R

v.

KING

New South Wales Supreme Court

Court of Criminal Appeal

(2003) 59 NSWLR 472; (2003) 139 A Crim R 132; [2003] NSWCCA 399

19 December 2003

Spigelman CJ, Dunford J and Adams J

[1] SPIGELMAN CJ. This is an appeal by the Director of Public Prosecutions pursuant to s 5F of the Criminal Appeal Act 1912, against, what the appellant contends to be, an interlocutory judgment of her Honour Judge Tupman in the District Court.

[2] The respondent to the appeal was charged with the offence of maliciously inflicting grievous bodily harm to Kylie Flick with intent to do grievous bodily harm. That is an offence contrary to s 33 of the Crimes Act 1900.

[3] The respondent to the appeal moved by way of notice of motion before her Honour for a permanent stay of the proceedings. This was decided as a preliminary issue. On 9 October 2003, her Honour determined that the offence as charged was "doomed to failure". Accordingly, her Honour made an order that the count under s 33 in the indictment be permanently stayed.

[4] This appeal raises an important issue of principle. The issue is whether or not the death of a foetus is capable of constituting grievous bodily harm to a

pregnant mother. Section 33 emphasises the word "person", relevantly, where first appearing:

"33 Wounding etc with intent to do bodily harm or resist arrest

Whosoever:

maliciously by any means … inflicts grievous bodily harm upon any person …

with intent … to do grievous bodily harm to any person …

shall be liable to imprisonment for 25 years."

The facts

[5] Her Honour had before her an agreed statement of facts and certain medical evidence, which was tendered in the form of statements and an extract from a medical textbook.

[6] The respondent and Ms Flick engaged in a single act of consensual sexual intercourse after which Ms Flick became pregnant. The respondent sought to persuade Ms Flick to have an abortion, but she refused. The appellant offered to pay others to assault the complainant, including hitting her in the stomach, but they refused. On 20 August 2002, when the pregnancy was between 23 and 24 weeks, the respondent attacked Ms Flick. This included kicking her in the stomach and stomping on her stomach about half a dozen times. Ms Flick was taken to Bankstown Hospital immediately, where an ultrasound was performed. No foetal heartbeat was detected. The foetus was delivered stillborn on 23 August 2002.

[7] Her Honour referred to the medical evidence, which would be called at trial by the Crown, in the following manner:

“This evidence would include observations that the placenta when delivered was pale and had a retro-placental clot on its edge measuring 80x20x20 millimetres. Expert opinion evidence would be called by the Crown that the complainant had suffered an abruption of the placenta at the site of this clot. The medical expert would give evidence for the Crown that the foetus had lost its blood or exsanguinated because of the abruption of the placenta. The evidence would further be that the force applied by the accused to the complainant's abdomen had caused this abruption of the placenta, leading to the demise of the foetus through exsanguination.”

[8] It was noted that the complainant had certain injuries as a result of the assault. However, it was not suggested that these injuries, which consisted of bruising, could amount to grievous bodily harm. The Crown relied before her Honour, and in this Court, on, alternatively, the death of the foetus and the injury to the placenta as constituting the grievous bodily harm suffered by the complainant.

The judgment of the trial judge

[9] Her Honour made the following findings:

“On the evidence there is no doubt that there was really serious bodily harm occasioned to the foetus as a result of the accused assaulting the complainant. In very simple terms, the foetus bled to death following the abruption of the placenta and, as I understand the medical evidence, this occurred at the site of the abruption. The foetus was stillborn however and did not take a breath outside the uterus.”

(2003) 59 NSWLR 472 at 475

And

“The placenta too suffered some injury on the evidence before me. As I

understand the medical evidence, that injury amounted to a portion of it detaching from the uterine wall, allowing the loss of foetal blood into the mother's blood stream and ultimately causing the retro-placental clot noted on delivery. The evidence would not allow me to determine whether that injury to the placenta alone is capable of amounting to really serious bodily harm. It seems to me, however, that this is not an issue on this notice of motion seeking permanent stay because that issue, if the only issue for determination, would ultimately be a matter for a jury to decide if in fact it was otherwise appropriate for the trial on this count to proceed."

[10] Her Honour referred to the decision of the House of Lords in Attorney-General's Reference (No 3 of 1994) [1998] AC 245 as authority for the proposition that a foetus was a "unique organism" and as having overruled earlier authority that a foetus was an integral and inseparable part of the mother. Her Honour further indicated: "That approach it seems to me, although not in relation to the law of homicide but in relation to the New South Wales provisions as they then existed relating to culpable driving, was adopted and followed in R v F (1993) 40 NSWLR 245, a decision of the New South Wales Court of Criminal Appeal".

[11] Her Honour referred to and distinguished judgments in Canada and in New Zealand but observed: "As I understand it there is no authority with the exception of R v F binding on me in relation to this issue. R v F, I accept, to an extent is peculiar to the then existing provisions of s 52A of the Crimes Act and the crime of culpable driving".

[12] Her Honour posed the issue in the following terms: "It seems to me that only if the foetus and placenta in the case before me are capable at law of being regarded as part of the mother can the Crown ever succeed in count 1".

[13] Her Honour went on to discuss the injury to the placenta in the following manner:

"The only evidence I have in relation to the status of the placenta is the limited textbook reference to which I have referred. It is necessary for me to look to this issue because that is one of the particulars provided by the Crown in relation to the element of grievous bodily harm, namely the abruption of the placenta. As I understand the evidence before me the placenta is not part of [the] body of the mother but rather the mother's bloodstream to that of the foetus. It attaches to the uterus and it is through that attachment that the blood flows to and from the foetus. As I understand the evidence, it was a small section of that attachment to the uterine wall which was ruptured as a result of the flows to the victim's abdomen and it was via that detached section that the foetal blood flowed back into the bloodstream of the mother, ultimately leading to the demise of the foetus. Again, as I understand the evidence, the placenta is formed at a time shortly after conception when the fertilised ovum attaches to the uterine wall. It cannot, as I understand it, exist independently of the foetus and only exists for the benefit of the foetus. There is no expert evidence otherwise in relation to the nature of the placenta and on the basis of that limited evidence and understanding it seems to me that the placenta cannot be viewed as being part of the body of the mother. As such the

injury to the placenta cannot it seems to me on the evidence before me be construed as bodily harm to the mother."

