circumstances of the case. In that context the position taken by defence counsel at trial may be a significant factor. This has been the accepted situation in Victoria for some years ...

6.28 After reviewing the evidence, Whelan JA concluded that there was "little evidence which raised the lesser alternatives as a real and not remote or artificial possibility". Furthermore, his Honour held that the failure by counsel for the Appellant to raise the lesser alternatives went beyond "calculated abstention"; in short, the decision was an acceptance of the "non-viability" of the lesser alternatives as possible verdicts.[29]

6.29 Maxwell P agreed with Whelan JA that the appeal should be dismissed; his Honour concluded that there was no "real" issue in the trial as to whether the Appellant had committed a lesser offence.[30] Further, in dismissing the appeal, Maxwell P specifically rejected the view expressed by Priest JA that the right to a fair trial meant that no conduct on the part of defence counsel could deny the accused the possibility of conviction for a lesser alternative offence where that offence is a realistic possibility on the evidence.[31]

6.30 Priest JA dissented; his Honour held that the Appellant had suffered a substantial miscarriage of justice by virtue of the trial judge failing to leave to the jury the alternative verdicts of causing injury intentionally (in respect of count 1) and causing injury recklessly

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[25] Ground 2 was a complaint on the issue of 'consciousness of guilt' evidence and ground 3 was a complaint on the issue of 'bad character' evidence
[26] See *James v R* [2013] VSCA 55, at [59], [62], [69], [82]
[27] See *James v R* [2013] VSCA 55, at [63], [66], [68], [69]
[28] See *James v R* [2013] VSCA 55, at [81]
[29] See *James v R* [2013] VSCA 55, at [82], [83]
[30] See *James v R* [2013] VSCA 55, at [14]-[19]
[31] See *James v R* [2013] VSCA 55, at [3], [13]

(in respect of count 2). In short, there was a "live" issue in the trial as to whether the Appellant intended to cause serious injury or rather mere injury.[32]

6.31 Importantly, Priest JA held that a miscarriage of justice arose notwithstanding the deliberate conduct of counsel for the Appellant not to seek to have the alternative offences left for the jury's consideration.[33] His Honour stated the relevant principle in the following manner:[34]

> The principle that can be drawn from *Pemble* and the cases following it is, in my opinion, that notwithstanding the forensic decisions and tactics of defence counsel, and notwithstanding that it may be inconsistent with the accused's case at trial, if on the evidence a defence is properly open (such defence being either a pathway to conviction for a lesser offence or for acquittal), the trial judge is bound to leave it to the jury.

Alternative verdicts in Victoria

6.32 The *Criminal Procedure Act 2009* ("CPA") regulates criminal trial procedure in Victoria. Section 239 of the Act provides for alternative verdicts on charges other than treason or murder as follows:[35]

> (1) On a trial on indictment for an offence other than treason or murder, if the jury finds the accused not guilty of the offence charged but the allegations in the indictment amount to or include, whether expressly or impliedly, an allegation of another offence that is within the jurisdiction of the court, the jury may find the accused guilty of that other offence.
>
> (2) For the purposes of subsection (1), an allegation of an offence includes an allegation of an attempt to commit the offence.

And section 240 of the CPA makes provision for a judge to order that guilt in respect of alternative offences is not to be determined at trial; that section reads as follows:[36]

> Despite section 421(1) of the **Crimes Act 1958** and section 239, if the trial judge considers that it is in the interests of justice to do so, the judge may order that the guilt of the accused in respect of all or any of the other offences of which the accused may be found guilty is not to be determined at the trial.

6.33 For the purposes of section 239 of the CPA, the Respondent accepts that the offence of causing injury intentionally is an alternative offence to causing serious injury intentionally (and causing injury recklessly is an alternative offence to causing serious injury recklessly)[37] – so much was established by the Victoria Court of Appeal's decision in ***R v Westaway***.[38]

6.34 A provision similar to section 239 was the subject of interpretation by this Court in ***Gammage v The Queen***.[39] In that case, a New South Wales provision dealt with leaving an alternative verdict of manslaughter in a murder trial. Barwick CJ observed:[40]

> Out of the circumstance that, though not charged, manslaughter if made out may be found on an indictment of murder, there naturally arises the obligation to tell the jury if they ask, or if the accused requires it, that this

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[32] See *James v R* [2013] VSCA 55, at [150]

[33] See *James v R* [2013] VSCA 55, at [157], [160], [196], [200], [208]; the Respondent notes this approach is inconsistent with the minority judgment of Ormiston JA in *R v Kane* (2001) 3 VR 542 where his Honour held that that except in cases of homicide, there is no basis in principle for asserting that suspicion of the deliberations of the jury justifies an insistence on all alternative charges being left to the jury

[34] See *James v R* [2013] VSCA 55, at [173]; see also [205], [206], [207]

