CITATION:	*The King v Wasaga (No 2)* [2024] NTSC 98
PARTIES:	THE KING v WASAGA, Eliasoa Thomas
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22211644
DELIVERED:	26 November 2024
HEARING DATE:	4 November 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

EVIDENCE – Expert evidence – Advance ruling as to admissibility of evidence – Whether expert evidence was admissible – Whether Defence had reasonable and sufficient notice of the substance of expert evidence – Common law duty on the prosecution to disclosure documents which are material – Common law duty must be discharged with the object of fairness in mind – Content of the common law duty as applied to expert evidence.

CRIMINAL LAW – Application to discharge the jury – Application founded on submissions made by the Crown in the closing address – Whether there was a high degree of necessity for the jury's discharge – Closing address did not necessitate to a high degree the jury's discharge – Whether summing up could overcome any adverse impact upon the fairness of the trial for the accused – Summing up could overcome any adverse impact – Application dismissed.

BD v The Queen (2017) 40 NTLR 1, *Crofts v The Queen* (1996) 186 CLR 427, *Hogan v Rigby* (2020) 352 FLR 93, *IMM v The Queen* (2016) 257 CLR 300, *MLW v The Queen* [2022] NTCCA 2, *The Queen v Higgins* (1994) 71 A Crim R 429, *The Queen v Higgins* (unreported, VCCA, 2 March 1994) referred to.

Evidence (National Uniform Legislation) Act 2011 (NT) ('ENULA') s 79.

I Freckelton, *Expert Evidence*, (Thompson Reuters, 6th ed, 2019).

REPRESENTATION:

Counsel:

Crown:	D Jones with C McKay
Accused:	C Mandy SC with G Chipkin

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Judgment ID Number:	Bro2411
Number of pages:	55

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Wasaga (No 2) [2024] NTSC 98
No. 22211644

BETWEEN:

THE KING

AND:

ELIASOA THOMAS WASAGA

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered on 26 November 2024)

[1] By an indictment dated 5 October 2023, the accused was charged with one count for the murder of Henry Asera ('the deceased'), contrary to s 156 of the *Criminal Code 1983* (NT), alleged to have been committed on 13 April 2022.

[2] The trial commenced on 28 October 2024.

[3] On the fifth day of the trial (being 1 November 2024) the parties sought advance rulings under s 192A of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA') with respect to evidence the Crown intended to adduce from the Forensic Pathologist, Dr Tiemensma.

[4] This issue arose when, just before Court resumed, the Crown informed the Defence of its intention to elicit expert opinion evidence from Dr Tiemensma by way of:

(a) showing her the actual pieces of an aluminium crutch and a white handled mop seized from the crime scene declared at the deceased's unit, which the Crown alleged were used by the accused to assault the deceased;

(b) showing her a still photograph of a burn on the deceased's torso, alleged by the Crown to have been inflicted by the accused, which photo had been taken from the body worn footage of a Police officer, Constable Hawken, who was first to arrive at the crime scene; and

(c) showing her a frying pan seized from the crime scene, which the Crown alleged was used by the accused to inflict the burn on the deceased's torso;

and asking her whether these things were consistent with injuries to the deceased that she observed during the autopsy.

[5] The Defence objected to this expert opinion evidence being elicited from Dr Tiemensma, essentially because they had not had adequate notice of it and were thereby prejudiced in the preparation and presentation of their case.

[6] Subsequently, on the eleventh day of the trial (being 11 November 2024), after closing addresses and before my summing up, the Defence made an application for the jury to be discharged. The Defence asserted that a discharge was necessary to prevent a miscarriage of justice because of a submission in the Crown's closing address about the possibility that the deceased had sustained the brain injury or injuries that caused his death as a result of a seizure and a fall (which was said to misrepresent the evidence) and the Crown's failure to call a neurologist who had reviewed medical records of the deceased and provided a letter about what they showed to the officer in charge of the investigation 12 days before the trial.[1]

Crown case

[7] The Crown case against the accused, as contained in its written outline, was as follows. By the time Dr Tiemensma was due to give her evidence, some of the evidence about these matters had been elicited in the trial. Not all of it was consistent with the written Crown case, but this overview suffices for present purposes.

[8] The accused was a 51 year old man from Thursday Island, who had a stocky build and weighed around 120kg. The deceased was a 54 year old man from Thursday Island, who was 164cm tall and weighed 56kg. He was frail and in poor health. He was taking anti-convulsing medication. The accused and the

1 This was the second application by the Defence for the jury to be discharged, the first application being made on the first day of the trial, after and in response to the Crown's opening address. I dismissed that application, with reasons, at the time it was heard.

deceased were cousins – their mothers were sisters. The deceased was the lessee of a public housing unit in Darwin City (‘unit 10’) and had been since April 2019.

[9] In around 2021, the accused and his de facto partner (‘AL’) moved into unit 10. The accused took over unit 10 and would bully and belittle the deceased. The deceased had routinely told family members or friends that he did not want the accused or AL staying at unit 10.

[10] In September 2021, the deceased also told the public housing authority that he had two people staying with him and he wanted them removed and given other accommodation.

[11] On the afternoon of 7 April 2022, the accused and AL went to a bar and a bottle shop in Darwin city. They walked back to unit 10 at about 3.50pm with a carton of beer. The deceased went to the same bar, leaving at about 6.17pm. He was sober when he arrived and drank only a small amount of alcohol. While at the bar, the deceased told a witness that he was having problems with the accused, and that he wanted the accused and AL to ‘fuck off out of his unit’. The deceased left the bar and walked back to unit 10, arriving nearby at around 6.43pm.

[12] When the deceased arrived at unit 10, the accused and AL were there. The accused was intoxicated, having drunk numerous cans from the carton of beer. He was playing loud music which was heard by witnesses in the unit below unit 10 (being unit 9).

[13] At about 6.53pm, the accused phoned a man, Mr Luta. Mr Luta thought the accused was drunk. The accused told Mr Luta that the deceased had told someone what the accused was doing to him, and now that person wanted to 'bash' the accused. Mr Luta asked where the deceased was and the accused said 'we're trying to get him off the road'. One minute later, the accused said the deceased was on the balcony with the accused.

[14] One of the occupants of unit 9, Mr Higgins, arrived home that night at around 7.30pm and fell asleep. He woke up at around 10pm, hearing arguing coming from unit 10. At around 11pm, he heard what he described as 'someone getting their head stomped in' and someone else crying and asking them to stop. These noises went on for about 30 minutes. At around midnight, Mr Higgins went to unit 10 to ask for a cigarette. AL asked him to call an ambulance. The accused told him not to. The accused was sitting on a chair in the doorway to unit 10, blocking the entry. Mr Higgins went downstairs and the accused started yelling and abusing everyone.

[15] The Crown case was that between 8pm, and around 4am or 5am, the accused intermittently violently assaulted the accused, by punching, kicking or stomping on him and striking him with pieces of aluminium crutch. The aluminium crutch was found broken and scattered in the lounge area with blood and the deceased's DNA on them. The deceased suffered at least 23 separate blunt force impacts during the assault.

[16] The accused and AL went to sleep some time in the early morning. They left the deceased unconscious, lying in a pool of blood on the lounge room floor. They did not assist him in any way or call an ambulance.

[17] Sometime before 7.30am on 8 April 2022, the accused and AL woke up. The deceased was still unconscious on the floor. The accused told AL to go to the service station across the road to get some bread for breakfast. She went to the service station at around 7.30am and tried to buy a loaf of bread, but had insufficient money to do so. She returned to unit 10. At around 7.55am, the accused went to the service station incensed about the inflated price of bread. He screamed, swore at, and abused the console operator about the price. When he was not served, he returned to unit 10. The console operator called 000 to report the incident.

[18] At about 8.23am, Police officers Hawken and Meyers went to the service station, spoke to the console operator and viewed CCTV footage of AL and the accused. The officers took a still image of both the accused and AL, and went to the unit complex to investigate. They showed the images to residents and were directed to unit 10. On the way there, they spoke to Ms Giddings. While speaking to Ms Giddings, they heard the accused yelling to the deceased to get up and loud music coming from unit 10. They went to unit 10 and went inside. They saw the deceased unconscious on the lounge room floor in a pool of blood, snoring. The accused was sitting in a chair next to the deceased, wearing only shorts, holding a mop and trying to mop

up the blood from around the deceased's head area. AL was standing in the kitchen. This was recorded on Constable Hawken's body worn camera.