[14] Her Honour concluded:

"It seems to me on the basis of the authorities to which I have referred and applying the logic in particular applied by the House of Lords in

Attorney Generals Reference No 3 (of 1994) and the Court of Criminal Appeal in New South Wales in R v F, that the Crown in this case cannot succeed on count 1 because it could never prove that the demise of the foetus itself and/or the abruption of the placenta amounted to grievous bodily harm to the complainant Kylie Flick and for that reason I propose to grant a permanent stay of count 1."

Jurisdictional challenge

[15] The first issue that needs to be addressed is the challenge by the respondent to the jurisdiction of this Court under s 5F of the Criminal Appeal Act. That section relevantly provides:

"5F(2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which this section applies."

[16] On this issue, the respondent referred the court to R v Cheng (1999) 48 NSWLR 616 where this Court determined that the words "interlocutory judgment or order" in s 5F(2) cannot be interpreted as extending to a direction to acquit by a trial judge. Accordingly there was no right of appeal under s 5F(2) from the decision of a trial judge that there was no case to answer, leading to the inevitable consequence of a direction to the jury to acquit. The reasoning of this Court was based on the "close relationship" between the decision sought to be challenged and a verdict of an acquittal (see at 619 [19] and 622 [32]–[34]).

[17] Mr C Steirn SC, who appeared for the respondent, submitted that the order for a permanent stay was in effect a final order and therefore s 5F had no application. He submitted that the relationship between an order for a permanent stay and a verdict of acquittal was as close as the relationship

between the decision to direct a verdict of acquittal and the actual acquittal considered in R v Cheng.

[18] In my opinion this submission should be rejected. An order for a permanent stay is not equivalent to a decision to direct a verdict of acquittal. In R v Cheng, the decision was made in the course of a trial. An acquittal was an inevitable consequence of the decision. A stay does not lead to an acquittal under any circumstances. There has been no trial.

[19] By reason of the notice of motion instituted by the respondent before the trial judge, there was no prospect of an acquittal. There was, accordingly, no infringement of the principle that the Crown does not have a right of appeal from an acquittal which was applied by this Court in R v Cheng.

[20] The issue of whether or not a stay constitutes an interlocutory judgment or order has frequently arisen in civil litigation in the context of whether leave is necessary before an appeal can be instituted. Sometimes the answer has been yes and sometimes no. (See Tampion v Anderson (1973) 48 ALJR 11; 3 ALR 414; Licul v Corney (1976) 180 CLR 213 at 219–220; Port of Melbourne Authority v Anshun Pty Ltd (No 1) (1980) 147 CLR 35 at 38; Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 3) (1998) 86 FCR 374; Little v Victoria (2003) 59 NSWLR 472 at 477

[1998] 4 VR 596; K R Handley, ed, Spencer Bower, Turner & Handley, Doctrine of Res Judicata, 3rd ed (1996) London, Butterworths, at [172].) This line of authority was not relied upon in the course of this case. In any event, the issue arises in the particular context of s 5F of the Criminal Appeal Act.

[21] I note that the effect of the respondent's contentions would not be that there could be no appeal from the judgment of Tupman DCJ. By leave, an appeal could lie to the Court of Appeal (see s 127(2)(a) of the District Court Act 1973). It is obviously desirable to avoid duplication of proceedings. Where a

jurisdictional challenge is made to the Court of Criminal Appeal hearing a matter under a provision such as s 5F, it is desirable for an appellant to consider instituting a precautionary application for leave to appeal to the Court of Appeal. As Chief Justice I am in a position to ensure that both applications are heard simultaneously by the same bench (see s 36(2) of the Supreme Court Act 1970).

[22] The legislative history of s 5F indicates that it was designed to ensure that the proliferation of stay applications, which bedevilled the administration of justice in this State during the course of the 1980s, should be transferred from the Court of Appeal to the Court of Criminal Appeal (see R v Edelsten (1989) 18 NSWLR 213 at 217–219; R v Lethlean (1995) 83 A Crim R 197 at 199). The grant or refusal of applications for a permanent stay was, given this legislative background, intended by the Parliament to fall within the meaning of the words "interlocutory judgment or order" in s 5F.

Discretion

[23] In the alternative to the jurisdictional point Mr Steirn SC submitted that this Court should refuse to permit the Crown to prosecute the appeal or refuse relief on the appeal, on the basis that it constitutes an abuse of process or would constitute an abuse unless certain conditions were met.

[24] This submission was first based on the provisions of s 5A of the Criminal Appeal Act, which create a regime by which a question of law can be referred to this Court where a person tried on indictment has been acquitted.

Mr Steirn SC points out that by reason of s 5A(2)(d), any answer to the question of law so submitted would not affect or invalidate the verdict of acquittal.

[25] If there had been a trial and a verdict of acquittal had been entered then, no doubt, this would have been the appropriate way in which the question of law

of broader significance could have been referred to this Court by the Director of Public Prosecutions. However there was no acquittal. The reason why there was no acquittal was because the now respondent, who asks this Court to exercise a discretion in his favour, chose to pursue the proceedings in a particular manner, that is, by asking for a permanent stay. The fact that, if an alternative route had been chosen, the respondent may have had the benefit of an acquittal, is not, in my opinion, a basis for the court exercising a discretion in favour of the respondent in this regard.

[26] I note that in the course of the submissions to this Court, counsel for the respondent repeated the submission made to Tupman DCJ that it was the

intention of the respondent to plead guilty to an alternative charge under s 83 of the Crimes Act. That section provides:

"83 Administering drugs etc to woman with intent

Whosoever:

unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing, or

unlawfully uses any instrument or other means,

with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years."

[27] As noted the maximum sentence for the charge under s 33 is 25 years imprisonment.

[28] The alternative charge is based on the assumption that attacking someone with fists or feet is "other means" within the meaning of s 83. It is by no means clear to me that this mechanism of causing miscarriage is something

which somebody can “use”. It is at least arguable that s 83 is concerned with administration of chemical substances and the application of physical implements of some character.

[29] The indication by the respondent that he intends to plead guilty to this alternative charge is not something to which the respondent can be held. Indeed, even after a plea and conviction there are circumstances in which a conviction will be set aside, notwithstanding the plea. Those circumstances are more restrictive than is presently the case with respect to a mere statement of an intention. This, again, is a manifestation of the difference between an application for a stay of proceedings and the results of an actual trial.