[35] Sections 239(1) and 239(2) of the *Criminal Procedure Act 2009* mirror the now repealed sections 421(2) and 421(3) of the *Crimes Act 1958* respectively; in addition, the *Crimes Act 1958* contains provisions concerning alternative verdicts for specific crimes; but personal injury offences are not captured by any of those provisions

[36] Section 240 of the *Criminal Procedure Act 2009* mirrors the now repealed section 421(4) of the *Crimes Act 1958*

[37] See section 18, *Crimes Act 1958*

[38] (1991) 52 A Crim R 337

[39] (1969) 122 CLR 444

[40] Ibid, at 450

alternative verdict is open to them if that is their view of the facts. Failure to so advise them will give rise to a justifiable complaint on the part of the prisoner. But, part of that advice should, in my opinion, be a clear statement of the occasion on which the jury might properly return a verdict of manslaughter.

Duty to leave alternative verdicts in homicide cases

6.35 Application of the general principle expressed in ***Gammage v The Queen*** has been eroded by subsequent decisions of this Court – but so far only in relation to a charge of murder. At common law, a judge in a murder trial is now required to direct the jury to consider the alternative verdict of manslaughter if a "viable" case is available on the evidence. This is necessary even if the possibility of a manslaughter verdict has not been raised by any party, and even if a party objects to the issue being left to the jury. A re-trial is required if a judge fails to so direct as this deprives the accused of a chance of being acquitted of murder (and convicted of manslaughter instead), causing a miscarriage of justice.[41]

6.36 In ***Gilbert v The Queen***,[42] Gleeson CJ and Gummow J referred to the rationale for the rule:

> The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.
>
> ...
>
> The death penalty has gone, but there are other, perhaps equally influential, realities. This is an age of concern for the victims of violent crime, and their relatives. To adapt the words of Fullagar J [in *Mraz v The Queen*], a jury may hesitate to acquit, and may be glad to take a middle course which is offered to them.[43]

Callinan J added:

> The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.[44]

6.37 As observed by Hayne J in ***Gillard v The Queen***,[45] this erosion is premised on an acceptance of the proposition that a jury may not follow directions in a murder trial:

> *Gilbert* contemplates, even perhaps requires, that an appellate court must consider the possibility that the jury did not apply the directions they were given but, instead, chose to return a verdict of guilty rather than acquit the accused despite not being satisfied to the requisite standard of all the matters which the trial judge's directions required them to consider.[46]

Important function of the jury

6.38 In ***Dupas v The Queen***,[47] this Court spoke of the important function of the jury in the following terms:

> The assumed efficacy of the jury system of which Windeyer J spoke [in *Gammage v The Queen*], whereby the law proceeds on the basis that the jury acts on the evidence and in accordance with the directions of the judge, represents the policy of the common law ...

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[41] See *Gilbert v The Queen* (2000) 201 CLR 414; *Gillard v The Queen* (2003) 219 CLR 1; *The Queen v Nguyen* (2010) 242 CLR 491; *Nguyen v The Queen* [2013] HCA 32
[42] (2000) 201 CLR 414
[43] Ibid, at 420 [13], 421 [17]
[44] Ibid, at 441 [101]
[45] (2003) 219 CLR 1
[46] Ibid, at 35 [107]
[47] (2010) 241 CLR 237

Whilst the criminal justice system assumes the efficacy of juries, that "does not involve the assumption that their decision-making is unaffected by matters of possible prejudice"....[48]

6.39 However, it is plain that the common law recognises certain situations where the decision-making process of a jury may be imperfect (or not a "place of undeviating intellectual and logical rigour"). The issue in this appeal is whether the law admits of another exception, namely where an accused person is on trial for an indictable offence and no lesser viable alternative is left? However, the Respondent submits that the further exception contended for by the Appellant is so wide-reaching as to invariably result in the abolition of the important precept that juries act on the directions of a judge.

Duty to leave defences in criminal trials

6.40 In submitting that there is a duty to leave alternative verdicts in non-homicide cases, the Appellant relies on the general principle that a trial judge is bound to leave to a jury any defence which is fairly raised on the evidence – this is often referred to as the rule in ***Pemble***.[49] This general principle applies even in circumstances where counsel for the accused does not raise the defence,[50] and even where the defence is inconsistent with the accused's version of events at trial.[51]

6.41 Further, the above general principle has been extended by the common law to apply to the defence of provocation even though such a defence does not result in an acquittal but rather a conviction for manslaughter.[52] If provocation is open on the evidence, the trial judge must leave it to the jury, no matter what course is followed by defence counsel.[53]

6.42 An obvious rationale for the above general principle is that the Crown invariably bears the burden of disproving any legal defence in order to prove a criminal offence; thus if the evidence raises the possibility of an available defence, it is fair (and proper) to insist that the Crown disprove that defence in order to secure a conviction for the relevant offence.

