LEGAL}{ EAGLES CLE

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PRESENTED AT LEGAL EAGLES CLE CONFERENCE HANOI VIETNAM 3/1/2014 – 8/1/2014

INTERESTING RECENT APPELLATE AUTHORITIES

This paper addresses;

- the recent decision of *Lane v R* [2013] NSWCCA 317 (delivered on13 December this year) and the consequences of the principle enunciated for proof of manslaughter in various jurisdictions ;

- some recent appellate authorities from various states where there emerges conflict in the interpretation of the *Evidence Act* and which have some relevance for the common law jurisdictions and;

- some other interesting appellate authorities which my be of assistance in overcoming the 'natural limitations' which are imposed upon judges at first instance.

Lane v R **[2013] NSWCCA 317**

It was the Crown case that on or about 14 September 1996, the appellant murdered her daughter, Tegan Lane who was then 2 days old at such time as, or at a time proximate to, when the appellant discharged herself from hospital after giving birth.

The Crown case was that appellant killed the child and did so possessing the intent to kill her. The Crown did not rely upon an intent to do grievous bodily harm or reckless indifference.

The Crown case was circumstantial and the body of the child has never been recovered. It follows inevitably that cause of death and requisite coincident intent were to be established by way of inference.

The evidence upon which the Crown relied to make good its case of intent to murder as distinct from, for example, reckless indifference or manslaughter was the appellant's history of previous pregnancies and how she behaved in the face of them giving rise to what was contended to be the irresistible inference, in the circumstances of this case, that this history was consistent with the appellant possessing an intent to kill.

In brief this history was evidence of the appellant having had two terminations (prior to Tegan's birth) and having had two children (one post-dating the birth of Tegan) in respect of whom she chose to have them both adopted.

In short, if the jury were satisfied that the child had met her death at the time advanced on the crown case it was the crown case that the appellant's personal history established beyond a reasonable doubt an intent to kill.

It was contended, and accepted on appeal, that this was a proper inference available from the *"appellant's history of taking steps to ensure that she did not have the responsibility of caring for a child or children."*

The appellant did not give evidence. It can be divined from the judgement that the defence case at trial was essentially that the Crown could not prove the elements of murder.

At [23]

> *"At the conclusion of the Crown opening, senior counsel for the appellant opened the defence case. He encapsulated the defence case in the following terms:*
> *"So, members of the jury, the first and perhaps fundamental difference, dispute or difference, between the defence and the prosecution is that our submission to you will be the Crown can't prove her death, the Crown can't prove the manner of her death, the Crown can't prove that any act was done by the accused in relation to Tegan* ***Lane*** *that either was done when she intended to cause Tegan's death or to do her serious bodily harm." (emphasis added)*

And at [28];

> *"Defence counsel summed up his response in the following terms:*
> *"Point number one is that we do not even know that the victim is dead. Point number two is if she's dead, we don't know how she died. There's no scientific evidence at all. There's nothing. Nobody can tell us anything, not one word in this case.*
>
> *'We don't know' number three is this, members of the jury: I haven't even got to the investigation and the evidence in the case yet directly. Number three is if she's dead, that is, Tegan Lane , we don't know who caused the death if anyone did because we don't know. It could have been an accident and people do terrible things to cover things up.*
>
> *And you will find out, members of the jury, when his Honour gives you directions in relation to this, that these next matters are absolutely as critical as the first point which we suggest is 'we don't know'. We do not even know that Tegan Lane is dead.*
>
> *Point number four: If Tegan Lane is dead we don't know that it was the deliberate act of Keli Lane that caused her death.*
>
> *Number five: We don't know that if Tegan is dead and the ability [sic - ? act] of Keli Lane caused her death, we don't know that it was done with the intention to kill her."*

Whilst the Court made the observation [at 32] that;

"During the entire course of the trial there was never any suggestion that an alternative verdict of manslaughter ought to have been left to the jury."

It seems apparent that defence counsel raised for the jury's consideration that if they were satisfied that the appellant orchestrated the child's demise the Crown could not prove that she did so with the requisite intent.

Neither the defence or the Crown requested of the trial judge to leave manslaughter to the jury.

Before the jury were inconsistent accounts provided by the appellant to police [and others] during the course of the investigation concerning the disposal and whereabouts of Tegan. These were relied upon as lies evidencing a consciousness of guilt. *R v Lane* [2011] NSWCCA 157; 221 A Crim R 309.