[30] It was also submitted that the Court should not permit the Crown to prosecute the appeal in the absence of an undertaking, on the part of the Crown, to pay the costs of representation of the respondent by junior and senior counsel. This submission proceeded on the assumption that the respondent would be entitled to receive payment pursuant to s 6C of the Suitors' Fund Act 1951, albeit one limited to the amount of $10,000.

[31] The submission was that it would be unfair to require the respondent to proceed subject to such a limitation in view of the complexity of the issue raised and the desirability of senior and junior counsel being briefed, as acknowledged to the respondent in correspondence on the part of the appellant.

[32] The principal point in issue is in a narrow compass. The authorities are few. It does require research in the preparation of the written submissions on the substantive issue. However, there are a number of matters which the respondent has, unsuccessfully, sought to raise. The main issue is not of such a wide ranging character as to conclude that $10,000 is so wholly disproportionate to constitute unfairness of a degree which would justify the court refusing to allow the Crown to prosecute the appeal.

[33] On the basis, to which I will now turn, that her Honour erred in her reasoning on the substantive issue, I do not see any proper basis on which the court should exercise a discretion to refuse to intervene or to do so only on terms.

Issue on the appeal

[34] The appellant submitted that her Honour erred in her consideration of the judgment of this Court in R v F (1993) 40 NSWLR 245. The references in her Honour's judgment, which I have quoted above, indicated that her Honour

regarded R v F as an authority binding on her and that it had adopted, for purposes of another section of the Crimes Act, the analysis of the House of Lords decision in Attorney-General's Reference (No 3 of 1994). The appellant pointed out that the actual reference in R v F to the case of Attorney-General's Reference (No 3 of 1994) was a reference to the judgment of the Court of Appeal (Attorney-General's Reference (No 3 of 1994) [1996] QB 581) that was overturned by the House of Lords. Indeed, the judgment of this Court in R v F preceded the judgment of the House of Lords in that case. Furthermore, it was submitted, that nothing in R v F directed attention to the issue before her Honour and that the reference to the English case was on a different point.

[35] The submissions of the Crown in this regard are correct. Nothing in R v F constituted an adoption by this Court of the approach to the question which later found favour with the House of Lords. This was not an issue before the Court in R v F. Nothing said by this Court adopted the subsequent reasoning of the House of Lords.

[36] There are, as will be seen, divergent approaches to this issue taken in the relevant authorities in England, Canada and New Zealand. The determination of the Australian position in this regard is open to this Court. There is no

authority binding on this Court.

[37] The issue that arises is to be determined as a matter of statutory construction of s 33 of the Crimes Act set out above. The primary issue is whether the actus reus of the offence under s 33 is made out when injury is inflicted upon a foetus resulting in death and the charge asserts that the "person" so attacked is the mother. To put the issue another way, do the words "upon any person" encompass the foetus as part of the mother, for purposes of the word "person" where first appearing in s 33?

The relevant case law

[38] The first authority is the Canadian case of R v Sullivan (1986) 31 CCC (3d) 62. It went on appeal to the Court of Appeal of British Columbia (R v Sullivan (1988) 43 CCC (3d) 65) and to the Supreme Court of Canada (R v Sullivan [1991] 1 SCR 489; (1991) 63 CCC (3d) 97).

[39] The case involved alleged offences against two provisions of the Criminal Code (Can):

"203 Everyone who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

204 Everyone who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years."

[40] The case involved two midwives who had assisted in a home birth. After many hours of labour the head of the baby was delivered but contractions ceased. The midwives were unable to complete the delivery. Emergency services were called but by the time the baby was taken to the hospital and finally delivered by an intern, it showed no signs of life.

[41] The trial judge, sitting at first instance without a jury, found that a full term

child which was in the process of being born is a "person" within the meaning of s 203. Accordingly she convicted on that count. She went on to acquit on count 2. With respect to that count, the Crown did not rely on death of the child as the relevant "bodily harm" for the purposes of s 204 of the Criminal Code (Can). (See R v Sullivan (1986) 31 CCC (3d) 62 at 74.) It was an

additional rather than an alternative charge. The trial judge found that the relevant injuries relied upon by the Crown did not constitute bodily harm within the meaning of the provision. She added, however (at 75):

"I should comment that had I reached the opposite conclusion with respect to the 'persons' argument above, then I would have found the accused guilty on this count because I would have concluded that the child was a part of Jewel Voth at the time of its death."

[42] On appeal to the Court of Appeal of British Columbia, the appellate court came to a different conclusion on the first count. It held that a child not completely born was not considered a person in accordance with the common law of Canada. The word "person" in s 203 of the Criminal Code (Can) did not extend to a foetus which was not fully born. However the Court of Appeal substituted a conviction on the second count.

[43] The Court of Appeal applied the logic of its decision for allowing the appeal with respect to count 1 to count 2, when it said (at 80): "From the conclusion that the line of demarcation as a matter of law is live birth, in our opinion, for the purposes of count 2, the child when it is in the birth canal remains part of the mother, as a matter of law".

[44] On appeal the Supreme Court of Canada agreed with the Court of Appeal with respect to count 1. The appeal, however, was allowed because there was, in fact, no Crown appeal against the acquittal and, save in certain circum-

stances identified in Canadian authority, an appellate court should not substitute a conviction for an acquittal on any count, by reason of particular provisions of the Criminal Code (Can).

[45] However, in the course of giving his reasons for reaching this conclusion Lamer CJC said (at 506):

"I respectfully disagree with the Crown's assertion that Sullivan and Lemay could not have been convicted on both counts in this case. The trial judge explicitly considered whether Jewel Voth had suffered bodily harm (independent of the death of the foetus) and concluded that she had not. Had the trial judge made a different finding of fact, she may well have convicted Sullivan and Lemay on both counts. Furthermore, even if no independent bodily harm was found to have occurred it will still not be impossible for Sullivan and Lemay to have been convicted on both counts. It would not have been illogical to find that bodily harm was done to Jewel Voth through the death of the foetus which was inside of and connected to her body and, at the same time, to find that the foetus was a person who could be the victim of criminal negligence causing death." (Emphasis supplied.)

[46] In Attorney-General's Reference (No 3 of 1994), the Court of Appeal and the House of Lords had before them a reference on a point of law after a murder accused was acquitted by direction of the trial judge. The facts in that case were that the respondent had stabbed his girlfriend who was, to his knowledge, pregnant with his child. The stab wounds included wounds which penetrated the uterus and the abdomen of the foetus. The injury to the foetus was not detected. The child was born grossly premature and survived for about 120 days. The issue before the court concerned the proceedings against the respondent for murder of the child.