[19] Constable Hawken placed the deceased in the recovery position and called paramedics. He spoke to the accused and this was also recorded on his body worn camera. In this conversation, the accused was asked what happened to the deceased. The accused told Police that the deceased fell down, he was drunk last night, came around last night and they tried to wake him up. When asked why he did not call for assistance, the accused said he thought the deceased was just sleeping, he just fell over now, the accused was just cleaning up, and was going to ring an ambulance. He also said he had no blood on him and did not hit the deceased. The accused also told Police that the deceased had come home in the early morning and gone to sleep in the lounge room, and that he had found the deceased bleeding on the floor when he woke up. The accused said he had a phone. When asked if he tried to call 000, he said he did not have a chance as he just woke up himself. Constable Hawken said to him: 'No you didn't, you've been across the road'. The accused agreed saying he went to get bread. When asked if he just left the deceased bleeding, the accused said the deceased was asleep. When told there was blood everywhere, the accused said that the deceased does that every time. The accused was cautioned by Sergeant Dunne. The accused repeated to the officer in charge, Detective Russell, his assertion that the accused had been out until 4am and then gone to sleep on the floor in the lounge room.

[20] At 9.08am, an ambulance arrived to attend to the deceased. When they cut off the deceased's shirt, Constable Hawken saw the burn to the deceased's torso and this was recorded on his body worn camera. Shortly after, the deceased was taken to the hospital and placed on life support with a non-survivable brain injury. A crime scene was declared at unit 10.

[21] The deceased died at 12.15am on 13 April 2022 as a result of blunt force trauma and the consequences thereof. The Crown case is that the deceased died as a result of the assault inflicted on him by the accused and being left unconscious, bleeding and without any medical assistance.

[22] An autopsy was performed by Dr Tiemensma. She found numerous recent injuries, including defensive injuries, said by the Crown to have been inflicted by the accused.

Rulings

[23] After hearing some oral argument from the parties, receiving written submissions and then hearing further oral argument, on 4 November 2024, I made the following determinations and rulings.

[24] As to expert evidence from Dr Tiemensma that the injuries sustained by the deceased are consistent with being inflicted by the broken crutch and/or the mop, I find that:

(a) this proposition was part of the Crown case, as disclosed in its opening address;

(b) this comprises expert opinion evidence, that is, evidence beyond what the jury might, by the application of logic and common sense within their ordinary life experience, know or understand;

(c) this comprises expert opinion evidence which Dr Tiemensma is qualified to give; and

(d) coupled with the forensic analysis of the broken crutch pieces and the mop, which showed a positive presumptive test for blood and for the deceased's DNA, this evidence has significant probative value.

[25] I am satisfied that, in substance, Dr Tiemensma gave evidence to this effect at the preliminary examination in the committal hearing in April 2023, when she said that the injury to the deceased's face could possibly align with the top of the crutch or the tip of a metal pipe. The Defence have therefore had reasonable and sufficient notice of the substance of this evidence.

[26] Consequently, I rule that the Crown is permitted to elicit this evidence from Dr Tiemensma during the trial, including by reference to her physical examination of the aluminium crutch pieces and the mop.

[27] As to expert evidence from Dr Tiemensma that the burn to the deceased's torso was consistent with the burn having been inflicted during the period in which the other injuries he sustained were inflicted, I find that:

(a) this proposition was part of the Crown case, as disclosed in its opening address;

(b) this comprises expert opinion evidence, that is, evidence beyond what the jury might, by the application of logic and common sense within their ordinary life experience, know or understand;

(c) this comprises expert opinion evidence which Dr Tiemensma is qualified to give; and

(d) this evidence has significant probative value.

[28] I am satisfied that, in substance, Dr Tiemensma gave evidence to this effect at the preliminary examination in the committal hearing in April 2023, when she said that the state of the burn at the time of the deceased's death was such that it could have been inflicted some few days before his death and in keeping with having been sustained during the period in which the other injuries sustained were inflicted. The Defence have therefore had reasonable and sufficient notice of the substance of this evidence.

[29] Consequently, I rule that the Crown is permitted to elicit this evidence from Dr Tiemensma during the trial, including by reference to the still photograph taken from the body worn footage of Constable Hawken when he found the deceased at unit 10 on the morning of 8 April 2022.

[30] As to expert evidence from Dr Tiemensma that the burn to the deceased's torso is consistent with the dimensions of the frying pan taken from the stove in unit 10, I find that:

(a) this proposition was not part of the Crown case, as disclosed in its opening address or its written outline of the Crown case;

(b) this comprises expert opinion evidence, that is, evidence beyond what the jury might, by the application of logic and common sense within their ordinary life experience, know or understand;

(c) this comprises expert opinion evidence which Dr Tiemensma is qualified to give; and

(d) in the absence of forensic testing for blood or DNA of the frying pans and sauce pans found on the stove in unit 10, the probative value of this evidence is considerably lower than that of the other evidence I have already referred to.

[31] I also find that Dr Tiemensma has not expressed this expert opinion in any expert report or statement disclosed to the Defence, and she did not express this expert opinion during the evidence she gave about the burn injury at the preliminary examination in the committal hearing. The only notice the Defence have had that Dr Tiemensma would give this evidence was on being told about it by the Crown on the morning of the fifth day of the trial, and in notes taken by the Crown of their conference with Dr Tiemensma later that afternoon (which notes were provided to the Defence shortly after that conference occurred). Consequently, the Defence was given little over two days' notice of this expert opinion evidence. I consider that the Defence

have not had reasonable and sufficient notice of the substance of this evidence.

[32] Consequently, I rule that the Crown is not permitted to elicit this evidence from Dr Tiemensma during the trial, whether by reference to Dr Tiemensma's examination of the actual frying pan or a photograph of it.

[33] On 11 November 2022, I dismissed the Defence's application for the jury to be discharged.

[34] In relation to the above rulings, I said I would publish written reasons in relation to the rulings after the end of the trial. These are my reasons.

Reasonable notice of the substance of expert evidence

[35] The Defence argued that the proposed expert evidence was 'new opinion evidence', of which the Defence had not previously been given notice, which denied to the Defence arguments available on the state of the evidence (i.e. as contained in Dr Tiemensma's written reports and the evidence she gave at the committal hearing) that: (a) the pieces of the aluminium crutch and the mop were not consistent with the injuries of the deceased because linear abrasions that might be expected from the use of long thin implements were not present; (b) the burn may have occurred up to a week earlier than 8 April 2022; and (c) there was never anything done by investigators to assess or measure the seized frying pan.

Allegations in the Crown case

[36] As conceded by the Defence, the use of the aluminium crutch to inflict injuries on the deceased was referred to in the Crown's written outline of its case and in its opening address to the jury. The use of the mop to inflict injuries on the deceased was not referred to in the Crown's written outline of its case, but (as conceded by the Defence) it was referred to in the Crown's opening address. The Crown clearly put a case that the aluminium crutch or pieces of it, and the white handled mop, were used by the accused to inflict injuries on the deceased.

[37] In the Crown's written outline, it was put that: (a) Dr Tiemensma performed an autopsy on the deceased which noted various injuries, including a large full-thickness burn over the deceased's torso; and (b) at the committal hearing, Dr Tiemensma expressed the opinion that the burn was inflicted roughly around the same time as the other injuries. In the Crown's opening address, it was put that the jury would hear evidence that, in the autopsy, a catalogue of injuries were noted as being sustained by the deceased via blunt force trauma, there was the presence of a large burn on the deceased's torso, and that injury (being the burn) and those injuries were fresh.

[38] The Defence argued that the Crown did not allege, either in its written outline or its opening address to the jury, that the burn was inflicted by the accused or that it was caused by using the frying pan seized in unit 10. It is the case that the Crown did not allege specifically that the burn was inflicted

by the accused, but the Crown did allege that the accused violently assaulted the deceased between the evening of 7 April and the early hours of 8 April 2022, which assault caused numerous blunt force injuries from which the deceased could not recover, and went on to describe the injuries noted at autopsy, including the burn, which was 'fresh'. It was abundantly clear that the Crown case was that the burn was inflicted by the accused during the period of the assault which was said to have occurred across 7 and 8 April 2022.

[39] However, there was no mention, either in the Crown's written outline or in its opening address, of the use by the accused of a frying pan or other pots and pans seized from unit 10 to inflict that burn. Nor was it suggested that the size of the burn was consistent with the dimensions of any of those pots and pans. The frying pan and other pots and pans were simply not referred to.

[40] For these reasons, I made the findings set out in subparagraph (a) of each of paragraphs [24], [27] and [30] above.