It was no positive aspect of the defence case that the appellant had been responsible for the death of the child.

There were various grounds of appeal against conviction which were dismissed. By the first ground it was contended that manslaughter ought to have been left to the jury.

The facts at trial were largely uncontroversial. What was in dispute (at trial and on appeal) was the inferences that could properly be drawn from the facts.

In short an extensive investigation failed to locate any child who could possibly have been Tegan or the biological father about whom the appellant spoke in her interviews with police.

On this evidence, *inter alia,* the Crown case was that Tegan was dead and that she had met her demise at the hands of the appellant.

Accepting that the Crown had established that Tegan had been killed by an unidentifiable act of the appellant the question on appeal was essentially what inferences were properly available on the evidence.

The Court was satisfied that murder was an available inference but they were not satisfied that manslaughter, by either dangerous or unlawful or criminal negligence, was an available inference upon the facts.

The relevant passages are set out below;

At [43];

> "The outcome of this ground of appeal hinges on whether there was, in the evidence, material capable of supporting a verdict of guilty of manslaughter. It does not depend upon whether there was evidence capable of supporting a verdict of guilty of murder. That question arises in relation to ground 7. The mere fact that the jury has found all of the elements of murder proved does not, of itself, obviate the need to consider whether manslaughter was a viable alternative. *If it were, and manslaughter was not left, the appeal must be allowed.* Determination of whether there was, on the facts of this case, evidence capable of supporting a verdict of manslaughter, or that a verdict of manslaughter

was "viable", calls, first, for an examination of the law relating to murder and manslaughter." *[emphasis added]*

In NSW there is no statutory definition for the offence of manslaughter.

Section 18 of the *Crimes Act* (NSW) provides;

> Murder and manslaughter defined.
>
> *(1)(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.*
>
> *(b) Every other punishable homicide shall be taken to be manslaughter.*
>
> *(2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.*
> *(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.*
>
> *(Emphasis added]*

Punishable homicide falls into two categories*;* voluntary and involuntary. Voluntary manslaughter, which is a creature of statute and to be found in various parts of the NSW Act eg s 23, s 23A, s 421.

Involuntary manslaughter as a punishable homicide is recognized in the common law to be an unlawful and dangerous act and criminal negligence.

It was contended on appeal that both should have been left for the jury's consideration.

In disposing of this complaint the Court said;

From [64];

> "One feature that distinguishes murder and manslaughter by criminal negligence on the one hand from manslaughter by unlawful and dangerous act on the other is that, in the case of former, conviction may result from proof that death was caused either by act or omission; ***as is apparent from the terminology,*** **manslaughter by unlawful and dangerous act** ***may only be established by proof of a specific act. And the act must be identified with precision.*** That is because, for conviction, the act must be shown to have the requisite characteristics - that it is unlawful (that is a breach of the criminal law), and dangerous, in the sense explained above***. If the act causing death is not identified with precision, it is not possible to ascribe to it those characteristics." [emphasis added]***
>
> There is a limit on the extent to which an omission may be relied upon to establish either murder or manslaughter. In *Burns*, the plurality said:

> "97 Criminal liability does not fasten on the omission to act, save in the case of an omission to do something that a person is under a legal obligation to do. As a general proposition, the law does not impose an obligation on individuals to rescue or otherwise to act to preserve human life. Such an obligation may be imposed by statute or contract or because of the relationship between individuals. The relationships of parent and child, and doctor and patient, are recognised as imposing a duty of this kind ..." (internal citations omitted).

At [63] the court set out a table reflecting elements of the offences of murder, manslaughter by unlawful and dangerous act, and manslaughter by criminal negligence." Theses "elements" are derived from *Wilson v The Queen* and Nydam. (Annexure A)

The court said from [103];