[47] In the course of dealing with a submission by defence counsel that an act causing death of the foetus was not itself an unlawful act, such an act being

one the elements required to establish murder, Lord Chief Justice Taylor, who delivered the judgment of the Court of Appeal, said (at 591G):

"… He argues that since the foetus has no separate existence, causing an injury to it is not unlawful unless it comes within the scope of one of the statutory offences such as child destruction or abortion. We reject that submission. In law the foetus is treated as a part of the mother until it has a separate existence of its own. Thus to cause injury to the foetus is just as unlawful as any assault upon any other part of the mother."

[48] His Lordship repeated this approach when dealing with the element of mens rea for murder when he said (at 593G):

"… In the eyes of the law the foetus is taken to be a part of the mother until it has an existence independent of the mother. Thus an intention to cause serious bodily injury to the foetus is an intention to cause serious bodily injury to a part of the mother just as an intention to injure her arm or her leg would be so viewed. Thus a consideration of whether a charge of murder can arise where the focus of the defendant's intention is exclusively the foetus falls to be considered under the head of transferred malice as is the case where the intention is focused exclusively or partially upon the mother herself."

[49] His Lordship went on to consider the concept of transferred malice. He concluded (at 594E–G):

"We can see no reason to hold that malice can only be transferred where the person to whom it is transferred was in existence at the time of the act causing death. It is perhaps pertinent to observe that a sufficient

intention may be directed at no individual but rather there may be an indiscriminate intention which will suffice. Thus a defendant who introduces poison into baby food on a supermarket shelf with an intention to kill some wholly unidentified child is clearly guilty of murder if a child later dies from eating the poisoned food. It would be a remarkable state of affairs if such a person was only guilty of murder if a child had already been born at the date when the poison was introduced to the food. If in such cases of general malice, there is no requirement that the child should already have been born, it is not easy to see why there should be a distinction drawn when malice is instead transferred from an intended victim to an unintended one. …"

[50] The first question contained in the reference from the Attorney-General was (at 587):

"1. Subject to proof by the prosecution of the requisite intent in either case: whether the crimes of murder or manslaughter can be committed where unlawful injury is deliberately inflicted: (i) to a child in utero, (ii) to a mother carrying a child in utero, where the child is subsequently born alive, enjoys an existence independent of the mother, thereafter dies and the injuries inflicted while in utero either caused or made a substantial contribution to the death."

[51] The answer given by the Court of Appeal to this question was (at 598):

"Yes. Murder or manslaughter can be committed where unlawful injury is deliberately inflicted either to a child in utero or to a mother carrying a child in utero in the circumstances postulated in the question. The requisite intent to be proved in the case of murder is an intention to kill or cause really serious bodily injury to the mother, the foetus before

birth being viewed as an integral part of the mother. Such intention is appropriately modified in the case of manslaughter."

[52] On appeal to the House of Lords, the House refused to answer that part of the question identified as part (i), that is, where unlawful injury is deliberately inflicted to a child in utero. It did this because it said that this issue did not arise at the trial (see the House of Lords at 265–266 and 274). The child was not the object of the attack and the accused had no intent to kill, or to do serious harm, to any person other than the pregnant woman. He did not intend to cause any harm to the foetus. The issue that arises in this case was precisely the issue not answered by the House of Lords in Attorney-General's Reference (No 3 of 1994).

[53] The judgments in the House of Lords concentrated on the issue of an unlawful injury directed to the mother alone, with the intention of hurting the mother alone (see, for example, at 253B). It was in the course of considering this question that Lord Mustill said (at 255C–G):

"The decision of the Court of Appeal founded on the proposition that the foetus is part of the mother, so that an intention to cause really serious bodily injury to the mother is equivalent to the same intent directed towards the foetus … I must dissent from this proposition for I believe it to be wholly unfounded in fact. Obviously, nobody would assert that once M had been delivered of S, the baby and her mother were in any sense 'the same'. Not only were they physically separate, but they were each unique human beings, though no doubt with many features of resem-blance. The reason for the uniqueness of S was that the development of her own special characteristics has been enabled and bounded by the collection of genes handed down not only by M but also by the natural father. This collection was different from the genes which had enabled

and bounded the development of M, for these had been handed down by her own mother and natural father. S and her mother were closely related but, even apart from differing environmental influences, they were not, had not been, and in the future never would be 'the same'. There was, of course, an intimate bond between the foetus and the mother, created by the total dependence of the foetus on the protected physical environment furnished by the mother, and on the supply by the mother through the physical linkage between them of the nutrients, oxygen and other substances essential to foetal life and development. The emotional bond between the mother and her unborn child was also of a very special kind. But the relationship was one of bond, not of identity. The mother and the foetus were two distinct organisms living symbiotically, not a single organism with two aspects. The mother's leg was part of the mother; the foetus was not."

[54] His Lordship went on to say (at 256B–D):

"I would, therefore, reject the reasoning which assumes that since (in the eyes of English law) the foetus does not have the attributes which make it a 'person' it must be an adjunct of the mother. Eschewing all religious and political debate I would say that the foetus is neither. It is a unique organism. To apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead. I prefer, so far as binding authority permits, to start afresh … ."

[55] His Lordship went on to determine the appropriate approach, limited to the crime of murder. He referred to the long established rules that an intent to

cause grievous bodily harm will found a conviction of murder and the inappropriateness of developing the law in a new direction based on that

traditional rule. His Lordship also considered the rule of "transferred malice" but again found reasons for restricting its application. His Lordship concluded (at 261–262):

"My Lords, the purpose of this inquiry has been to see whether the existing rules are based on principles sound enough to justify their extension to a case where the defendant acts without an intent to injure either the foetus or the child which it will become. In my opinion they are not. To give an affirmative answer requires a double 'transfer' of intent: first from the mother to the foetus and then from the foetus to the child as yet unborn. Then one would have to deploy the fiction (or at least the doctrine) which converts an intention to commit serious harm into the mens rea of murder. For me, this is too much. If one could find any logic in the rules I would follow it from one fiction to another, but whatever grounds there may once have been have long since disappeared. I am willing to follow old laws until they are overturned, but not to make a new law on a basis for which there is no principle."