Is there a duty to leave alternative verdicts in non-homicide cases in Victoria?

6.43 In Victoria, the prevailing view is that a trial judge is not bound to direct the jury on alternative charges to offences other than in cases of murder. However, appellate courts have recognised that there are non-homicide cases where the circumstances require a direction on an alternative offence.

6.44 Whether an alternative offence should be left depends on all the circumstances of the case, including the dictates of the public interest, fairness to the accused, the course of the trial and the scope of forensic judgment on the part of counsel. The simple test to be applied is "what does justice require in the particular case?"[54]

6.45 However, and importantly, the cases recognise that the interests of justice do not require a lesser alternative offence to be left to the jury unless the evidence raises the alternative

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[48] Ibid, at 248 [28], [29]
[49] See *Pemble v The Queen* (1971) 124 CLR 107
[50] See *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *Stevens v The Queen* (2005) 227 CLR 319
[51] See *R v Kear* [1997] 2 VR 555
[52] See *Parker v The Queen* (1963) 111 CLR 610; *Van Den Hock v The Queen* (1986) 161 CLR 158; *Stingel v The Queen* (1990) 171 CLR 312; *Masciantonio v The Queen* (1994) 183 CLR 58; *Heron v The Queen* (2003) 197 ALR 81
[53] See *Masciantonio v The Queen* (1994) 183 CLR 58; *Pollock v The Queen* (2010) 242 CLR 233
[54] See *R v Doan* (2001) 3 VR 349; *R v Kane* (2001) 3 VR 542; *R v Saad* [2005] VSCA 249; *R v Bui* [2005] VSCA 300; *R v Christy* (2007) 16 VR 647; *R v DD* [2007] VSCA 317; *R v Nous* [2010] VSCA 42

offence as a "real" and not "remote or artificial" possibility.[55] In ***Tilley v R***,[56] the South Australia Court of Criminal Appeal held that merely because an alternative verdict might be open or possible, this is not enough to require an alternative verdict to be left; it must be a "viable rationale result" on the evidence before the jury.

Position elsewhere in Australia

6.46 The Appellant contends at para 6.36 of the Amended Submissions that the Victorian line of authority should be overruled so as to align with the general principle propounded in ***Gilbert v The Queen*** and with intermediate appellate courts elsewhere in Australia.

6.47 In ***R v King***,[57] the New South Wales Court of Criminal Appeal held, by majority, that on a trial for armed robbery a trial judge was bound to leave the lesser offence of robbery in circumstances where it was a viable outcome even though the accused does not seek it. Grove J stated the decisions of this Court in ***Gilbert*** and ***Gillard v The Queen*** had application beyond that of murder.[58] Smart AJ agreed,[59] stating that he had "reservations about the suggestion that the Crown is entitled to go to the jury on an "all or nothing" basis where there is a viable case of a lesser offence.[60] Davidson AJ dissented, holding that different considerations apply in homicide cases.

6.48 In ***R v Tilley***,[61] the accused was charged with the offence of aggravated threatening life. The trial judge did not leave the alternative offence of threatening life to the jury. On appeal, the South Australia Court of Criminal Appeal held that the principle in ***Gilbert*** extends to non-homicide cases regardless of whether or not either counsel raise the issue.[62]

6.49 However, the vice exposed in the decision of ***R v King*** was that the accused was contending for facts which directly raised an alternative offence as a possible verdict. And, in ***R v Tilley,*** the alternative verdict was obviously raised by the evidence since the defence threw doubt on an ingredient for the more serious offence. The cases also illustrate that the conduct of the defence case is not irrelevant to this question of whether the lesser alternative is a viable rational result on the whole of the evidence.

6.50 But, in ***R v Willersdorf***,[63] the Queensland Court of Appeal adopted a different approach (which is consistent with the approach taken in Victoria):

> Consistently with the authorities including *Rehavi*, I conclude that whenever an alternative verdict *fairly arises for consideration on the whole of the evidence* then failure to leave it to the jury prima facie deprives the accused of a chance of acquittal of the principal offence. A tactical request from defence counsel is a matter that must be taken into account in the overall assessment of miscarriage of justice, but it is not conclusive. The

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[55] See *Jensen v R* (1991) 52 A Crim R 279; *R v Benbolt* (1993) 60 SASR 7; *R v Kane* (2001) 3 VR 542; *R v Willersdorf* [2001] QCA 183; *R v Parsons* (2004) 145 A Crim R 519; *R v King* (2004) 59 NSWLR 515; *R v Saad* [2005] VSCA 249; *R v Bui* [2005] VSCA 300; *R v GS* [2005] QCA 376; *R v DD* [2007] VSCA 317; *R v Tilley* (2009) 105 SASR 306; *R v Nous* (2010) 26 VR 96; *Carney v The Queen* (2011) 217 A Crim R 201