Expert opinion evidence

[41] The Defence argued that the Crown was seeking to introduce 'common sense inferences' that are 'squarely within the province of the jury's rational assessment of the evidence' because they could see for themselves the dimensions and shapes of each of the implements and compare them to the deceased's injuries, particularly a C-shaped laceration to the deceased's

upper lip and the burn. It was argued by the Defence that the propositions that the aluminium crutch pieces or the mop could have caused the C-shaped laceration and that the frying pan could have caused the burn were being dressed up as outside the common experience of jurors, unavailable to ordinary logic and common sense, thereby 'giving them the imprimatur of expert evidence', which is highly persuasive and carries greater weight in a trial than a common sense inference.

[42] As I understood it, this was a submission to the effect that the proposed evidence was not expert evidence. In oral submissions, when I put that to senior counsel for the Defence, the response was that the Defence was not arguing that Dr Tiemensma would not be able to express those opinions, but was saying these were matters that the jury could work out for themselves, from the evidence about the dimensions of the injuries and the dimensions of the implements. It was said that 'it's not expert evidence; it's a ruler'.

[43] While the jury could legitimately be invited to measure the pieces of the aluminium crutch, the mop and the frying pan or the other pots and pans, and compare those to the dimensions of the C-shaped laceration and the burn recorded by Dr Tiemensma at autopsy in order to draw the inference that the injuries were inflicted by the use of those implements, I do not accept that this denies to the proposed evidence the character of expert opinion

evidence (that is, evidence of an opinion wholly or substantially based on specialised knowledge based on training, study or experience).[2]

[44] I consider the proposed evidence as to the consistency or otherwise of the deceased's injuries observed at autopsy, some six days after the injuries are alleged to have been inflicted, during which period the deceased was hospitalised and treated for his injuries, to be properly based on Dr Tiemensma's specialised knowledge as a highly experienced and well qualified forensic pathologist. For example, the effects of the body's healing processes upon the injuries and how that may impact upon the dimensions of the injuries seen at autopsy, and the properties of the human body when impacted with an implement and how that may affect the dimensions or shapes of injuries, would clearly be matters outside of the jury's logic and common sense within their ordinary life experience. So too are the age of the burn as seen at autopsy and when Police first arrived at unit 10 and attended to the deceased, and the timing and mechanism of its infliction.

[45] For these reasons, I made the findings set out in subparagraph (b) of each of paragraphs [24], [27] and [30] above.

Dr Tiemensma's expertise about burns

[46] The Defence referred to Dr Tiemensma's evidence at the committal that a burns specialist, i.e. a surgeon who treats burn injuries, would be best placed to consider the age and timing of the burn. The suggestion appeared

2 See s 79, *Evidence (National Uniform Legislation) Act 2011* (NT).

to be that Dr Tiemensma was not sufficiently qualified to give expert opinion evidence about the age and timing of the burn, given that she was looking at the injury some five or six days after it was alleged to have been inflicted, when the deceased had been hospitalised and treated.

[47] At the committal hearing, Dr Tiemensma gave evidence that she had previously given opinions in relation to the age of burn injuries, she had seen many burn injuries when she worked in South Africa, where the hospital was a referral hospital for burn fatalities, and she had seen victims who had been hospitalised for varying periods of time with a whole range of burn injuries.[3]

[48] On the basis of this evidence and the matters referred to in the preceding section of these reasons, I am satisfied that Dr Tiemensma has the necessary specialised knowledge to give the proposed expert opinion evidence in relation to the consistency of the deceased's injuries with the implements identified, including the burn injury.

[49] For these reasons, I made the findings set out in subparagraph (c) of each of paragraphs [24], [27] and [30] above.

Probative value

[50] The 'probative value' of evidence refers to the extent to which the evidence could rationally affect the assessment of the probability of the existence of a

3 Transcript, 20 April 2023, pp 167-168.

fact in issue.[4] Evidence has significant probative value if its probative value is important, or of consequence.[5]

[51] By the time this issue as to the admissibility of the proposed evidence arose, the Court had heard evidence as to the forensic analysis of the broken crutch pieces and the mop, which showed that two of the four crutch pieces and the mop showed a positive presumptive test for blood and for the deceased's DNA.

[52] The Crown case is that the accused inflicted the injuries the deceased was found to have when Police attended at unit 10 on the morning of 8 April 2022, and that one or more of those injuries caused his death. A principal issue in the trial is whether the deceased sustained that injury or those injuries as a result of a fall due to intoxication or a seizure, rather than as a result of an assault. Another principal issue in the trial is when the deceased sustained those injuries, and specifically whether they were sustained during the time witnesses present in unit 9 (directly below unit 10) heard sounds consistent with a beating and one heard a male voice yelling out the deceased's name, saying: 'You better look at me, Henry, one, two,' and 'You better look at me, Henry, one, two, open your eyes, Henry', each followed by the sound of hitting, like wood hitting skin, and that these

---

4 'Probative value' as defined in the Dictionary, ENULA.

5 *IMM v The Queen* (2016) 257 CLR 300 at [46] per French CJ, Kiefel, Bell and Keane JJ ('*IMM*'); *BD v The Queen* (2017) 40 NTLR 1 at [84] per Grant CJ, Kelly and Barr JJ.

sounds were heard at a time when it was not disputed that the accused was present in unit 10.

[53] In the largely circumstantial case pressed by the Crown, Dr Tiemensma's evidence about whether some of the injuries she observed at autopsy were consistent with being inflicted by the implements found in unit 10 on the morning of 8 April 2022, when coupled with the results of the forensic analysis of those implements showing the presence of blood and the deceased's DNA, has significant probative value in relation to those principal issues and the existence of the facts in issue relating to them, being the fact that the deceased sustained the injury or injuries that caused his death as a result of a fall due to intoxication or a seizure, rather than as a result of an assault, and the fact that the deceased sustained those injuries during the period when the sounds were heard in unit 9.

[54] Similarly, the age of the burn and the time at which it was inflicted has significant probative value in relation to those principal issues and the existence of those facts.

[55] However, in the absence of forensic testing (for blood or DNA) of the frying pan and other pots and pans found in unit 10, the probative value of the proposed evidence that the burn to the deceased's torso is consistent with the dimensions of the frying pan, is considerably lower than that of the other proposed evidence. This proposed evidence has far less capacity to rationally affect the assessment of the probability of these facts when there

is no other evidence that suggests the frying pan or the other pots and pans are the potential mechanism of the burn injury.

[56] For these reasons, I made the findings set out in subparagraph (d) of each of paragraphs [24], [27] and [30] above.

Notice to the Defence of the proposed expert opinions

[57] Unlike in the case of a civil trial,[6] or expert evidence proposed to be called by the accused in a criminal trial,[7] there is no legislation, *Supreme Court Rule* or Practice Direction which expressly requires the Crown to disclose to the Defence any statement of expert opinion evidence intended to be elicited by the Crown in a criminal trial.

[58] However, it was not in dispute that the common law duty on the prosecution to disclose documents which are material[8] extends to a duty on the prosecution to disclose all expert material to the Defence, which duty must be discharged with the object of fairness in mind.[9]

---

6 See Order 33.07 and Order 44.03, *Supreme Court Rules 1987* (NT); Practice Direction No 6 of 2015.

7 See s 331A, *Criminal Code 1983* (NT).

8 See *Hogan v Rigby* (2020) 352 FLR 93 at [18]-[19] per Hiley J and the authorities there cited.

9 See I Freckelton, *Expert Evidence*, (Thompson Reuters, 6th ed, 2019), [5.0.350], citing *R v Higgins* (1994) 71 A Crim R 429. It should be noted that the reported version of that decision does not contain the observations of the Victorian Court of Criminal Appeal relating to the fifth ground of appeal concerning non-disclosure of Crown documents. The unreported and full version of the decision contains the observation of the Court that the 'lonely and heavy responsibility imposed upon prosecutors [by the general prosecutorial duty of disclosure of material which would tend to assist the defence case] must be discharged with the object of fairness in mind': *The Queen v Higgins* (unreported, VCCA, 2 March 1994) (at 80) per Brooking, Byrne and Eames JJ.

[59] No authority was cited by the parties which dealt specifically with the scope of the prosecutorial duty to disclose expert opinion evidence. It seems to me that, consistent with the object of fairness, the duty would encompass the following:

(a) Disclosure must be given within a reasonable time prior to the trial.