> *"The key to the determination of this ground of appeal lies in the examination of what must be established in order to prove the appellant guilty of either of the categories of manslaughter. That examination has to take place in the context of the evidence. What is somewhat unusual is that, as Tegan's body has not been found, no cause of death can be determined. Whether the ground succeeds depends upon what inferences were (or would have been) properly available to the jury, on the evidence in the trial.*
>
> ***The circumstance that no cause of death can be determined concludes the issue of manslaughter by unlawful and dangerous act**. Guilt of this offence depends upon the absence of intention to cause death or grievous bodily harm. As we have acknowledged above, the same evidence may be capable to giving rise to inferences that justify, or call for, a finding of murder, or that justify, or call for, a finding of manslaughter. **As pointed out above, for a verdict of guilty of that category of manslaughter, it is necessary that the act causing death be identified with precision, in order that it can properly be characterised as both unlawful (a breach of the criminal law), and dangerous.** What, it may be asked, is the criminal act that caused the death? How can it be said that it was dangerous in the sense that a reasonable person in the position of the appellant, performing that act, would have realised that he or she was exposing another or others to an appreciable risk of serious injury? The evidence was not such as to permit or justify the inferences necessary to found a conviction of manslaughter by unlawful and dangerous act. It was therefore not an error not to leave that verdict to the jury.*

It is apparent at this part of the judgement that an absence of evidence as to the act causing death was fatal to this category of involuntary manslaughter.

From [105] the court deal with criminal negligence;

> *"The same reasoning applies to manslaughter by criminal negligence. In order to establish guilt of that category of manslaughter, **it is necessary that the Crown prove an act or omission in breach of the appellant's undoubted duty of care to Tegan, the causal connection between that act or omission and the death, and, importantly, that the breach of duty was so grave as to merit criminal punishment.***

Guilt of this offence also depends upon the absence of intention to cause death or grievous bodily harm.

To come to a conclusion that the appellant was guilty of either category of manslaughter, in the absence of evidence as to the nature of the act or omission causing death, would be to engage in pure speculation. To leave either category of manslaughter to the jury would be to invite the jury to engage in pure speculation. It will be recalled that, in Stevens, Gleeson CJ and Heydon J (while in dissent in the result) dismissed the possibility of inviting surmise or speculation, as did Kirby J.

The majority judgments in Gilbert are instructive in that they recognise that juries may not always apply intellectual rigour to the reasoning process. They do not, however, authorise an approach to jury directions that involves an invitation to speculation or conjecture. It remains the case that there must be an evidentiary foundation for a finding of guilty of either category of manslaughter."

It is evident from this passage of the Court's reasoning that murder was an available inference because it was not encumbent on the Crown to establish beyond a reasonable doubt [in a case of murder] a specific qualitative act to which certain objective features must attach. That is, for murder the crown need only prove to the requisite standard that the appellant killed the deceased (by any mechanism which can remain unidentified) and that at the time of the infliction of this unidentified act the accused possessed the requisite men's rea.

In this case the relevant inference was available because the Crown had established the following facts namely that;

(a) the appellant had a demonstrated a state of mind evidencing that she did want the responsibility of being a parent and that;

(b) as a consequence of this state of mind she had a tendency to act in such a way as to do what was necessary to 'dispose' of her children;

(c) she had lied about how she had disposed of Tegan, giving rise to a consciousness of guilt.

It was not impermissibly speculative to conclude from this evidence in combination that the unidentified act was occasioned with the requisite intent.

In conclusion the Court said [from 108];

"……***It may reasonably be asked, and the question has to be confronted, why it is permissible for the jury to draw the inference that, by some means that cannot be specified, the appellant murdered the child, but that it would not have been permissible for the jury to find that she killed the child, but in a manner that amounted to manslaughter rather than murder.***

The answer to that question lies in the distinction, which is a very real one, between inference and speculation."

And from 111;

*"The critical issue in this case is the inferences available to be drawn concerning the appellant's state of mind. As we have mentioned, it may be taken that the jury was satisfied beyond reasonable doubt that Tegan was dead, and that her death had been caused by an act or omission of the appellant. Those conclusions are not in issue for the purpose of this ground. The circumstance that would distinguish the appellant's guilt of murder from guilt of manslaughter by criminal negligence is her state of mind**. There was before the jury a great deal of evidence that the appellant was determined not to accept responsibility for the care of a child.** True it is, competing arguments could be, and were, advanced in relation to the inferences to be drawn from the manner in which she had (lawfully) previously disposed of children, and the manner in which she subsequently disposed (again lawfully) of another. The jury were also entitled to take into account evidence of the accounts she gave concerning her disposal of Tegan to, as she asserted, the child's natural father. The jury were entitled to accept the Crown contention that these were lies evidencing consciousness of guilt. T**hese alone were sufficient to provide the evidentiary foundation for an inference that, in causing the death of the child, she acted with the intention of killing.** They provide no factual foundation for an inference that the manner in which she killed Tegan was a breach of duty of the requisite gravity. There was no other evidentiary foundation for such a conclusion. It was therefore not an error not to leave that possible verdict to the jury.*

Accordingly, we reject this ground of appeal."