[56] (2009) 105 SASR 306

[57] (2004) 59 NSWLR 515; the approach adopted by the Court in *R v King* was subsequently followed in *Blackwell v R* (2011) 81 NSWLR 119 and *Sheen v R* (2011) 215 A Crim R 208

[58] Ibid, at 517 [5]

[59] Ibid, at 528 [75], 532 [99], 534-535 [110]-[111]

[60] Ibid, at 530 [87]

[61] (2009) 105 SASR 306

[62] Ibid, at 322 [60]

[63] [2001] QCA 183

ultimate duty to ensure fairness rests with the trial judge, and this is not always achieved by acquiescing in the request of defence counsel.[64]

6.51 The approach in ***R v Willersdorf*** has been recently endorsed by the Queensland Court of Appeal in ***R v MBX***,[65] and was cited with approval by the High Court in ***The Queen v Keenan***[66] (see below at paras [6.55] – [6.61]).

Position in United Kingdom

6.52 In ***R v Fairbanks***,[67] the accused was charged with causing death by dangerous driving. The trial judge refused to allow the alternative of careless driving to be left to the jury. The English Court of Appeal allowed an appeal on the basis that there was evidence upon which the jury could properly have concluded that demonstrated careless driving. In delivering judgment, Mustill LJ stated:

> [T]he judge is obliged to leave the lesser alternative only if this is necessary in the interest of justice. Such interest will never be served in a situation where the lesser verdict simply does not arise on the way in which the case has been presented to the court ...[68]

6.53 In ***R v Maxwell***,[69] the accused was charged with robbery. At trial he denied the charge but admitted to recruiting a co-offender to arrange a burglary (that charge was not left to the jury). In delivering the judgment of the English Court of Appeal, Mustill LJ stated:

> The right course will vary from case to another, but the judge should always use his powers to ensure, so far as practicable, that the issues left to the jury fairly reflect the issues which arise on the evidence.[70]

6.54 In ***R v Coutts***,[71] the accused was convicted of murder. The trial judge, with the support of the prosecution and the consent of the defence, did not leave an alternative count of manslaughter to the jury. On appeal to the Court of Appeal, the accused contended that a manslaughter verdict should have been left to the jury for their consideration, irrespective of the parties' wishes, since there was evidence to support it. The Court of Appeal rejected that contention, but on appeal the House of Lords upheld that contention. Importantly, Lord Bingham stated:

> I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.[72] [emphasis added]

Resolution – the Gilbert principle does not extend to all offences

6.55 The Respondent supports the current line of authority in Victoria; furthermore, and more importantly, submits that line of authority is supported by precedent.

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[64] Ibid, at [20]; see also *R v Rehavi* [1999] 2 Qd 640; *R v Perussich* [2001] QCA 557; *R v GS* [2005] QCA 376; *R v Mead* [2010] QCA 370
[65] [2013] QCA 214
[66] (2009) 236 CLR 397
[67] [1986] 2 WLR 1202
[68] Ibid, at 1205
[69] [1988] 1 WLR 1265
[70] Ibid, at 1270
[71] [2006] UKHL 39
[72] Ibid, at 17 [23]

6.56 In ***The Queen v Keenan***,[73] the accused was acquitted of attempted murder but convicted of unlawfully causing grievous bodily harm with intent at trial. On appeal, the Queensland Court of Appeal set aside the conviction and declined to order a retrial (the Court entered a verdict of acquittal for the offence for which the accused had been convicted and for the lesser offence of grievous bodily harm *simpliciter*) but this Court reversed that decision. In allowing the appeal, Keifel J delivered the leading judgment[74]in which her Honour discusses the topic of alternative charges in non-homicide cases:

> A trial judge's duty to ensure a fair trial does not mean that the lesser charge must be left to a jury in every case. It is a question of what justice to the accused requires. Putting the lesser charge to a jury might jeopardise the accused's chance of a complete acquittal in some cases.
>
> It could not be said that the evidence of intention was weak in the present case, having regard to the threats made by the respondent. The defence strategy was to suggest to the respondent's niece that they were not said in such a way, or in a context, which conveyed that they were made seriously. If the jury had accepted this explanation the respondent may have been acquitted altogether, whereas he may well have been convicted of the lesser charge. The fact that the respondent's counsel did not seek to have the lesser charge put to the jury confirms that a forensic advantage was sought by its omission. No miscarriage of justice can be said to have resulted.[75]

6.57 Importantly, Keifel J refers to the Queensland decision in ***R v Willersdorf*** in a footnote to the above passages with apparent approval.

6.58 Finally, in the recent decision of ***R v MBX***,[76] the Queensland Court of Appeal dismissed a conviction appeal involving a ground of complaint that the trial judge erred in not directing the jury that attempted rape or indecent treatment was open on the evidence as an alternative verdict to rape. The accused at trial had not sought to have any alternative offences left to the jury.