(b) What is reasonable will depend on the nature of the expert opinion evidence and will vary from case to case, but it should be within a time sufficient to permit the Defence to:

(i) seek and obtain its own expert opinion about, or responsive to, the expert opinion evidence disclosed to it by the prosecution;

(ii) comply with the requirement in s 331A of the *Criminal Code* to give written notice of the substance of the expert evidence it intends to adduce at least 14 days before the start of the trial; and

(iii) whether or not it pursues its own expert opinion, prepare its case at trial, including cross-examination of the expert called by the Crown and of any other witnesses whose evidence may bear upon the issues the subject of the expert opinion evidence, for example, addressing the factual matters upon which the expert opinion is based.

(c) What must be disclosed is the substance of the expert opinion evidence, that is, the substance of the opinion and the basis or bases for it,[10] and the substance of the facts, assumptions and reasoning related to that opinion.[11]

[60] Generally speaking, contrary to the submissions of the Crown in this matter, the above scope of the prosecutorial duty is not *confined* by the capacity of the Defence to seek and obtain its own expert opinion evidence. To suggest that the Crown was not required to disclose the substance of the expert opinion evidence because the Defence had access to the physical implements and could have sought its own expert evidence about whether they were consistent with the deceased's injuries would, if accepted, amount to a reversal of the onus of proof.

[61] The Defence argued that the proposed evidence was different from any previous expert opinion Dr Tiemensma had provided, and based on material she was never shown before. In particular, it was argued that Dr Tiemensma had never been shown a photograph of the mop or the frying pan and had never expressed an opinion about either of those things being consistent with the injuries caused. Further, it was argued that the opinions now sought to be adduced by presenting the physical items were in addition to, and far

---

10 The disclosure requirements in a civil proceeding under Order 44 of the *Supreme Court Rules 1987* (NT) relate to the substance of all of the material evidence to be given by the expert in evidence in chief: Order 44.03(1) and (2), read with Order 44.01(2).

11 In *Ollett v Bristol Aerojet Ltd* [1979] 3 All ER 544, Ackner J held (at 544) that a requirement to disclose the substance of an expert's report extended beyond merely a substance of the factual description of the relevant circumstances to the substance of the expert opinion in relation to them.

more refined than, the previous opinions she had expressed. It was also argued that, on the basis of the proofing notes (see below from [62]), the Defence was not aware what Dr Tiemensma would say about the age of the burn and whether she would resile from the evidence she gave at the committal hearing about it, which was said to be that the burn could have been inflicted two days or a week prior to the other injuries.

The proofing notes

[62] After this issue was raised on the morning of 1 November 2022, later that day the Crown had a conference with Dr Tiemensma. During that conference, hand written notes were made and a typed document was prepared which Dr Tiemensma signed. These documents comprised the proofing notes which were disclosed to the Defence later that day.

[63] The proofing notes disclose that Dr Tiemensma was shown an autopsy photograph of the deceased's face which depicted numbered laceration injuries. She was shown the four broken crutch pieces and the mop seized from unit 10 and was asked if they were consistent with the injuries to the deceased's face. Her opinion was that the pieces of the crutch that comprised a hollow pole or stick or rod were consistent with the C-shaped laceration to the deceased's upper lip which she had identified as injury (h) on the autopsy external examination diagram and which was numbered (1) on the autopsy photograph of the deceased's face. She said the broken crutch piece which had the rubber stoppers on the end could have been used, but it

was not possible to identify it with any specific injury. She said the mop did not correspond with any specific injury, and specifically not the C-shaped laceration, because it had a broken and distorted edge. Dr Tiemensma was also shown the still photograph taken from Constable Hawken's body worn footage and asked about the timing of that burn. She said it looks like a fresh burn because you can see blistering of the skin around the edges of the dark black wound, which is different to the appearance seen at autopsy where there were some signs of reaction of the body to the injury, namely healing. She said as shown in the still photograph, it looks like an acute burn because you can see acute blister formation, and the blisters were largely filled with fluid. She agreed that the two photographs showed what you would expect to see in terms of healing from day one to day five.
Dr Tiemensma was also shown the frying pan taken from the stove in unit 10 and asked whether its diameter was consistent with the burn as seen in the still photograph from the body worn footage. She said the burn looks like a contact burn, the dimensions might match as they are consistent, but she could not say for certain.

Dr Tiemensma's previous opinions

[64] Dr Tiemensma prepared two written reports, both of which were disclosed by the Crown to the Defence.

[65] The first report was her post-mortem examination report for the Coroner dated 9 August 2022. The report noted her main pathological findings as: (a)

external examination showing, *inter alia*, multiple healing facial lacerations (both eyebrows, forehead, both cheeks and upper lip), and a healing scalp laceration in the left occipital region, and a large full-thickness burn over the left lateral aspect of the torso; (b) internal examination showing, *inter alia*, large clotted subdural haemorrhage (± 70 ml) with bi-frontal contusions, brain swelling, herniations, secondary brainstem haemorrhages, and brain infarction; (c) histological examination showing, *inter alia*, acute dural haemorrhage (subdural and intra-dural), haemorrhagic infarction of the brain, and coagulation necrosis involving the epidermis and dermis of the skin of the left lateral aspect of the torso, with an acute inflammatory response; and (d) post-mortem toxicological analysis showing the presence of prescription medication (two specified kinds) at non-toxic concentrations in the hospital admission blood and the presence of prescription medications (various, including the two just mentioned) in the preserved subdural blood sample and no alcohol detected in either blood sample.

[66] Dr Tiemensma's opinion as to the cause of death was blunt force head injury and the consequences thereof. The report said the post-mortem examination confirmed the presence of a large left-sided subdural haemorrhage, bi-frontal brain contusions, brain swelling and infarctions and showed multiple blunt force injuries in different locations on the body, including injuries in locations typical of defensive injuries, and a large full-thickness burn on the left lateral aspect of the torso. The report also said the deceased had a known medical history of seizure disorder, following a previous head injury

sustained in 2019. However, in Dr Tiemensma's opinion the demonstrated injuries were too severe and diffuse to have resulted from seizure activity. In relation to the burn, the report said that it was 175mm x 150mm in size, with charring of the central aspect, and some surrounding skin slippage, with the surrounding skin showing no significant macroscopic inflammatory reaction, and there were no macroscopic signs of infection. The skin showed various stated characteristics in keeping with acute inflammatory tissue response.

[67] The second report was her additional statement regarding the death investigation of the deceased dated 30 November 2022. This report responded to various questions posed by the then Crown Prosecutor, who had provided Dr Tiemensma with, *inter alia*, statements of the two first attending Police officers, Constable Hawken and Aboriginal Community Police Officer Meyers, the body worn footage of Constable Hawken of that attendance at unit 10, photographs taken by a crime scene examiner, and statements of the accused, his wife and other witnesses regarding what the accused had said to them about what happened to the deceased.

[68] As regards the photographs, on 31 October 2024, 45 crime scene photographs were tendered through that crime scene examiner and received as Exhibit P4. A number of those photographs depicted the pieces of a broken aluminium crutch found in various places in unit 10 and the white handled mop. I infer that the photographs referred to in Dr Tiemensma's second report are photographs within Exhibit P4.

[69] One of the questions asked was as to the likely mechanism of the subdural haemorrhage and any other injuries. As regards the subdural haemorrhage, Dr Tiemensma opined that it is almost exclusively the result of trauma. Subdural bleeding arises from the tearing of the veins that traverse the subdural space, and the mechanical cause of that bleeding is a change of velocity of the head, typically as a result of a blow or a fall with a head strike. It is not possible to differentiate between the likely aetiology of the subdural haemorrhage if evaluated in isolation, and its presence should be seen in the context of the deceased having a large number of other injuries, including multiple discrete injuries covering the head, face and upper extremities.

[70] As regards the other injuries, Dr Tiemensma opined that they consisted of multiple blunt force injuries, namely multiple facial and scalp lacerations/tears, knee laceration, multiple scalp bruises covering the left and right side and the back of the head, and multiple internal bruises involving the upper extremities, right shoulder and right side of the back. She said these injuries would have resulted from the application of blunt force trauma to the body/skin and the numerous separate injuries are not in keeping with them being the result of a simple or single fall or collapse and, in her opinion, most likely resulted from multiple blows, kicks, or strikes with a blunt object.

[71] Another question was asked as to whether the broken crutch shown in the crime scene examiner's photographs is capable of inflicting injuries

consistent with any of those suffered by the deceased. Dr Tiemensma said that although none of the injuries could have been caused exclusively by the broken crutch, the lacerations and bruises may have been inflicted by a blunt object such as the crutch.