Reliability and probative value the conflict between *Dupas v The Queen* [2012] VSCA 328 (21 December 2012) and XY [2013] NSWCCA 121

In NSW it was well settled that considerations of truthfulness and reliability should not be taken into account in the task of assessing probative value; *Adam v The Queen* (2001) 297 CLR 96 at [60] (Gaudron J); R v Shamouil (2006) 66 NSWLR 228 at [61]–[65]; R v Sood, above, at [38]: R v Mundine (2008) 182 A Crim R 302 at [33].

The Victorian Court of Appeal held in *Dupas v R* (2012) 218 A Crim R 507 that *R v Shamouil,* above, (and decisions which followed it) were wrongly decided and should not be followed. The court held that a judge considering "probative value" of evidence is only obliged to assume that the jury will accept the evidence as truthful but is not required to assume that its reliability will be accepted. MA v R [2013] VSCA 20. In so doing it was uncontroversial on the appeal that s 137 of the *Evidence Act* did not alter the operation of the common law (the Christie discretion). Accordingly this conflict such as it emerges between the Evidence Act states is a live one for the common law jurisdictions.

In R v XY [2013] NSWCCA 121, a majority of the five-judge bench (Basten JA, Hoeben CJ at CL and Simpson J) declined to overrule R v Shamouil.

However, competing inferences available on the evidence may be taken into account in a consideration of whether the probative value of the evidence is 'significant' for the purposes of the tendency and coincidence evidence; DSJ v R (2012) 215 A Crim R 349) (Bathurst CJ); [11] (Allsop P) and [78] (Whealy JA).

In XY, Hoeben J departed from the opinions of Basten JA and Simpson J in respect of the relevance of competing inferences in assessing probative value. His Honour

said [at 88];

When assessing the probative value of the prosecution evidence sought to be excluded, i.e., its capacity to support the prosecution case, a court can take into account the fact of competing inferences which might be available on the evidence, as distinct from determining which inference or inferences should be or are most likely to be preferred.

Reliability and expertise

Adopting what was said in XY, it follows that in New South Wales the unreliability of an expert's opinion is not considered in assessing the opinion's 'probative value' as that may be relevant to the operation of the exclusionary rules.

For example, the credibility or reliability of the expert as a witness cannot used to assess the 'probative value' of the expert evidence for the purpose of ss 135 and/or 137.

In this respect it must be that contextual bias has no operation in a consideration of probative value.

However in *Wood v R* [2012] *NSWCCA* 21 [which was delivered in February 2012] to which no reference is made in *XY* the former Chief Judge (McClellan CJ at CL) said about an expert witness in respect of whom the Court was satisfied had demonstrated real bias;

> *"This is not to say that the Expert Witness Code of Conduct is merely aspirational. Where an expert commits a sufficiently grave breach of the Code, a court may be justified in exercising its discretion to exclude the evidence under ss 135 or 137 of the Evidence Act . Campbell J adverted to this possibility in Lopmand when his Honour stated at [15]: "The policy which underlies the existence of Part 36 rule 13C is one which I should take into account in deciding whether [the expert evidence] should be rejected under section 135." I respectfully agree with that approach. While there is no rule that precludes the admissibility of expert evidence that fails to comply with the Code,* ***the Code is relevant when considering the exclusionary rules in ss 135-137 of the Evidence Act . The expert's "failure to understand his [or her] responsibilities as an expert" (Lopmand at [19]) may result in the probative value of the evidence being substantially outweighed by the danger that it might mislead or confuse or be unfairly prejudicial to a party.***
>
> *I do not believe it is necessary to resolve this issue in these proceedings. However, as I have said, to my mind the book which A/Prof Cross published has the consequence that his opinion on any controversial matter has minimal if any weight: see Pan Pharmaceuticals Ltd (in liq) v Selim [2008] FCA 416 at [157] (Emmett J)."*

A failure to comply with the Code presumably is a factor going to credibility either touching upon reliability or truthfulness or both – it isn't a factor that is confined to an assessment of prejudice.