6.59 Applegarth J (Fraser JA and Jackson J agreeing) discussed the relevant principles.[77] In referring to the earlier decision in ***R v Willersdorf*** with approval, his Honour stated:[78]

> [T]he requirement stated in *R v Willersdorf* that the alternative verdict "fairly" arise for consideration on the whole of the evidence was taken to comprehend the fairness of putting to a jury an alternative verdict which the appellant's counsel at trial, for arguably sound forensic reasons, requested not be left to the jury.

6.60 Importantly, Applegarth J referred to the Victorian decision in ***James v R*** where his Honour expressed disapproval of the judgment of Priest JA stating:[79]

> There are three reasons why I do not accept the view of Priest JA that a trial judge is obliged to put lesser alternatives, notwithstanding the "calculated abstention" of defence counsel from requesting that they be put. The first is that the authorities of this Court identify the forensic choices made by defence counsel as a relevant factor. The second is that the decisions of the Victorian Court of Appeal, including *R v Nous* and the majority in *R v James,* do the same. The third is that the views of Priest JA are convincingly countered by the reasons of Maxwell P in *R v James*.

6.61 As to the importance of forensic decisions on appeal, Applegarth J observed:[80]

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[73] (2009) 236 CLR 397
[74] Hayne J agreeing (at 422 [80]); Heydon J agreeing (at 425 [92]); and Crennan J agreeing at (425 [93])
[75] Ibid, at 438 [138]-[139]
[76] [2013] QCA 214
[77] Ibid, at [19]-[59]
[78] Ibid, at [33]
[79] [2013] QCA 214, at [46]; Applegarth J referred to the Victorian decision in *R v Nous* (2010) 26 VR 96 with approval at [48], [56]
[80] Ibid, at [57]; see also [50]

A tactical request, in the exercise of the accused's right to a fair trial, that an alternative offence not be left is relevant in determining whether the interests of justice require the alternative to be put.

Principles which support confining Gilbert principle to homicide cases

6.62 There are a number of reasons why the principle in ***Gilbert v The Queen*** (that on a trial for murder no tactical decisions on the part of counsel can deny an accused the possibility of a conviction for manslaughter provided it is a viable alternative) has been confined to homicide cases and why it was never intended to have application beyond those cases:[81]

- first, there are important historical reasons – until replacement by life imprisonment as the maximum penalty, murder carried the death penalty in Australia;
- secondly, because of the consequences of a murder conviction juries are more likely to take a merciful view of the facts – they cannot do so if deprived of the middle course of manslaughter; and
- thirdly, if a jury is satisfied that an offender was involved in some way in a homicide, it will be reluctant to acquit altogether; in homicide cases it is assumed that the risk of a compromise verdict (to ensure that that the offender does not escape punishment) is intrinsically high and, as a consequence, a jury may fail to heed judicial instruction and not return a true verdict.

6.63 The above reasons do not apply with the same degree of force to non-homicide cases, even those involving serious offences. Furthermore, the extension of the rule in homicide cases is met by the resistance offered by the following cardinal principles:

- first, a fundamental precept of any criminal trial is that a jury will follow instructions from a trial judge;[82]
- secondly, an important principle of criminal litigation is that parties are bound by the conduct of their counsel;[83] and where a party elects to take a course at trial which conveys a forensic advantage upon that party, he or she cannot ordinarily resile from and complain of that course upon appeal; and
- thirdly, a trial judge should only direct the jury on the real issues in the trial; and forensic choices of counsel play an important role in determining what the issues are.

6.64 Having regard to the reinforcement of the above principles in recent times by this Court, the Respondent submits that to further extend the ***Gilbert*** principle would seriously undermine the modern development of the criminal law. As Applegarth J observes in ***R v MBX***:[84]

> Maxwell P [in *James v R*] explained the significance of decisions made by defence counsel about the best way to conduct a trial in the interests of the accused. The proposition, which underpinned the decisions considered by his Honour, was said to be that, in an adversarial system, the making of such decisions on behalf of the accused is itself an exercise of the right to a fair trial. A rational forensic decision by counsel not to request that an alternative be left is likely to be very significant in determining whether the failure to leave the alternative offence produced a miscarriage of justice.