[56] Lord Hope of Craighead said (at 267D–G):

"The Court of Appeal ([1996] QB 581) held that a foetus before birth must be taken to be an integral part of the mother, in the same way as her arm or her leg. It was for this reason that they said that the requisite intent to be proved in the case of murder, if the child was subsequently born alive and then died, was an intention to kill or to cause really serious bodily injury to the mother. I am not satisfied that this is the correct approach. The creation of an embryo from which a foetus is developed requires the bringing together of genetic material from the father as well as from the mother. The science of human fertilisation and embryology has now been developed to the point where the embryo may be created

outside the mother and then placed inside her as a live embryo. This practice, not now uncommon in cases of infertility … serves to remind us that an embryo is in reality a separate organism from the mother in the moment of its conception. Its individuality is retained by it throughout its development until it achieves an independent existence on being born. So the foetus cannot be regarded as an integral part of the mother in the sense indicated by the Court of Appeal, notwithstanding its dependence upon the mother for its survival until birth."

[57] The House of Lords answered the first question, with respect to murder, in the negative, that is, that the crime of murder was not committed in the circumstances posed in (ii) of the question. However, it answered the question with respect to manslaughter in the opposite way, that is, that the circumstances were capable of constituting manslaughter.

[58] As Lord Hope of Craighead said (at 268F–G):

"… The mental element which is required to establish the crime of manslaughter is different from that which is required for murder. The difference may be regarded as one of degree where there is only one victim of the criminal act done by the defendant, and he intended to cause harm to the victim. In that case the only issue is whether the crime is that of murder or of manslaughter. But in the present case, where there were two alleged victims — the mother who was stabbed, to whom B intended to cause harm, and the child who was born later and then died, to whom

no harm was intended — the question is not simply one of degree. An analysis is needed of the nature of the intention which requires to be established in the case of each of these two crimes."

[59] His Lordship concluded that the position with respect to manslaughter was

different to that with respect to murder. He noted that the crime of manslaughter can be committed even though a defendant did not intend to injure the deceased. This encompasses death as a result of gross negligence or arising from an unlawful and dangerous act. In this context his Lordship said (at 270G–H):

"… [I]t is unnecessary to prove that he knew that his act was likely to injure the person who died as a result of it. All that need be proved is that he intentionally did what he did, that the death was caused by it and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result."

[60] His Lordship concluded (at 274D–G):

"I think, then, that the position can be summarised in this way. The intention which must be discovered is an intention to do an act which is unlawful and dangerous. In this case the act which had to be shown to be an unlawful and dangerous act was the stabbing of the child's mother. There can be no doubt that all sober and reasonable people would regard that act, within the appropriate meaning of this term, as dangerous. It is plain that it was unlawful as it was done with the intention of causing her injury. As B intended to commit that act, all the ingredients necessary for mens rea in regard to a crime of manslaughter were established, irrespective of who was the ultimate victim of it. The fact that the child whom the mother was carrying at the time was born alive and then died as a result of the stabbing is all that was needed for the offence of manslaughter when actus reus for that crime was completed by the child's death. The question, once all the other elements are satisfied, is simply one of causation. The defendant must accept all the consequences of his act, so long as the jury are satisfied that he did what he did intentionally,

that what he did was unlawful and that, applying the correct test, it was also dangerous. The death of the child was unintentional, but the nature and quality of the act which caused it was such that it was criminal and therefore punishable. In my opinion that is sufficient for the offence of manslaughter. There is no need to look to the doctrine of transferred malice for a solution to the problem raised by this case so far as manslaughter is concerned."

[61] In R v F, this Court considered a question of law submitted by the Director of Public Prosecutions pursuant to s 5A(2)(a) of the Criminal Appeal Act. That question was (at 246):

"Is a child in utero who is injured through impact with a motor vehicle or through impact with any object of a motor vehicle in or on which that child in utero was being conveyed, is subsequently born, lives independently and then dies as a result of the injuries sustained, a person for the purposes of s 52A of the Crimes Act 1900?"

[62] The basic factual situation can be seen to be similar to that considered in Attorney-General's Reference (No 3 of 1994). A distinctive feature was that s 52A of the Crimes Act did not require an intent to inflict death or grievous bodily harm. The introductory words, relevantly for present purposes, of s 52A(1) are: "where the death of, or grievous bodily harm to, any person is

occasioned through … impact etc". The trial judge had held that a child, whose pregnant mother was injured in the accident and who was subsequently born but died as a result of injuries sustained in the motor vehicle accident, was not a "person" within the meaning of this provision.

[63] In its reasons for deciding that the question posed for its consideration should be answered in the affirmative, the court relied on the line of authority

at common law to the effect that where an unborn child receives injuries, is born alive but dies of those antenatal injuries, the perpetrator may be found guilty of homicide (see at 247C–G). It is in the context of accepting that common law principle that the judgment of Grove J, with whom McInerney J and Hulme J agreed, referred to the Court of Appeal decision in Attorney-General's Reference (No 3 of 1994). By the application of this line of authority, Grove J concluded (at 248B–C) that, subject to the condition that the baby in utero is born alive, the baby is a "person" within the meaning of s 52A(1)(a).

[64] It should be noted that the offence under s 52A is committed when either death or grievous bodily harm is occasioned to "any person". This is the same formula as is contained in s 33 of the Act. However, the reasoning in R v F is not directed to the issue now before the Court, that is, whether the foetus is part of the "person" of the mother at the time of the injury.

[65] The Supreme Court of Canada returned to the issue of the relationship of a foetus and a mother in a civil legal context in Winnipeg Child & Family Services (Northwest Area) v G (1997) 152 DLR (4th) 193. The issue was whether the law of torts or the parens patriae jurisdiction of the court permit an order detaining a pregnant woman against her will, to protect her unborn child from conduct that may harm the child (see at 201 [9]).

[66] McLachlin J, as her Ladyship then was, delivered the judgment of the majority. Her Ladyship indicated (at 202 [12]): "… [T]he issue is not one of biological status, nor indeed spiritual status, but of legal status".

[67] She went on to quote (at 202 [12]) from the decision of the Supreme Court of Canada in Tremblay v Daigle [1989] 2 SCR 530:

"The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a

fundamentally normative task. It results in the recognition of rights and duties — a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature."

[68] McLachlin J went on to note the line of authority in Canada which had acknowledged that injury to a foetus was actionable in negligence, but that the right to sue did not arise until the infant was born (at 202 [13]). Her Ladyship also referred to Australian cases to the same effect (Watt v Rama [1972] VR 353).

