NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Reid*, 2003 NSCA 104

Date: 20031009
Docket: CAC 179257
Registry: Halifax

Between:

Joey Robert Reid and Michael Gene Stratton

Appellants

v.

Her Majesty the Queen

Respondent

- and -

CAC 179434

Her Majesty the Queen

Appellant

v.

Joey Robert Reid and Michael Gene Stratton

Respondents

Judges:	Saunders, Oland & Hamilton, JJ.A.
Appeal Heard:	May 29, 2003, in Halifax, Nova Scotia
Held:	Appeal allowed, convictions set aside and a new trial ordered for both Reid and Stratton per reasons for judgment of Saunders, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Laurel Halfpenny-MacQuarrie, for the Crown Kevin Coady, Q.C, for Joey Robert Reid Anne MacLellan Malick, Q.C., for Michael Gene Stratton

Reasons for judgment:

Introduction

[1] A few minutes of stupidity after a reckless night of drinking left a young man dead and two others convicted of manslaughter for killing him. This appeal raises a most serious point concerning the requirement in law that in order for a culpable homicide to have been committed, the person accused of the crime must be shown to have *caused the death of* a human being.

[2] I have concluded that in the unique and tragic circumstances of this case the incompleteness of the trial judge's directions to the jury concerning this essential element of the offence, amounted to a serious error of law and that it cannot be said with any confidence that the error occasioned no substantial wrong or miscarriage of justice.

[3] Accordingly I would set aside the verdict and order a new trial for both Joey Robert Reid ("Reid") and Michael Gene Stratton ("Stratton").

[4] In light of my conclusion and disposition it will not be necessary for me to comment further on the several other grounds advanced by Reid and Stratton in their appeals from conviction, nor express any opinion on the separate appeal taken by the Crown against their sentences.

Factual Background

[5] After a seven day trial in Truro last September before Nova Scotia Supreme Court Justice Robert W. Wright and a jury, Reid and Stratton were convicted of manslaughter in the death of Joseph MacKay contrary to s. 236(b) of the **Criminal Code**. On April 2, 2002, Wright, J. imposed a conditional sentence upon each offender amounting to incarceration of two years less a day to be served in the community through house arrest with conditions including 240 hours of community service. The only important differences between the two sentences related to Reid who was prohibited from consuming or possessing alcohol or any non-prescription drugs and further, that immediately upon the expiration of his conditional sentence, he would be subject to a probation order for an additional two years.

[6] The material facts adduced at trial are largely not in dispute and for the purposes of my analysis may be briefly stated.

[7] On the evening of January 27, 2000 two separate groups of young adults, all from Truro, went out for a night of drinking with friends.

[8] The first group included Reid, Stratton, Holly DeCoste, Andrew Pace and Rachael Reid. Holly DeCoste was dating Reid at the time, he being Rachel's cousin. Rachel Reid lived with her parents at their Giles Street residence in Truro where the incident occurred. Andrew Pace was a good friend of both Reid and Stratton.

[9] The second group of people included the victim Joey MacKay and his friend Jason Boudreau. The members of both groups, for the most part, were passing acquaintances. They had all grown up in Truro and were familiar with one another.

[10] The evidence disclosed that most of the young people in both groups were already intoxicated by the time they arrived at The Mill Beverage Room shortly before midnight. There the drinking continued.

[11] Rachael Reid's parents' home is located a short distance from The Mill. At closing time around 1:00 a.m. the two groups dispersed. Reid, Stratton, DeCoste and Pace left the tavern and got into Stratton's vehicle. MacKay and Boudreau asked for a lift to Rachael Reid's parents' home, about a block away. There wasn't enough room in Stratton's vehicle, so MacKay and Boudreau, together with Rachael Reid, decided to walk. The first group consisting of Reid and Stratton and others drove ahead and were already in Rachael Reid's driveway on Giles Street by the time Ms. Reid, MacKay and Boudreau arrived on foot.

[12] The evidence at trial was that Ms. Reid, MacKay and Boudreau intended to take Reid's car and go off in search of cocaine. Ms. Reid admitted to having a severe addiction to cocaine at the time. The young people were milling about the side entrance and driveway to the home, smoking, chatting or having a beer. Some had to report for work early that morning.

[13] An argument developed between Joey Reid and Jason Boudreau. Evidently upon hearing that Rachel was going to use her car to find a source of cocaine, Joey Reid told his cousin that she was in no condition to be operating a motor vehicle. This prompted Jason Boudreau to tell Joey Reid to "mind his own business." For reasons that are not entirely clear from the evidence the argument between Reid and Boudreau somehow escalated into a physical altercation between the victim MacKay, Reid and Stratton. Stratton and MacKay exchanged punches. At some point both men slipped to the ground. Stratton was able to grab MacKay around the neck in a headlock. While MacKay was on the ground Reid administered some kicks. After noticing that MacKay was no longer resisting or struggling, Stratton let go and got to his feet. It soon became apparent that MacKay was unconscious.