An 'injury' verdict not a viable alternative

6.65 In the court below, the Respondent submitted that there was no realistic alternative open on the evidence.[85] Priest JA rejected that argument concluding that it was open for the jury to

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[81] See *R v Doan* (2001) 3 VR 349, at 356-357 [27]; *R v Kane* (2001) 3 VR 542, at 544 [3], 546 [7], 562 [41], 564-565 [44], 572-573 [63]; *R v Saad* [2005] VSCA 249, at [94]-[97]

[82] See *Dupas v The Queen* (2010) 241 CLR 237, at 247-249 [25]-[29]

[83] See *Nudd v The Queen* (2006) 225 ALR 161, at 164 [9]; *Patel v The Queen* (2012) 290 ALR 189, at 214 [114], [117]

[84] [2013] QCA 214, at [47]; see also *James v R* [2013] VSCA 55, at [5]-[11], [14], [18]

[85] See *James v R* [2013] VSCA 55, at [177], [178]

conclude that the Appellant had struck the victim only "a glancing blow"; support for that proposition was said to come from the victim's statement to police that the Appellant "had put the car into reverse and swung the steering wheel so that the front of his car hit me as it reversed". As a consequence, it was said that there was a viable case of intent to cause mere injury rather than serious injury.[86]

6.66 The element of intent to cause serious injury (or whether the Appellant foresaw the probability of serious injury) was a live issue in the trial. But it was confined to a particular context – the defence case was that the Appellant accidentally (or inadvertently) struck the victim with his vehicle (and thus did not intend to cause the victim serious injury), and conversely, the prosecution case was that the Appellant deliberately (or intentionally) struck the victim with the vehicle (and thus intended to cause him serious injury).

6.67 The trial judge charged the jury on this issue accordingly. The jury was expressly directed that a threshold question for them to determine was whether the prosecution had proved that the striking of Sleiman was deliberate, rather than accidental. In re-capping the elements which the jury would have to find beyond reasonable doubt before convicting the Appellant, the trial judge said:[87]

> First, that he deliberately hit Sam Sleiman with his vehicle and didn't hit him by accident. Secondly, that Samuel James intended to cause Sam Sleiman serious injury when he hit him deliberately and that he did not act in self-defence when he intentionally caused that serious injury. And of course you will only be asked for your verdict in relation to the second offence if you find him not guilty of the first one. And, in order to find him guilty of that alternative offence, you would have to be satisfied beyond reasonable doubt of those three elements: that Samuel James deliberately hit Sam Sleiman with his vehicle and did not hit him by accident, that he was aware when he deliberately hit Sam Sleiman that his acts probably would cause him serious injury and that he did not act in self-defence when he reckless caused that serious injury. [emphasis added]

6.68 In addressing this topic, Whelan JA concluded (Maxwell P agreeing):[88]

> There was never any doubt that the prosecution needed to prove an intention to cause serious injury, or that that element was in issue in the trial. But the issue in controversy as to intention did not concern the severity of the injury intended; rather, it concerned whether any injury was intended. The issue was whether the impact between the vehicle and Mr Sleiman was deliberate or not. As noted earlier, the appellant's account at interview was that he had been taking evasive action and had not even been aware of making contact with Mr Sleiman.

6.69 The Respondent submits that Whelan JA was undoubtedly correct in his assessment that this was the live or real issue insofar as the element of intent was concerned. In short, the leaving of an alternative verdict would have been inconsistent with the defence case presented in court as well as the evidence.[89]

6.70 As a matter of common sense and experience, when a vehicle is used as a weapon to deliberately strike an unprotected person (in the position of pedestrian), such conduct is so inherently dangerous and perilous, that it inevitably involves exposing the person to serious injury (or something worse), save perhaps for the most trifling contact at negligible speed. The nature of the driver's conduct, including the degree of actual contact, will ordinarily provide compelling evidence of his or her intention to cause serious injury (or at least foresight of the probability of causing serious injury).

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[86] See *James v R* [2013] VSCA 55, at [180], [181], [209], [217], [218]

[87] See Trial Transcript, at 561; this was not repeated when the trial judge re-directed on the element of intent in response to the jury's questions - see Trial Transcript, at 718-719

[88] See *James v R* [2013] VSCA 55, at [44]

[89] See, for example, *CTM v The Queen* (2008) 236 CLR 440, at 496 [194], per Hayne J

Analysis of evidence led at trial

6.71 The Respondent submits the lesser 'injury' alternatives were not realistically open on the basis of the evidence led at the trial, in particular the evidence of the eye-witness Monica Woods, the victim Sleiman, Dr Cunningham, and the Appellant's record of interview.

6.72 Monica Woods

Monica Woods gave evidence that she saw the ute stop about two metres from the victim and heard a car door slam. A man got out of the ute, and went around to its front. Somebody (the Appellant) then got into the driver's side, and started revving back and forth about a metre back and then moving forward, four or five times. Ms Woods saw the victim standing in front of the car, appearing to try to get away, but looking as if he couldn't get away fast enough. All of a sudden, she saw the victim's body has flown a few metres in the air. The ute has then driven over the top of the victim before driving off.