[72] One of the questions was when the burn injury was likely to have been occasioned and if it may be relevant to any assault that resulted in the deceased's death. Dr Tiemensma said that microscopic examination of the burn injury showed coagulation necrosis of the skin with evidence of an acute inflammatory response, in keeping with the first stage of healing, and in keeping with the burn injury being a few days old, and therefore in keeping with the injury sustained at the same time the other injuries were sustained. She said the burn wound was large, covering the left side of the torso, and this would have caused significant pain and discomfort. There was no record in the deceased's electronic clinical health records that the deceased sought help for treatment for a burn injury in the week prior to hospitalisation.

[73] In the committal hearing in April 2023, Dr Tiemensma was cross-examined by the Defence about the opinion expressed in her second report that there were at least 23 separate blunt force impacts to the deceased's body. Initially, questions were put to her about whether an 'object with a multifaceted surface' could leave an impression of multiple impacts despite

there being only one blow.[12] Dr Tiemensma asked for an example of such an object and was referred to three crime scene photographs (9, 10 and 17) of the pieces of the aluminium crutch found in unit 10.[13] Dr Tiemensma said that when you strike the body with such an object, there will be a main contact point, if the crutch strikes the body lengthwise, then you expect to see a linear contusion or linear abrasion, but if the body is hit with the top of the crutch, you would see different focal impacts, like the lacerations seen to the front, such as the C-shaped, semi-circular laceration which could possibly be the top of the crutch or the tip of a metal pipe.[14] The cross-examination along the lines of the initial questions continued, with Dr Tiemensma ultimately saying that it is possible that the number of impacts to the deceased's body may have been less than 23, but she did not think the impacts to the face and head were combined, they were separate impacts (because the head is round), and the burn is obviously not caused by that weapon.[15]

[74] Also at the committal hearing, Dr Tiemensma was cross-examined in relation to the burn injury. When asked about the significance of the surrounding skin showing no significant macroscopic inflammatory reaction, she said it means there is no reaction to show that the wound was healing, it

12 Transcript, 20 April 2023, p 162.

13 Ibid.

14 Transcript, 20 April 2023, pp 162-163.

15 Transcript, 20 April 2023, p 163.

means it is fresh, it is new.[16] She agreed that it is very difficult to give an opinion about the precise age of the burn some five days after the deceased was admitted to hospital, but said that when she looked at it microscopically, it showed evidence of acute inflammatory response, in keeping with the first stage of healing and in keeping with a burn injury being a few days old, so she did not think it was an old burn wound, it was in keeping with a burn wound that was sustained some days before, not weeks before.[17] She said you cannot be exactly specific but the wound was in keeping with being sustained a few days before the deceased died, and it is possible that it was sustained at the same time as the other incident. It was a large burn wound and would have caused discomfort, so she thought it was possible that it was inflicted at the same time as the other injuries because she would find it hard to believe that he would not complain of a burn wound that size on the side of his torso. When asked if it was also possible that it was caused at a slightly different time, she said not weeks prior, but a few days prior. When asked if the observations of first responders would be important in informing the opinion of when the burn injury was inflicted, she said she did not think so because first responders are not there to describe wounds, but are there to save somebody's life, so they often describe wounds incorrectly. When referred to the impression of a paramedic attending on 8 April 2022 that the burn appeared to be old, she said if you look at the photograph of the burn, what she described as old is

16 Transcript, 20 April 2023, p 166.

17 Ibid.

actually black necrotic skin, and what may be interpreted as dry and old was not dry because it was old, but dry because the moisture had been burnt away and only dead tissue was left.[18] She said this is something seen in acute burn injuries. If it was old at the time of admission, you would expect it to heal even further before death so you would expect to see more signs of healing microscopically. Those signs were not there. When referred to her autopsy photos of the burn, Dr Tiemensma said that the wound showed features of the first stage of healing, which puts it at a few days to a week old. She said it was possible it could have been sustained a day or two before the deceased was admitted to hospital, but she did not think it was sustained more than a week to months before the incident.[19] She also said that pain is a subjective thing, but the location of the burn meant that whenever the deceased moved his body or something rubbed against that area, such as clothes or his arm, or a bed or couch, it would cause stretching of the skin and some pain and discomfort.[20] If intoxicated when it was inflicted, that would reduce the perception of pain, but as he sobered up, the pain sensation would return to normal, and when stretching, walking and moving he would experience some pain and discomfort.[21]

18 Transcript, 20 April 2023, p 168.

19 Transcript, 20 April 2023, pp 169-170.

20 Transcript, 20 April 2023, p 170.

21 Ibid.

Consideration

[75] Since Dr Tiemensma's cross-examination in the committal hearing in April 2023, the Defence have been aware of Dr Tiemensma's opinion that the top of the pieces of aluminium crutch, as depicted in the crime scene photographs, would result in focal impacts like the lacerations on the deceased's face such as the C-shaped semi-circular laceration to his upper lip, which could possibly be from the top of the crutch or the tip of a metal pipe. While that evidence did not expressly refer to the mop depicted in the crime scene photographs, her reference to 'the tip of a metal pipe' is clearly a reference to the mop handle depicted in the crime scene photographs, which is a metal pipe with a hollow tip and no other metal pipe was located at the crime scene.

[76] It is irrelevant that that opinion was given in the Defence's cross-examination, or in response to questions about whether multiple injuries could have been caused with a single blow. The substance of Dr Tiemensma's opinion as to the consistency between the pieces of aluminium crutch and the mop handle and the C-shaped laceration to the deceased's face, and the basis for that opinion (the shape of the laceration and the shape of the tip of the crutch or mop handle as depicted in the crime scene photographs) was thereby disclosed.

[77] I reject the Defence's argument that the proposed expert evidence on this topic denied to the Defence arguments available on the state of the evidence

as contained in Dr Tiemensma's written reports and the evidence she gave at the committal hearing that the pieces of the aluminium crutch and the mop were not consistent with the injuries of the deceased because linear abrasions that might be expected from the use of long thin implements were not present. That was not the substance and effect of the evidence given by Dr Tiemensma at the committal hearing.

[78] The proposed expert evidence to be given by Dr Tiemensma (as indicated in the proofing notes) by reference to the actual crutch pieces and mop, the same ones depicted in the crime scene photographs on which her opinion was based, is not materially new or different to the substance of her evidence of which the Defence were aware over a year prior to the trial.

[79] For these reasons, I was satisfied, as set out in paragraph [25] above, that the Defence had reasonable and sufficient notice of the substance of the proposed evidence. For those reasons, I made the ruling set out in paragraph [26] above.

[80] Since Dr Tiemensma's cross-examination in the committal hearing in April 2023, the Defence have been aware of Dr Tiemensma's opinion that the absence of macroscopic inflammatory reaction referred to in her first report meant that the burn injury was fresh or new; it was a few days to a week old at the time of death; it was possible that it was sustained at the same time as the other injuries; it was possible that it was sustained a day or two or a few days before hospitalisation; it was not possible that it was sustained a week

before hospitalisation; any movement would have caused pain and discomfort such that, if it had been sustained up to a week before hospitalisation, one would expect the deceased to have complained about it or sought medical treatment and there was no record showing he had done so.

[81] The substance of Dr Tiemensma's opinion that the burn to the deceased's torso was consistent with the burn having been inflicted during the period in which the other injuries he sustained were inflicted, and the basis for that opinion (that it was fresh, a few days to a week old, could possibly have been sustained at the time of the other injuries, or a day or two or a few days prior to the other injuries, which possibility was reduced by the pain and discomfort it would have caused) were thereby disclosed.

[82] I reject the Defence's argument that the proposed expert evidence on this topic denied to the Defence arguments available on the state of the evidence as contained in Dr Tiemensma's written reports and the evidence she gave at the committal hearing that the burn may have occurred up to a week earlier than 8 April 2022. That was not the substance and effect of the evidence given by Dr Tiemensma at the committal hearing.

[83] The proposed expert evidence to be given by Dr Tiemensma (as indicated in the proofing notes) by reference to the still photograph of the burn taken from the body worn footage on the morning of 8 April 2022, is not materially new or different to the substance of her evidence of which the

Defence were aware over a year prior to the trial. While the proposed expert evidence to be given by Dr Tiemensma notes acute blister formation and blisters filled with fluid in the still photograph, whereas the autopsy photograph showed the blisters had disappeared or collapsed, that is in substance consistent with her prior evidence that the burn was 'fresh' and, by the time of autopsy, the first stage of healing had commenced which was in keeping with the burn being inflicted at the same time as the other injuries. The proposed expert evidence does not contain any opinion to the effect that, having seen the still image, it was not possible that the burn was sustained prior to 7-8 April 2022.