[69] In the course of her reasoning her Ladyship said (at 207 [27]): "Before birth the mother and unborn child are one in the sense that 'the life of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman' ". She referred to Paton v United Kingdom (1980) 3 EHRR 408 (Comm) at 415 as applied in Re F (in utero) [1988] 2 WLR 1288; [1988] 2 All ER 193.

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[70] In the course of her reasoning rejecting the tort law basis for the suggested power, her Ladyship said (at 207 [29]):

"[29] To permit an unborn child to sue its pregnant mother-to-be would introduce a radically new conception into the law; the unborn child and its mother as separate juristic persons in a mutually separable and antagonistic relation. Such a legal conception, moreover, is belied by the reality of the physical situation; for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth."

[71] This passage may be seen as rejecting the analysis of a separate genetic bundle, which was influential in the reasoning of Lord Mustill and Lord Hope

in Attorney-General's Reference (No 3 of 1994).

[72] The court rejected the proposition that a pregnant woman had a duty of care to a foetus which could be breached by lifestyle choices such as alcohol consumption, drug abuse and poor nutrition. The court also rejected the submission that the court's parens patriae jurisdiction permitted protection of unborn children.

[73] There is a long line of authority that, for purposes of the civil law including the parens patriae jurisdiction and the law of torts, the position is as stated by Sir George Baker in Paton v British Pregnancy Advisory Service Trustees [1979] QB 276 at 279D:

"… The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant). …"

(See also C v S [1988] QB 135 at 140; Paton v UK; Re F (in utero) (at 1299–1300, 1302–1303; 195–196, 197–198); Attorney-General (Qld) v T (1983) 57 ALJR 285 at 286; 46 ALR 275 at 277.)

[74] In Harrild v Director of Proceedings [2003] 3 NZLR 289, an issue about the relationship between a foetus and a mother arose in the civil context of the particular statutory regime for compensation for personal injury in New Zealand. The issue was whether or not harm to a foetus was harm to the mother for the purposes of the no fault accident compensation legislation applicable in that country. If it were not, then the mother had not suffered personal injury and accordingly could not claim under that legislation.

[75] A statutory office holder, called the Director of Proceedings, brought proceedings under the Health and Disability Commissioner Act 1994 (NZ) on behalf of the parents of a stillborn child alleging that the medical specialist,

Dr Harrild, was in breach of the relevant Code in that he provided inadequate medical service which resulted in the death of a foetus. In the tribunal and court below, the Director succeeded in pursuing a claim for damages under that Act on the basis that harm to the foetus was distinct from harm to the mother and, accordingly, that the mother had suffered no personal injury. A claim under the particular statutory regime could not be made if the claim arose "directly or indirectly out of " a "personal injury" suffered, relevantly, by the mother.

[76] Elias CJ emphasised (at 294 [15]) the particular statutory framework in which the issue arose and that care had to be taken with the application of reasoning from other cases, such as those dealing with criminal assaults. Her Honour concluded (at 296 [20]–[22]):

"[20] I do not think the answer to the appeal turns upon questions such as whether an unborn child itself is a person in law and has cover

under the Injury Prevention, Rehabilitation and Compensation Act, or whether it is biologically 'the same' as the mother, or whether it is a distinct organism. As Lord Mustill pointed out in Attorney-General's Reference at p 256, a foetus is not an 'autonomous being'. Application of legal principles developed in relation to autonomous beings is 'bound to mislead'. That did not mean in the application of the criminal law in that case that its existence as a 'unique organism' was to be ignored. Conversely, it seems to me wrong for the purposes of compensatory cover to ignore the physical bond between foetus and mother. Foetus and mother are not the same but neither are they physically free of each other. They are physically connected. The connection ends with birth or by death of one of the two. Both events physically impact upon each. The

impact is of more significance than the ‘sprain’ or ‘strain’ given as examples of physical injuries in s 26(1)(b).

[21] For the purposes of assessing whether there is cover under the 2001 Act, I am not attracted by the stark choice of treating the unborn child either as the same as the mother or as distinct. Where severance of the physical link between mother and unborn child occurs through the death of the child as a result of medical error I consider that physical injury within the meaning of the legislation is suffered by each. That was the view taken by the Supreme Court of Canada in respect of a criminal prosecution of midwives on charges both of negligently causing the death of an unborn child and causing bodily harm to the mother ‘through the death of the foetus which was inside of and connected to her body’ (R v Sullivan (1991) 63 CCC (3rd) 97). The Supreme Court expressed the opinion that there would be no inconsistency in guilty verdicts on both charges.

[22] It is not an answer to say that the connection between mother and child would have been severed in any event upon birth. Nor that the complaint made of the appellant is that he did not take steps to induce the child's birth and achieve earlier severance of the physical connection between the two. Such alternative outcomes, and their undoubted physical impact upon the mother, do not negate the direct physical injury suffered by a mother where her child dies in utero. She suffers a personal injury in such loss within the meaning of the legislation. Her injury is not identical to the injury suffered by the foetus. I am of the view that the Injury Prevention, Rehabilitation and Compensation Act provides cover to the mother for loss of an unborn child caused by medical misadventure.”

[77] Keith J also emphasised the particular context, when he said (at 299 [38]):

"[38] The question has to be answered in terms of the 2001 personal injury compensation legislation. Like the Chief Justice and McGrath J, I find limited assistance, at best, in decisions about criminal liability, guardianship, caesarean sections, and rights in respect of wills and negligence. One limited lesson from those cases is the critical importance of the particular legal, statutory and policy context. As the first paragraph of Lord Mustill's judgment in Attorney General's Reference (No 3 of 1994) … makes plain, the law in some of those areas may be afflicted by historical anomalies and may have lost its intellectual foundations."

[78] His Honour went on to conclude (at 300 [42]):

"[42] Is it really consistent with the purpose of the personal injury compensation legislation for the mother in that situation not to be able to

claim under it? It is true that the baby is not the 'same as' the person (but is any part of the human body?) and that it cannot be equated with an organ of the human body (but organs can sometimes be transplanted to another and may be stored for a time outside a human body). On the other hand, at the time of the crash the baby is within the mother. They are physically linked and throughout the pregnancy the baby is sustained by that linkage. Given those facts and the purpose of the legislation, I conclude that the stillbirth is properly to be seen as an injury to the mother."