6.73 The Appellant relies upon one aspect of Monica Woods' evidence to demonstrate that the lesser alternatives were open on the evidence. She agreed in cross-examination that she did not put in her police statement that she "saw the car run over the man when he was on the ground". In her statement she had said "I then saw the car drive on to the grassed area, where I thought the man had fallen down to, as if the person was trying to run over him." Ms Woods also agreed that when giving evidence at the committal hearing, she had said that she had seen the utility hit the victim and then she could no longer see him; and she did not see the utility run over him.[90]

6.74 As Whelan JA points out, Monica Woods was adamant that this was her memory as she stood in the witness box, and she also said that as time went by she had thought about it and remembered more things.[91]

6.75 In any event, even if there remained a reasonable doubt about whether the Appellant drove over the victim whilst lying on the ground after the initial blow, Woods' evidence concerning the initial blow patently excluded the possibility of a minor contact. Woods' account at trial of the initial blow was of a very significant impact causing the victim to be thrown a few metres up in the air.[92] Moreover, she gave evidence that Sleiman was standing in front of the car at the time he was struck.[93] If the Appellant deliberately (i.e. intentionally) struck the victim in the manner described by Woods, he could not have acted with something less than an intention to seriously injure (or foresight of that probability).

6.76 Importantly, no prior inconsistent statements were identified in relation to her account of this initial impact – her account of the initial impact was consistent with her accounts in her original police statement,[94] and at the committal hearing.[95]

6.77 Furthermore, it was never suggested to Woods that the impact was a glancing blow as the car was attempting to reverse.

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[90] See Trial Transcript, at 160-165
[91] See *James v The Queen* [2013] VSCA 55, at [3]; see also Trial Transcript, at 165
[92] See Trial Transcript, at 55
[93] See Trial Transcript, at 155-156
[94] See Trial Transcript, at 160
[95] See Trial Transcript, at 163-164

6.78 Dr Cunningham (forensic physician)

The injuries sustained were extensive and life threatening, being a combination of bone fractures and internal organ injuries that involved multiple areas of the body.[96] The injuries were "serious" on any view.

Dr Cunningham gave evidence as to the scenarios which would account for the multiplicity of injuries. Each of those scenarios involved at least two occasions of trauma. There was an initial or primary impact causing injuries, followed by further injuries as a consequence of being thrown over the bonnet, or impacted by the car whilst on the ground, or impact with the ground after a primary impact from the car. In Dr Cunningham's opinion, the injuries were the result of a direct or forceful blunt trauma from either the front or the rear of a vehicle impacting the victim with considerable force in that direction of travel.[97] Importantly, this evidence was not challenged or contradicted by other expert evidence.

6.79 Dr Cunningham said it was 'highly unlikely' that the injuries sustained were a result of a glancing blow.[98] This evidence was also not challenged or contradicted by other expert evidence.

6.80 The Appellant's record of interview

In his record of interview the Appellant had said that he had tried to avoid the victim, that he had avoided him, and that he had left the car park not knowing that the victim had been injured at all. The Appellant claimed that his intention was to do a 'U turn' to extricate himself from the situation.

6.81 The effect of the Appellant's account was that he never intended to strike Sleiman. The Appellant never asserted he intended to strike Sleiman with a glancing blow, or that he struck Sleiman with a glancing blow while reversing his vehicle.

6.82 The Respondent submits the Appellant's account did not raise the question of the severity of injury intended. It did not raise the 'glancing blow' thesis (or the thesis that he intended to injure but not seriously injure) as postulated by Priest JA; rather it raised the question of whether the impact between the vehicle and the victim was deliberate (i.e. intentional) or accidental (inadvertent), and thus whether any injury at all was intended.

6.83 The victim (Sleiman)

The Respondent submits that the reference in the victim's police statement that the Appellant "*put the car into reverse and swung the steering wheel so that the front of the car hit me as he reversed*"[99] does not throw up a realistic hypothesis that the Appellant may have intended (or foresaw the probability of) mere injury rather than serious injury.

6.84 The Respondent submits that the 'glancing blow' thesis (or the thesis that the Appellant intended to injure but not seriously injure) would require the rejection of the version of events of Monica Woods (in relation to the initial impact as well as her account concerning the subsequent running over) and the evidence of Dr Cunningham; and, in short, there was no reasonable basis upon which a jury could have so discarded this body of evidence:

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[96] See *James v The Queen* [2013] VSCA 55, at [25]
[97] See Trial Transcript, at 198, 217
[98] See Trial Transcript, at 198, 217
[99] See Trial Transcript, at 136-137

- while the prior statement of Sleiman is equivocal, it is patently inconsistent with Dr Cunningham's evidence (direct or forceful trauma from either the front or the rear of a vehicle impacting the victim with considerable force in the direction of travel, with a glancing blow being 'highly unlikely');
- to the extent that the prior statement bespeaks of a glancing blow (or blow of a minor kind which might allow for the thesis of an intent to injure *simpliciter*), it is also inconsistent with the evidence of Monica Woods in relation to the initial impact (Sleiman hit while in front of car, flying a few metres in the air);
- there was no reasonable basis on which a jury could reject the evidence of Woods (she was an independent witness) in relation to the initial frontal blow (which was not impugned or discredited), or the unchallenged and contradicted opinion of Dr Cunningham; and it is submitted, with respect, that it would have been entirely "capricious" for a jury to have rejected their evidence.