[84] For these reasons, I was satisfied, as set out in paragraph [28] above, that the Defence had reasonable and sufficient notice of the substance of the proposed evidence. For those reasons, I made the ruling set out in paragraph [29] above.

[85] Unlike the other proposed expert evidence, nowhere in Dr Tiemensma's reports or the evidence she gave at the committal hearing did she give any opinion that the burn to the deceased's torso was consistent with the dimensions of the frying pan or any other pot or pan taken from unit 10. The first time the Defence were notified, verbally, of the intention of the Crown to elicit this evidence was on the fifth day of the trial and very shortly before Dr Tiemensma was due to give her evidence. By provision of the proofing notes, the Defence were then given less than three days' notice (including the weekend) of the substance of Dr Tiemensma's opinion

evidence on this topic. While the proposed expert evidence does not have significant probative value, I accept that the late notice of it denied to the Defence any capacity to seek and obtain its own expert evidence about this matter, and it denied to the Defence (or at least significantly reduced the force of) an argument available on the state of the evidence (as contained in Dr Tiemensma's written reports and the evidence she gave at the committal hearing) that there was never anything done by investigators to assess or measure the seized frying pan.

[86] For these reasons, I was not satisfied, as set out in paragraph [31] above, that the Defence had reasonable and sufficient notice of the substance of the proposed evidence. For those reasons, I made the ruling set out in paragraph [32] above.

Defence application to discharge the jury

[87] As set out above, the Defence application for the jury to be discharged was founded on submissions made by the Crown in its closing address and the failure of the Crown to call a neurologist to give evidence at the trial.

[88] The impugned part of the Crown's closing address is italicised in the below extract:

> Now, the Defence don't have to prove anything and you'll hear that, I imagine, from my learned friend's address. But they will attempt to suggest that the subdural haemorrhage was caused by either a seizure or a fall from a seizure. *There are two problems with that proposition that the Crown submits make them an unreasonable hypothesis.*

> *The evidence of the forensic pathologist, when she referred to the medical records, the deceased had been seizure-free for about two to three years and the deceased had been compliant with his medication and that was supported by levels of the medication for his epilepsy found at a therapeutic level in his blood. In review of the medical records, the deceased had previously suffered seizures. They occurred in the context of either intoxication or lack of compliance with medication and alcohol withdrawal.*

[89] The Defence argued that the submission asked the jury to draw the inference that the deceased was unlikely to have suffered a seizure because he was compliant with his medication because medication was found at therapeutic levels in his blood, which are matters that could only have been addressed by expert opinion evidence from a neurologist.

[90] The Defence argued that this submission misrepresented the evidence because there was no evidence that the therapeutic levels of anti-convulsant medications in the deceased's blood were consistent with compliance; there was no evidence that the amount of anti-convulsant medication prescribed was sufficient to control his seizures, which was a matter only a neurologist could give evidence about; and there was evidence, in the form of parts of a letter from the neurologist, contradicting the Crown's submission that the previous seizures occurred in the context of either intoxication or lack of compliance with medication because the letter noted that, on the deceased's admission to hospital in 2019 following a seizure and a fall with a head strike, the records noted that he had been compliant with his medication but had nevertheless had a seizure.

[91] The Defence said that the Crown could have asked the neurologist for an opinion about these matters, but instead had relied on and misapplied the evidence of Dr Tiemensma about what the medical records said, to urge the jury to draw an inference which is unavailable unless supported by a neurologist's opinion.

[92] This was said to give rise to a serious disadvantage to the accused about an important matter urged by the Defence as a reasonable hypothesis consistent with innocence.

The evidence and rulings at trial

[93] At the trial, Dr Tiemensma gave evidence-in-chief that the subdural blood sample she obtained from the deceased at autopsy, which was a good indicator of the concentration of substances in the body at the time the injury was sustained, showed two types of anti-epileptic medications present which were within therapeutic limits.[22] 'Within therapeutic limits' means that the medications were not in toxic or subtherapeutic concentrations, they were what they should be when treating a person with epilepsy.

[94] Dr Tiemensma also gave evidence that she had been provided with all of the deceased's medical records from both Royal Darwin Hospital and his general practitioner and she had reviewed them. When she wrote her report, she only had the hospital discharge summary, which stated that, in 2019, the deceased had a cerebral haemorrhage post-head injury with seizure activity.

22 Transcript, 4 November 2024, p 340.

Upon review of all of the deceased's medical records, she found that the deceased was first diagnosed with epilepsy in 2011. In the 11 years between 2011 to 2022, the deceased had eight seizures in total, so she got the impression that his epilepsy was relatively well controlled. The deceased had other seizures in March 2011, two seizures in 2014, three seizures in 2015 (in April, July and October), and the last recorded seizure he had was in March 2019. She said when you read through the notes, there are often remarks that say things like: 'He's been seizure-free for two years.', 'He's taking the medication.' and 'He's been counselled about the importance of being compliant with medication.'. On the times he presented with seizure activity, he never had any significant injury except in 2019 when he had a seizure on a bus and had a fall with a head strike. On that occasion, he had a localised injury, namely a left eyebrow laceration and a fracture of the left eyebrow ridge. That was the most significant injury he had since he was diagnosed in 2011. The blunt force injuries Dr Tiemensma had observed to the deceased were not, in her opinion, consistent with having a seizure because of the severity of the injuries, the different locations of them, the number of them and the fact that his anti-epileptic medication was present in his blood.

[95] In cross-examination, Dr Tiemesma agreed that the reason for someone falling over and potentially suffering a subdural haemorrhage include having had a seizure; that any time someone has a seizure there is a risk of a head strike and a risk of brain injury (such as a brain contusion or a subdural

haemorrhage) occurring as a result; and a subdural haemorrhage could be initiated by a fall with a significant head strike or a fall with a less than significant head strike.[23] Dr Tiemensma said that the deceased's medical records showed that the incident where the deceased suffered a cerebral haemorrhage post-head injury with a seizure was in 2011, not 2019.[24] It was upon that admission that the deceased was first diagnosed with epilepsy.[25] The presentation in 2019 after a fall due to a seizure involved a laceration and fracture to his eyebrow ridge, but not any internal brain injury. She denied that the seizure activity in 2011 was because of non-compliance with medication as that was when the deceased was first diagnosed with epilepsy so he was not taking medication when it happened and he was put on medication after that. From 2011 to 2019, he had additional seizures and at those times there was documentation about compliance with medication and the importance of complying because it seemed that he had the seizures whenever he was not complying with his medication. Dr Tiemensma agreed the records revealed eight seizures over the 2011 to 2019 period, some of which involved falls and head strikes, any of which could have caused a subdural haemorrhage, and some past history of brain injuries as a result of falls from epilepsy.[26]

---

23 Transcript, 4 November 2024, p 359.

24 Transcript, 4 November 2024, p 361.

25 Transcript, 4 November 2024, p 362.

26 Transcript, 4 November 2024, pp 362-363.

[96] The Defence then sought to elicit evidence from Dr Tiemensma as to whether the Crown provided her with a letter from a neurologist at the Royal Darwin Hospital recording and interpreting some of the prior admissions of the deceased. The question was objected to by the Crown.

[97] In the absence of the jury and Dr Tiemensma, I heard submissions from the parties about the admissibility of this evidence.

[98] The Crown argued that the letter was irrelevant, was hearsay and contained an expert opinion as to the possibility of the deceased having had a seizure on 7-8 April 2022 which was inadmissible because the neurologist did not have the requisite information to reach that view, namely the blunt force trauma injuries recorded by Dr Tiemensma at autopsy.[27] The Crown said that they had asked the officer in charge of the investigation to seek from the Royal Darwin Hospital the deceased's medical records, and when she did that, she also sought a summary of the records relating to the deceased's seizure history from a neurologist, and the letter contained the expert opinion about 7-8 April 2022 which was neither sought nor relied upon by the Crown.

[99] The Defence then indicated that they were not interested in that part of the letter containing the expert opinion about 7-8 April 2022, only the part of the letter in which the neurologist gave his summary of the deceased's

27 Transcript, 4 November 2024, pp 364-365.

medical records.[28] The intention was, if Dr Tiemensma had seen the letter, to put to her each of the propositions in the letter about what the medical records showed.