[14] Some in the group attempted resuscitation, to no avail. A telephone call to 911 sought an ambulance. Rather than wait and seeing that their efforts to resuscitate MacKay were ineffective, Pace, Rachael Reid and DeCoste carried MacKay to a vehicle and drove to the hospital while Pace continued CPR. MacKay was pronounced dead at the hospital. Reid and Stratton who had remained at the scene were apprehended by police and taken in for questioning. On January 28 they were charged with manslaughter. Their trial by judge and jury was conducted at Truro from September 4 to 13, 2001. Considerable formal proof was dispensed with on important but ancillary matters by admitting two detailed agreed statements of fact. They were convicted of manslaughter and each was subsequently handed a conditional sentence. Reid and Stratton appealed from their conviction on May 3, 2002. The Crown appealed their sentences on May 9, 2002.

Grounds of Appeal

[15] Each of the appellants Reid and Stratton advanced five grounds of appeal alleging that:

1. the trial judge erred in law in not adequately instructing the jury on the issue of *intervening act* and *intervening cause* as it related to the CPR procedure which, on the evidence, was the cause of death.
2. the trial judge erred in law in not adequately instructing the jury on the law in the line of authorities following **R. v. Harbottle**, [1993] 3 S.C.R. 306, as it related to the actions of the appellant being a substantial and integral cause of death,

3. the jury were unduly influenced and gave undue weight to the theory of the offence presented to them in the Crown's address to the jury, such theory not supported by the evidence.
4. the jury, having informed the court that they were tired, nonetheless continued to deliberate and render a verdict,
5. the finding of guilt is not supported by the evidence.

[16] To these five the appellant Stratton added a sixth, that:

6. the judge erred in instructing the jury that Stratton did not have the defence of consent available to him.

[17] At the hearing before us counsel confirmed their abandonment of their fourth ground of appeal.

[18] For the purposes of these reasons I need only deal with the appellants' first submission, that the trial judge's charge to the jury was flawed in that he did not specifically instruct them on the issue of intervening act and intervening cause as it related to the failed attempts at CPR which, on the evidence, was the sole cause of Mr. MacKay's death.

[19] Before considering this ground of appeal it bears emphasis now - and about which I will say more later - that at no time during the pre-charge meeting with counsel and the two accused on the record, nor at any time following the judge's charge when given the opportunity to do so, did counsel for Reid and Stratton either urge Justice Wright to instruct the jury on what they now say was a fatal omission in his directions, or make any real attempt to persuade the judge of the inadequacy of his directions or that the jury ought to be re-charged.

[20] Absent a plea of self-defence which now has no bearing on this appeal, the operative provisions of the **Criminal Code** pertaining to the circumstances of this case state:

> **222.(1) Homicide**— A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> **(2) Kinds of homicide** — Homicide is culpable or not culpable.

(3) Non Culpable homicide — Homicide that is not culpable is not an offence.

(4) Culpable homicide — Culpable homicide is murder or manslaughter or infanticide.

(5) Idem — A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act,

....

225. Death from treatment of injury — Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith.

...

234. Manslaughter — Culpable homicide that is not murder or infanticide is manslaughter.

...

236. Manslaughter — Every person who commits manslaughter is guilty of an indictable offence and liable

...

(b) in any other case, to imprisonment for life.

[21] At trial, Stratton testified on his own behalf and called as a witness Dr. Peter Markenstein of Winnipeg, Manitoba, qualified as an expert forensic pathologist.

[22] Reid chose not to testify or call evidence. The videotaped statement he gave to the police of January 28, 2000, was ruled admissible and a transcript of that recorded statement was before the jury as an exhibit.

[23] The uncontroverted evidence at trial, the view shared by all of the doctors whose reports and testimony were before the jury, was that Joey MacKay's death was due to asphyxia after he aspirated on his stomach contents. Put simply he choked to death on his own vomit. The botched attempts to resuscitate him tragically brought on his death, when the pressure of physical resuscitation efforts forced large quantities of vomitus into his lungs.

[24] Dr. B.A. Phillips, a general practitioner, was the first physician called by the Crown. He was on duty that night in the Emergency Department at Colchester Regional Hospital. He described the medical staff's attempts to revive Mr. MacKay whom he said was:

> ... fully dressed, totally unconscious, and basically, for all intents and purposes ... dead on arrival.