The conflict in the extent of the operation of the credibility rule

In *Dupas* a significant conflict emerges with appellate decisions in NSW concerning the extent of the operation of the credibility rule. The rule is to be found in section 102 of the Evidence Act which provides that; *" Credibility evidence about a witness is not admissible"*

S 102 is a statutory formulation of a common law rule; *Piddington v Bennett & Wood Pty Ltd* [1940] HCA 2; 63 CLR 533.).

The dictionary provides;

> ***"credibility"*** *of a person who has made a representation that has been admitted in evidence means the credibility of the representation, and includes the person's ability to observe or remember facts and events about which the person made the representation.*
>
> ***"credibility"*** *of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.*

In *Dupas,* having had regard to the definitions, the Court of Appeal said at [265];

> " Thus, the credibility of a witness expressly includes the credibility of *the evidence of the witness*. And the express reference to a person's '*ability* to observe or remember facts and events' can only be a reference to reliability. In short, 'credibility' imports notions of both truthfulness and reliability. Section 102 provides that credibility evidence about a witness is not admissible. Thus, prima facie, evidence relevant to the reliability of a witness is not admissible."

The point of *Dupas* is that the rule applies evidence going solely to reliability as well as truthfulness.

However this construction is in direct conflict with decisions in New South Wales namely for example *Peacock* [2008] NSWCCA 264; (2008) 190 A Crim R 454, 465 [57] and *RGM* [2012] NSWCCA 89, [72]–[73]

In *Peacock*, Simpson J (with whom McClellan CJ at CL agreed) considered there to be a distinction between evidence going to;

- the credibility *of a witness (truthfulness)* and
- evidence going to the credibility *of the evidence given by that witness (reliability)*

On that basis, it was held, s 102 prohibited only evidence going to the credibility (truthfulness) of the witness and did not prohibit evidence going only to the reliability of the evidence given by that witness. Simpson J concluded that 'the reliability of evidence given by a witness might be challenged by evidence contradicting all, or part, of that witness's evidence' and that such contradictory evidence was not rendered inadmissible by s 102.

These observations were quoted without criticism by Fullerton J (with whom McClellan CJ at CL and Johnson J agreed) in RGM v R.[372]

Subject to the statutory exceptions, in practical terms, for example, what this means in NSW is that the examiner in chief is only precluded from adducing evidence by the opereation of s 102 which bolsters the truthfulness of the witness but not their reliability.

Fairness

R v Hein [2013] SASCFC97 (20 September 2013). The Court held that parts of the appellant's interview should have been excluded on the basis of unfairness arising from police conduct of the interview which included in this case "the combination of the quite forceful indications by the police officer that he would continue to put "tough" questions to the appellant, several expressions of belief that the appellant was involved in the robbery and the contribution the officer made to engendering a false belief that a co accused had implicated the appellant."

Directions in relation to expert evidence in mental illness cases

In Kosnian [2013] VSCA 357;

> At 49; "Where mental impairment is raised as a defence, a jury must always consider not only the expert evidence but all of the circumstances of the case which will include the evidence of the commission of the alleged offence, the conduct of the accused before, during and after that time and any history of mental illness. Consideration of all these circumstances may lead the jury to properly refuse to accept the expert evidence. But the province of the jury to reject expert evidence is subject to important qualification. The jury are not entitled to capriciously disregard the expert evidence. *They should accept those opinions unless there are facts which entitle them to reject or differ from the opinions of the experts. If the expert opinion is on an esoteric subject quite outside common experience, then depending upon what facts are in controversy and the degree of unanimity between the experts, it may be perverse for the tribunal of fact to ignore it."*
>
> At 51; In cases where insanity is the issue, a danger may thus arise that unless warned, the jury may fail to appreciate the significance of the expert evidence and assess the applicant's conduct by attributing to him the kind of reasoning that a person without a mental illness would employ.
>
> At 58; Instead the jury were encouraged to draw a particular inference from that event by relying upon their own imperfect understanding of the workings of the mind of a man with paranoid schizophrenia. There was a substantial risk that the jury, as they were invited to do, without reason residing in logic, discarded the expert evidence in favour of their own intuitive, commonsense understanding of how the mind of an insane person works and how the acts of the applicant should be interpreted.

The direction sought was that the jury be directed that they should not

discard the expert opinions without a logical reason for doing so and in so doing highlight the danger of applying standards of commonsense and rationality used by sane people rather than mentally ill people.