[100] The Crown argued that they had never shown Dr Tiemensma the letter and, if the question was permitted to be asked, her answer would be 'no' but the jury would be left with the impression that there was material evidence that had not been provided to them or to Dr Tiemensma, which would prejudice her reliability and the Crown's case.[29]

[101] The Defence argued that, if Dr Tiemensma said she was not aware of the letter, the Defence would not ask her any further questions about it, but may seek to elicit its contents in another way, such as through the officer in charge.[30] The Defence indicated that, ultimately, the contents of the letter, if elicited, could found a submission to the jury that there was no evidence called from a neurologist about the deceased's seizure history.

[102] Given that intended submission, I considered the proposed evidence was relevant, was not inadmissible and there was little harm to the Crown's case in putting the question to Dr Tiemensma, and I overruled the objection.[31] The question was asked and Dr Tiemensma's answer was that she was not

---

28 Transcript, 4 November 2024, p 365.

29 Transcript, 4 November 2024, pp 365, 366.

30 Transcript, 4 November 2024, p 366.

31 Transcript, 4 November 2024, p 366-367.

provided with a letter from a neurologist who considered the deceased's seizure history.

[103] The issue about the letter arose again during the cross-examination of the officer in charge. She agreed that, on 16 October 2024, she had sent an email to the Royal Darwin Hospital seeking information about the medical records of the deceased. The Crown then objected.

[104] In the absence of the jury and the witness, I heard submissions from both parties about the matter.

[105] The Crown argued that the email sent by the officer in charge was not a formal letter instructing an expert to provide expert opinion evidence.[32]

[106] The Defence argued that the purpose of eliciting the evidence about the neurologist's letter was to found a '*Jones v Dunkel* kind of direction' about the Crown's failure to call the neurologist to give evidence in the trial, the neurologist being the person who reviewed the medical records about the deceased's seizure history, was qualified to give expert opinion evidence about them, and had given the letter about them to the officer in charge, showing that the neurologist was an available witness but was not called.[33]

[107] The Defence read out the email sent by the officer in charge, in which she asked for a written medical opinion from a neurologist in relation to the deceased's seizures and medication prior to his death, and all of his medical

32 Transcript, 7 November 2024, p 516.

33 Transcript, 7 November 2024, p 518.

records.[34] The email said that this was the task she had been given by the Crown. This was said by the Defence to demonstrate that the Crown considered it to be important, had sought an opinion from the neurologist about the deceased's seizure history as disclosed in his medical records, had received one, and had then failed to call the neurologist to give the evidence about it.[35]

[108] The Crown argued that the officer in charge was never tasked by them to seek that opinion, rather, she misunderstood what she was asked to do, which was simply to obtain the medical records so someone (presumably, Dr Tiemensma) could review them. The Crown accepted that there may be a factual dispute as to what the officer in charge was asked by the Crown to do.[36] It was also put that the neurologist's letter may contain inaccuracies in that the neurologist may not have reviewed all of the deceased's medical records.[37]

[109] The Crown was given time to consider its position in relation to those matters.

[110] The following day, on 8 November 2024, further argument was heard in relation to these matters. The Crown argued that there was a factual dispute as to what the officer in charge was asked to do by the Crown, which could

34 Transcript, 7 November 2024, p 519.

35 Transcript, 7 November 2024, p 519.

36 Transcript, 7 November 2024, p 520.

37 Transcript, 7 November 2024, p 521.

only be resolved by one or other of the Crown prosecutors appearing in the trial to give evidence.[38] Further, the Crown argued that the summary of the medical records in the neurologist's letter was identical to the evidence of Dr Tiemensma about the medical records.[39]

[111] In order to avoid the difficulties involved in resolving the factual dispute that would arise if the officer in charge was asked about what the Crown tasked her to obtain, the Defence agreed to confine the questions about the neurologist's letter to whether she asked for an opinion from a neurologist as to the deceased's medical records about the history of seizures.[40]

[112] The Crown argued that, if the evidence was admissible, it raised a risk of unfair prejudice to the Crown because the jury would get the impression that the Crown had not done something it was required to do, namely call the neurologist to give evidence as to his opinion about what the deceased's medical records showed in terms of his seizure history and medications.

[113] Ultimately, I ruled that the evidence that the officer in charge asked for an opinion about the deceased's medical records relating to his seizure history, received one, and what that summary as set out in the neurologist's letter said was admissible because: (a) the factual dispute was avoided by the Defence proposal to confine the questions in that way; and (b) whether or not there was an inconsistency between the evidence of Dr Tiemensma about

38 Transcript, 8 November 2024, p 526.

39 Transcript, 8 November 2024, pp 526-527, 530.

40 Transcript, 8 November 2024, pp 531-532.

the medical records and the neurologist's opinion about the medical records was a matter about which reasonable minds might differ, and submissions as to any inconsistency could be put to the jury. Further, I concluded there was little risk of prejudice to the Crown because the impression about which the Crown complained was precisely the purpose of a *Jones v Dunkel* kind of direction. In such a direction, the jury is told that they may consider that the Crown could reasonably have been expected to call the witness, they may consider there was no satisfactory explanation for failing to do so, with the explanations recited, and if they are so satisfied, they may conclude that the neurologist's evidence about the deceased's medical records would not have assisted the Crown.

[114] In cross-examination, the officer in charge confirmed that, on 16 October 2024, she sent an email to the Royal Darwin Hospital seeking information about the medical records of the deceased, and that she received a response from a neurologist which said:[41]

> [The deceased] had his first seizure on 13 October 2008, which was interpreted as alcohol-related. He was not started on any treatment at that time. Later in 2011, he had a cerebral trauma secondary to alcohol withdrawal seizures. The brain CT scan showed contusions on the left temporal and left frontal lobes, related to the traumatic brain injury as a consequence of the seizure. He was started on phenytoin, which was later switched to lamotrigine due to his history of chronic hepatitis B.
>
> On 22 March 2011, he had seizures that were related to noncompliance with lamotrigine and alcohol intake. Another CT scan showed the previous lesions related to brain trauma. He was further studied in 2012 with an electroencephalogram that was normal.

---

41 Transcript, 8 November 2024, pp 546-547.

> As he did not have more seizures, in April 2023 he was cleared for driving. However, shortly after that, in May 2014, he had an alcohol withdrawal seizure. This happened again in November 2014, with poor medical compliance and alcohol intake.
>
> In March 2015, he had a fall whilst intoxicated. Also, he had seizures that motivated admission in April, July and October 2015. I could not find any other evidence of seizure until an admission on 24 March 2019, in which he had a seizure with a fall and head strike. At that time, he was still taking lamotrigine 75mg once daily. I have not seen in previous notes that the dose of lamotrigine was modified. On this admission, it is written that he was compliant with medication, and this was the last seizure before the fatal event that happened on 8 April 2022.

[115] She confirmed that she provided the neurologist's letter to the Crown.

Closing addresses

[116] The Crown's closing address included the submissions that: (a) a localised head injury such as the deceased suffered in 2019 is what you would expect from a seizure event with a head strike, not the catalogue of injuries found to the deceased;[42] (b) the subdural blood showed the subdural haemorrhage occurred when the deceased was sober and his medication levels were adequate for his epilepsy;[43] (c) in the subdural blood was anti-convulsant medications at therapeutic levels designed to prevent seizures;[44] (d) the impugned passage set out in paragraph [88] above;[45] (e) there was no evidence from anyone other than the accused (who told some family

42 Transcript, 8 November 2024, p 564.

43 Ibid.

44 Transcript, 8 November 2024, p 565.

45 Ibid.

members) to suggest that the deceased had had a seizure and a fall;[46] (f) apart from the bruising to the tongue which may be consistent with a seizure, there were no other notable hallmarks, such as bite or teeth marks, of physical evidence pointing to a seizure;[47] (g) as a matter of common sense, the tongue bruising could have occurred when the blows were delivered to the deceased's head;[48] (h) Dr Tiemensma's evidence was that it appeared the deceased's epilepsy was relatively well controlled, with notes saying he had been seizure-free for two years and he is taking his medication, and between 2011 and 2019 it seemed that the seizures occurred when he was not complying with his medication;[49] (i) the accused told Detective Russell on the morning of 8 April 2022 that the deceased took his medication every day, every morning, the accused reminded him to do so, and he has seizures if he does not take his tablets;[50] and (j) the paragraphs read from the neurologist's letter summarising the medical records were consistent with Dr Tiemensma's evidence about that.[51]