[79] The third majority judgment was delivered by McGrath J. His Honour referred to the line of authority, including Paton, Re F (in utero) and Winnipeg Child & Family Services, to the effect that the foetus had to be born alive in order to acquire civil rights and concluded (at 313 [117]–[118]):

"[117] … The modern justification for the born alive rule is that legal

complexities and difficult moral judgments would arise if the Courts were to alter the common law to treat the foetus as a legal person. … It is important however to bear in mind that the rule according legal rights only at birth is in modern times one founded on convenience. It does not rest on developed medical or moral principle.

[118] The position at common law, however, is not of course decisive or necessarily even indicative of whether the Courts have power to protect a foetus under particular legislation. While the lack of legal personality of a foetus in a statutory context at times may be a significant factor, in the end it is the nature of the rights under the relevant statute that must be ascertained. Thus the differing statutory provisions in different countries at different times have enabled Courts to interpret child protection legislation so that it applies to unborn children. …"

[80] His Honour turned to the issue of whether the mother of the child which dies prior to birth is a "person" under New Zealand accident compensation legislation and whether she, therefore, has suffered "personal injury". His Honour said (at 314 [120]):

"[120] … Here the focus must ultimately be on the meaning of the phrase 'injury suffered by a person' and the scope of the concept of a person under the legislation. The High Court judgment, in holding that the foetus was not part of the mother's person, places great weight on the analysis of the House of Lords in the Attorney-General's Reference (No 3 of 1994) case. At issue in that case was whether the crimes of murder or manslaughter could be committed where an unlawful injury was deliberately inflicted on a mother and her unborn child, by an accused, the child was subsequently born but later died, and the inflicted injuries caused or substantially contributed to the child's death."

[81] His Honour referred to the judgments of Lord Mustill and Lord Hope of Craighead and continued (at 315 [123]–[124]):

"[123] This reasoning for treating the foetus as separate from the mother comes down to the lack of a common genetic identity. That must certainly be accepted as a matter of scientific fact. But it is also a fact that a foetus comprises human tissue which is connected to the mother while it is inside her. The argument based on the biological distinctiveness of the foetus does not of itself address, let alone answer, the alternative argument that because it is connected to human tissue inside her a foetus is part of the mother's person, albeit, unlike a person's limb, a

biologically distinct part of the mother. The opinions of Lords Mustill and Hope of Craighead in the House of Lords did not discuss the connected tissue argument in any detail although it is implicit from their rejection of the Court of Appeal's reasoning that they did not favour it.

[124] The criminal context of the Attorney-General's Reference case, however, suggests a particular reason for the preference in analysis. Lord Mustill was concerned at the potential operation in the case concerned of the grievous bodily harm rule as part of the crime of murder in English criminal law. If an unborn child were to be viewed as part of the mother's person, as the Court of Appeal had held, the grievous bodily harm rule would operate and an assault with intention to cause grievous bodily harm to the mother could translate into one with intent to cause grievous bodily harm to the unborn child as part of the mother. If the foetus was born alive after such an assault, but died following birth, that would then allow a charge of murder to be brought. It is plain that Lord Mustill considered the existing law was not based on principles which justified its 'extension

to a case where the defendant acts without an intent to injure either the foetus or the child which it will become' (p 435)."

[82] His Honour then went on to quote from Lord Mustill, particularly his identification of the foetus as a "unique organism" and continued (at 315 [126]–[127]):

"[126] I certainly accept that reasoning directly from the basis of the 'born alive rule' to a conclusion that mother and foetus are a single entity is problematic but that is because, as previously discussed, the rule is based on expediency rather than principle. Problems arising from such direct reasoning are instanced in the discussion of the common law status of the unborn child in 'Court-Ordered Caesarean Section' J Manning (1998) 18 NZLUR 546 at pp 547–549. Accepting there are such problems however does not preclude the notion of a 'person' having a broader meaning, which encompasses the mother and the foetus as a single entity in a particular legislative context. An unborn child can be part of a mother's 'person' in the ordinary meaning of the word. Whether that is so in the interpretation of a particular statute will turn on the context. Parliament may choose to enact legislation on the basis that the person of a pregnant woman includes the human tissue connected to and inside her body. The High Court judgment however gives no consideration to whether that approach is applicable in New Zealand to accident compensation legislation.

[127] I am reinforced in my view that an unborn child inside the mother is capable of being regarded as part of her as a person by dicta in the majority judgment of the Supreme Court of Canada in R v Sullivan."

[83] His Honour went on to refer and quote from the judgment of Lamer CJC in that case and continued (at 316 [128]):

"[128] The Supreme Court of Canada was deciding a criminal appeal, albeit one involving less serious criminal charges than the circumstances before the House of Lords in the Attorney-General's Reference case. The Canadian judgment is nevertheless a helpful instance of a Court expressing the view, when interpreting a criminal code, that bodily harm might be caused to a woman through the death of a foetus she was carrying because it was connected to and inside her."

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[84] His Honour went on to consider the scope of the word "person" in the New Zealand accident compensation legislation and concluded (at 317 [133]):

"[133] The alternative of attributing to 'person' a broader meaning which extends to human tissue that is connected to and inside of the body of a woman is one that is open on the ordinary meaning of 'person'. That is adequately demonstrated by reference to the Canadian Court's dis-cussion. The fact that the unborn child is not permanently connected to or inside of the mother is a consideration that does not negate the availability of the connected human tissue meaning at the time of the injury to the foetus. This meaning, to my mind, better accords with the policy of legislation intended to compensate for personal injury on a broad basis, whether or not attributable to the fault of another. By holding that in the present statutory context a foetus is part of the person of the mother, so that injury to a foetus is personal injury to that person, I am not of course saying that it is appropriate to view an unborn child as part of the mother in all contexts. In the area of obstetric practice, for example, plainly it is not. The present case is however one which concerns the meaning of accident compensation legislation rather than the requirements of obstetric practice."

The offence under s 33 of the Crimes Act

[85] I have set out above the terms of s 33. The words "any person" occurs twice: on the first occasion, referring to the person upon whom grievous bodily harm is actually inflicted and, on the second occasion, referring to the person to whom such harm was intended to be inflicted. The structure of the section, with the use of the words "any person" on each occasion, indicates that this section was intended to encompass the common law doctrine of transferred malice, that is, that the offence is made out if, while intending to inflict such harm on one particular person, the result of the actions are to in fact inflict such harm on another person.