6.85 Sleiman's prior statement relied upon to support the 'glancing blow' thesis was equivocal and lacking in cogency:

- as Whelan JA correctly observed, the victim did not adopt that evidence when it was put to him in cross-examination;[100] he said he had no memory of it;[101]
- the statement was made in circumstances which raised questions as to its reliability – the evidence was that Sleiman made the statement on 20 July 2007 while in Epworth Hospital in rehabilitation (nearly 3 months after the accident); and when asked to describe his health at the time he said he could hardly remember, and it was all blurry, and he was medicated;[102] and
- the prior statement does not convey or contain any explanation as to how Sleiman could be struck by the front of the car as it is reversing (let alone with the degree of force required to cause the serious injuries sustained by Sleiman).

6.86 The manner in which the defence case was conducted reflected the fact that lesser 'injury' alternatives were not viable on the evidence to be led at trial:

- the prior statement was relied upon by the Appellant as suggesting an <u>accidental</u> strike and in support of self–defence (i.e. that it occurred when the Appellant was attempting to extricate himself from a situation where Sleiman was the aggressor);[103]
- the evidence was never relied upon to support the thesis that while the Appellant may have intended to strike Sleiman, he intended to merely injure him but not cause him serious injury; it was not relied upon as evidence which was inconsistent with proof of an element of the more serious offence but consistent with proof of the lesser offence;
- the defence conducted the case upon the basis that the Appellant caused the horrific injuries to the victim and that the injuries were clearly 'serious' – once these concessions were made it was fanciful to suggest the Appellant caused them by a glancing blow (with the requisite lesser intent); Sleiman had to have been struck with very considerable force from the car; whether the striking occurred as part of a reversing, turning or forward manoeuvre, the striking of the victim by the Appellant's vehicle was executed with significant force; on any view of the facts, the striking went well beyond contact at

[100] See *James v The Queen* [2013] VSCA 55, at [82]
[101] See Trial Transcript, at 136-137
[102] See Trial Transcript, at 139
[103] See Trial Transcript, at 136-138 (cross-examination of Sleiman); 465, 470, 471 (defence closing address)

negligible speed; the nature of the blow itself also realistically excluded an intention to make minor contact; and once it is accepted that the Appellant deliberately struck the victim (and that it was no accident), the only reasonable inference available was that the Appellant must have known serious injury would (or would probably) result;

- the defence case was conducted upon the basis that it took no issue with the opinions of Dr Cunningham, and counsel did not challenge the graphic account of Monica Woods relating to the initial impact – for the reasons already advanced, this made the alternative thesis (that the Appellant intended to strike Sleiman with an intent to cause mere injury) even more remote and unrealistic; and
- to the extent that there was some evidence (Sleiman's prior statement) to support the alternative thesis, it is submitted that the conduct of the defence case here ensured that the thesis remained, at best, remote and theoretical; and there was certainly nothing about the conduct of the defence case which enlivened that thesis as a real issue.

Conclusion

6.87 In short, the alternative verdicts did not arise on the issues as presented at trial. In all of the circumstances, Whelan JA was right to conclude that when the evidence is viewed as a whole, the hypothesis that the Appellant possessed something less than an intention to cause serious injury (or foresight of the probability of serious injury being caused), when he deliberately struck the victim, was (at best) a remote or theoretical one.[104] In this respect, the conclusion of Priest JA on this issue is erroneous.

No 'false choice' for jury

6.88 The 'false choice' here is said to arise in relation to the Appellant's state of mind. In this case, there was an alternative verdict available to the jury involving a lesser form of *mens rea*, namely the alternative charge of recklessly causing serious injury (charge 2). Had the jury felt that they were faced with a false choice between conviction or acquittal of the more serious offence (intentionally causing serious injury), but were concerned that the Appellant not escape without punishment, they would have acquitted of the offence involving the higher degree of state of mind (intentionally causing serious injury) and convicted on the alternative offence involving a lesser state of mind (recklessly causing serious injury).[105] Yet they did not, which suggests the jury experienced no difficulty in resolving the live issues at trial in conformity with the relevant legal directions.

PART VII: Not Applicable

PART VIII: ORAL ARGUMENT

8.1 The estimated duration of oral argument for the appeal is ½ day.

Dated: this 11th day of October 2013.

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Peter Kidd S.C.
Senior Crown Prosecutor, State of Victoria
Senior Counsel for the First Respondent

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Brett L. Sonnet
Crown Prosecutor, State of Victoria
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[104] See *James v The Queen* [2013] VSCA 55, at [82]
[105] See, for example, *R v Kane* (2001) 3 VR 542, at 573 [65]