[117] The Defence closing address included the following rhetorical questions: Is it possible for someone to have a seizure without doing jerky movements on the floor that we typically associate with seizures? Is it possible for someone to be on 75mg of lamotrigine and still have a seizure? For you to

---

46 Ibid.

47 Ibid.

48 Ibid.

49 Transcript, 8 November 2024, p 575.

50 Ibid.

51 Ibid.

be compliant with a previous dose of your medication but it not being enough to manage your seizures? Wouldn't it be nice to have a neurologist to give you evidence about those things? Wouldn't it be good if the prosecution had access to a neurologist with the medical records to answer those kinds of questions that the prosecutor poses to you?[52] The closing address then included the submissions that: (a) the prosecution did have a neurologist they had access to, but he was not called to give evidence and instead the medical records went to a pathologist and she gave an opinion about what the records reveal; (b) there was no evidence from a neurologist, or even from Dr Tiemensma to support the Crown's proposition that a localised injury is to be expected from a seizure event;[53] (c) there was no evidence from a neurologist about whether the dosage of lamotrigine was appropriate for the deceased; (d) there was no evidence to support the Crown's proposition that bite and teeth marks to the tongue are what would be expected in a seizure; and (e) the neurologist's letter showed that the deceased had had seizures which resulted in a head strike, one of which caused brain injuries, and in 2019 when he had a seizure and a head strike he was compliant with his medication, so it obviously was not enough.[54]

52 Transcript, 8 November 2024, p 588.

53 Transcript, 8 November 2024, p 589.

54 Transcript, 8 November 2024, p 597.

The test in an application to discharge the jury

[118] The parties accepted that the test for whether a trial Judge should dismiss a jury is as set out in *Crofts v The Queen* (1996) 186 CLR 427.[55] In an appeal on the ground that the trial Judge's refusal to discharge the jury was a substantial miscarriage of justice, their Honours held as a correct statement of principle the Court of Appeal's approach, which was that the question is – whether in the circumstances there was such a high degree of necessity for the jury's discharge that the failure to have ordered it has resulted in a mistrial. Their Honours added that:

> No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues, the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact. … Much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from a reading of the transcript.

[119] I have set out above the lengthy background relating to the seizure issue, the evidence about the deceased's medical records, and the neurologist's letter as it is necessary for the consideration of the significance of the Crown's closing address and the Crown's failure to call the neurologist to be seen in context.

---

55 *Crofts v The Queen* (1996) 186 CLR 427 at 440 per Toohey, Gaudron, Gummow and Kirby JJ and at 432 per Dawson J (in dissent, but not as to the principle). See also *MLW v The Queen* [2022] NTCCA 2 at [22] per Grant CJ, Southwood and Brownhill JJ.

High degree of need for the jury to be discharged?

[120] The need for the jury to be discharged was said to arise, in the context of the Crown's failure to call the neurologist to give evidence about the deceased's seizure history as disclosed in his medical records, from the Crown's 'misrepresentation' of the evidence about when the deceased had had seizures in the past, particularly that they had occurred in the context of intoxication, alcohol withdrawal or lack of compliance with medication. This was said to be a misrepresentation because the neurologist's letter showed that, in 2019 when the deceased had a seizure, he was compliant with his medication.

[121] There is no doubt that the issue of whether the deceased suffered the fatal brain injury or injuries as a consequence of a fall due to a seizure was an important issue in the trial. It was one of a number of matters put to the jury as a rational hypothesis consistent with innocence. However, aside from the medical evidence, and in addition to the evidence supporting a finding that the deceased was beaten and sustained numerous bleeding injuries in unit 10 during 7-8 April 2022, there was also other evidence contrary to that hypothesis, including the accused's statement given to Police on the morning of 8 April 2022, in which he said that the deceased had come home at 4am or 5am that morning (which the Crown argued was a lie told in consciousness of guilt), lay down on the floor, and subsequently began vomiting blood, and that the deceased has seizures if he does not take his medication, which he takes every morning, and he had not had a seizure

since taking his medication, with the last one being a year ago when he was on the bus (this being the seizure in 2019). Consistent with the CCTV footage of the deceased returning to unit 10 on 7 April 2022 and the accused's statement, the hypothesis had to be that the deceased returned to unit 10 at around 6.30pm, was beaten and sustained some injuries, left unit 10, had a seizure with a fall and a head strike, sustained the brain injury or injuries that caused his death, returned to unit 10, bled profusely or vomited blood (when Dr Tiemensma found no evidence at autopsy to support a finding that the deceased had vomited blood), and then became unconscious as a result of the brain injury or injuries. Whilst Dr Tiemensma agreed that such a course of events was a possibility, the importance of this issue for the Defence must be viewed in this light.

[122] The impugned passage of the Crown's closing address was essentially consistent with Dr Tiemensma's evidence: (a) in examination-in-chief that the deceased was diagnosed with epilepsy in 2011 and placed on medication, had eight seizures between then and 2019, and his epilepsy was relatively well controlled; and (b) in cross-examination that the deceased had seizures associated with alcohol withdrawal, intoxication and non-compliance with medication.

[123] Dr Tiemensma's evidence in cross-examination was that from 2011 to 2019, the deceased had eight additional seizures and at those times there was documentation about compliance with medication and the importance of complying with it because it seemed that he had the seizures whenever he

was not complying with his medication. When the Defence cross-examined Dr Tiemensma, they had the neurologist's letter. It appears from the questions asked that the Defence did put to Dr Tiemensma some of the propositions contained in the neurologist's letter. For example, they asked her about the deceased having hepatitis in 2011, and that his CT scans showed previous lesions associated with head trauma, which are matters specifically referred to in the neurologist's letter. However, the Defence did not put to Dr Tiemensma that, as the neurologist's letter disclosed, the medical records in relation to the 2019 admission noted that the deceased was then compliant with his medication. The Defence then asked Dr Tiemensma if she had seen the neurologist's letter. She said she had not and no further questioning about any of the content of the neurologist's letter was put to her. The Defence said its purpose in eliciting the contents of the neurologist's letter was to found a *Jones v Dunkel* kind of direction about the Crown's failure to call the neurologist to give evidence about his medical records.

[124] The content of the neurologist's letter, and that the 2019 seizure occurred at a time when the deceased was compliant with his medication, was referred to by the Defence in its closing address.

[125] In that context, the impugned passage of the Crown's closing address was consistent with Dr Tiemensma's evidence, which despite cross-examination about some of the contents of the neurologist's letter, did not include any reference to the fact, as evidenced by the neurologist's letter, that the

deceased's seizure in 2019 occurred when he was apparently compliant with his medication. While it is likely that evidence would have been elicited if the neurologist had been called by the Crown, evidence of it was elicited through the officer in charge and the Defence made a closing submission about it.

[126] As to the failure of the Crown to call the neurologist to give evidence about the deceased's seizure history as disclosed in the medical records, that does not significantly further impugn the Crown's closing address, given that the relevant contents of the neurologist's letter was put before the jury enabling the Defence to make the submission it did.

[127] The Defence argued that it had repeatedly urged the Crown to call the neurologist and get 'a proper opinion from him with all of the facts', and had continuously urged the Crown to provide the neurologist's letter to Dr Tiemensma, both of which were refused. The Crown denied those matters or at least the Defence's descriptions of them. Given that any resolution of this dispute would involve disclosure of communications between counsel, which are had on the basis that they remain confidential as between counsel and are not to be disclosed to the Court, I do not take those matters into account.

[128] Taking all of the other matters referred to above into account, I do not consider the impugned passage in the Crown's closing address, in the context of the Crown's failure to call the neurologist, to be of any

significant seriousness in the context of the contested issue. The deliberateness of the conduct is therefore of little moment.

[129] The application to discharge the jury came on the eleventh day of the trial, after the evidence had closed and closing submissions had been made. That bears significantly on the degree of necessity for a discharge to prevent a miscarriage of justice.

[130] I considered that, if I were to include in my summing up: a comprehensive summary of the evidence of Dr Tiemensma; a full recitation of the contents of the neurologist's letter as read to the officer in charge; repetition of both the Crown submission and the Defence submission that the neurologist's letter showed that the medical records were that, when the deceased had a seizure in 2019, he was compliant with his medication; and a *Jones v Dunkel* kind of direction about the Crown's failure to call the neurologist, those would be effective in overcoming any adverse impact upon the fairness of the trial for the accused.

[131] For those reasons, I dismissed the Defence application to discharge the jury and I gave a summing up which contained those matters.