[86] The effect of the born alive rule, which is referred to in a number of the authorities that I have analysed above and which were specifically applied by this Court in R v F, is that the infliction of harm on a foetus will not constitute an offence against the foetus unless that foetus is born alive. Where the intention is to harm the foetus and, in the course of seeking to do such harm to a foetus, grievous bodily harm is in fact inflicted on the mother, the offence is also made out. However, in the present case, the assault on the mother did not inflict grievous bodily harm on her, unless the harm done to the foetus or the placenta is sufficient for that purpose.

[87] My review of the authorities indicates that there is no clear rule, applicable in all situations, as to whether the mother and foetus must be considered as one or as separate. The answer will turn on the incidents of the particular legal situation under consideration including, where relevant, the scope, purpose and object of a particular statutory scheme.

[88] This proposition is best illustrated by the answers to the two distinct questions in Attorney-General's Reference (No 3 of 1994). For purposes of the law of homicide, the question posed in those proceedings was as noted above

in the negative with respect to murder and in the affirmative with respect to manslaughter.

[89] The case which is closest to the present situation is the Canadian authority of R v Sullivan where, for purposes of an offence of "causing bodily harm", the

Canadian judges unanimously gave the answer that the foetus should be regarded as part of the mother. This authority is not binding on this Court but, in my opinion, the Canadian judges reached the correct conclusion, for reasons which are the subject of more elaborate consideration in a different context by the New Zealand Court of Appeal in Harrild.

[90] In Attorney-General's Reference (No 3 of 1994), Lord Mustill and Lord Hope of Craighead emphasised the separate genetic makeup of the foetus. The foetus contains the genes of the father as well as the mother. For that reason, it was not to be regarded as an integral part of the mother. This emphasis on this separate genetic composition may be appropriate when one is considering the identity of a "person" for purposes of the law of homicide. The focus on the foetus as, to use Lord Mustill's terminology, a "unique organism" is entirely understandable in that context, a context which, Lord Mustill himself emphasised, had its own distinct historical roots. Whether that represents the law with respect to the Australian law of homicide need not be considered in this case. This perspective, however, is not the appropriate one when the law comes to deal with the quite distinctive context of harm to a person, rather than death of a person.

[91] In R v Sullivan, the Canadian judges had no difficulty in asserting, without elaborate reasoning, that for purposes of an offence of causing bodily harm, a child in the birth canal is part of the mother. The basic proposition, however, does not need elaborate reasoning. As Lamer CJC put it (at 506), "the foetus

… was inside of and connected to her body".

[92] To similar effect are the observations of McLachlin J in Winnipeg Child & Family Services (at 207 [27]) that: "the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman".

[93] In the New Zealand Court of Appeal, in Harrild, Chief Justice Elias referred, (at 296 [20]), to "the physical bond between foetus and mother … neither are … physically free of each other. They are physically connected".

[94] In that case Keith J stated (at 300 [42]): "They are physically linked and throughout the pregnancy the baby is sustained by that linkage".

[95] Furthermore, McGrath J, in Harrild, when rejecting the biological distinctiveness of the foetus reasoning of Lord Mustill and Lord Hope of Craighead, identified the alternative approach (at 315 [123]): "that because it is connected to human tissue inside her a foetus is part of the mother's person". His Honour referred to this as the "connected tissue argument". The formulation which he found determinative, (at 315 [126] and 317 [133]), was that the foetus, even if a separate entity for some purposes, was "human tissue connected to and inside" the body of the mother.

[96] I find this approach compelling for the law of assault and in particular for the forms of aggravated assault requiring as an element of the offence actual bodily harm, grievous bodily harm or wounding. The close physical bond between the mother and the foetus is of such a character that, for purposes of offences such as this, the foetus should be regarded as part of the mother.

[97] The aggravated forms of assault reflect the community's legitimate concern to control violence between persons. The greater the degree of injury, as compared with the result of common assault, the greater the community's concern. Where such enhanced injury is inflicted on a foetus only, I can see no reason why the aggravated form of offence should depend on whether the

foetus is born alive. The purpose of the law is best served by acknowledging that, relevantly, the foetus is part of the mother.

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[98] Accordingly, I would allow the appeal and set aside the order made by Tupman DCJ. If otherwise entitled, the respondent should have a certificate under the Suitors' Fund Act 1951.

[99] Since writing the above, I have seen the judgment of Dunford J in draft. I agree with his Honour's observations that only in an unusual case under s 5F would it be appropriate that a certificate should issue under the Suitors' Fund Act. However, the Crown did not oppose that course being taken in the present case. It also acknowledged the important issue of principle that arose.

[100] DUNFORD J. In this matter I have had the opportunity of reading in draft form the judgment of Spigelman CJ. I agree with the orders proposed by his Honour and with his reasons, and only wish to add something in relation to the grant of the certificate under the Suitors' Fund Act 1951.

[101] Although the Criminal Appeal Act 1912, s 17, prevents this Court making an order for costs in any appeal, that does not prevent the court making an order pursuant to s 6(1) of the Suitors' Fund Act granting to an unsuccessful respondent an indemnity certificate under that Act. Such certificate entitles such respondent to recover the costs incurred in the appeal: s 6(2)(b), but there is no provision for the grant of an indemnity certificate to a successful appellant.

[102] In relation to appeals under s 5F of the Criminal Appeal Act, this creates an anomalous situation in the sense that whilst an unsuccessful respondent to an appeal under s 5F(2) can obtain a certificate, a successful appellant in an appeal under s 5F(3) cannot, and is left to his or her right to make an application under s 5C, which depends on the discretion of the Director

General.

[103] It has not in my experience, been the practice of this Court to grant certificates of indemnity in appeals under s 5F and I see no reason why the practice should be varied as a general rule. This case was exceptional in that it raised a question of public importance and involved a consideration of decisions of the highest courts of the United Kingdom, Canada and New Zealand; and although the Crown Advocate in written submissions submitted that the appropriate remedy for the respondent was an application under s 6C, in oral submissions he conceded that s 6(1) of the Act applied.

[104] In these circumstances I have, with some hesitation, come to the conclusion that this is an appropriate case for the grant of an indemnity certificate, but in my opinion the grant of such certificates to unsuccessful respondents in appeals under s 5F should be limited to exceptional cases.

[105] ADAMS J. I agree.

Appeal allowed

Solicitors for the appellant: Director of Public Prosecutions (NSW).

Solicitors for the respondent: Legal Aid Commission of NSW.