[25] The medical team suctioned "at least half a cup to a cup", said to be "a lot of vomitus", from MacKay's lungs. Dr. Phillips said this was liquid stomach contents that had moved from MacKay's stomach into his windpipe and into his lungs. He explained that once a person's lungs fill up with fluid, the body is not able to get oxygen to the red blood cells, the tissues, the heart and other organs, leading to death.

[26] On cross-examination Dr. Phillips confirmed that when he examined Mr. MacKay's body he noticed the presence of only superficial abrasions that would not have caused his death. He opined that a victim in the condition of Mr. MacKay with "a very substantial amount" of vomitus blocking his trachea or windpipe "could go without oxygen no more than a couple of minutes" before the events led to cardiac arrest.

[27] Dr. V.F. Bowes was called by the Crown. He is the Chief Medical Examiner for Nova Scotia, and was qualified to give expert opinion evidence in the field of forensic pathology. Dr. Bowes conducted the post mortem examination of the victim on January 28, 2000. His report was filed as an exhibit with the jury. Under the heading CAUSE OF DEATH Dr. Bowes wrote:

1. (a) Aspiration of stomach contents

   (b) Compression Asphyxia

[28] Based on the records from the Colchester Hospital as well as his own observations during the autopsy, Dr. Bowes described the amount of fluid in the trachea and lungs of the victim as being "very large quantities" which could only have been "pushed in by inadvertent attempts to revive the patient." Dr. Bowes described what he termed the ABC's of proper resuscitation, first to check the air way to make sure it is clear; then to check respiration to see that the victim is breathing; and finally to check for a heart beat. These three steps: airway, breathing and cardiac are the correct sequence for proper resuscitation efforts.

[29] Tragically those who tried to revive Mr. MacKay while he lay unconscious on Giles Street, inadvertently killed him. Dr. Bowes described Mr. MacKay as being a muscular, healthy, very fit and well developed 23 year old male. Force applied to the chest or upper abdomen of a body, on its back and unconscious would, in Dr. Bowes' view, force the contents of the person's stomach to come up into the mouth "and having nowhere to go, would be almost completely inhaled into the breathing tubes." Accordingly, Dr. Bowes testified that in his expert opinion the cause of MacKay's death was aspiration of stomach contents.

[30] The toxicology analysis for the presence of alcohol in Mr. MacKay's system confirmed a reading of 160 milligrams of alcohol in 100 milliliters of blood. This reading, in Dr. Phillips' opinion, suggested that Mr. MacKay was "intoxicated but not extremely intoxicated". Dr. Bowes described it as highly unlikely that such a healthy young male might have died of aspiration from intoxication in any event, whether or not anyone had attempted CPR.

[31] Dr. Bowes explained that the potential risk of death arises when one vomits and inhales at the same time. Ordinarily an individual possesses a gag reflex to prevent that from happening. He said that intoxication might impair the gag reflex, just as would unconsciousness, but that even an unconscious person retains a gag reflex depending on the level of unconsciousness and a combination of other factors. Dr. Bowes was not asked to express an opinion - perhaps because of the lack of evidence as to the level and duration of MacKay's own unconsciousness coupled with his known blood alcohol reading, as to whether, if at all, MacKay's gag reflex may have been diminished.

[32] He described the abrasions, scrapes and bruises to Mr. MacKay's body as being very superficial. Based on his external and internal examination there was

no significant injury to the man's neck. None of the bruises, scrapes and abrasions found on the man's body were life threatening or had anything to do with the aspiration, asphyxia and subsequent death.

[33] As noted earlier, Dr. Peter Markenstein was called by Stratton as a defence witness. After examining the exhibits, photographs, post mortem examination and all of the hospital records, Dr. Markenstein reached precisely the same conclusion: that MacKay's death resulted from asphyxia when he aspirated the contents of his stomach and choked to death. Dr. Markenstein shared the other doctors' views that none of the scrapes, bruises and other superficial physical injuries contributed in any way to MacKay's death.

[34] In light of this uncontroverted medical evidence it therefore became an essential inquiry for the jury to determine what in fact *caused* the victim's death. In order for the jury to convict Reid and Stratton, they had to be satisfied beyond a reasonable doubt that their actions in fact and in law caused MacKay's death. That determination obliged them to consider not just the facts as they found them relating to the physical contact among MacKay and Stratton and Reid, but also to carefully reflect upon the activities of those who attempted to revive Mr. MacKay with various attempts at CPR. This complete analysis was made all the more important in view of the medical experts' shared opinion as to how and why he died.

[35] In my respectful opinion, in light of this unique set of circumstances surrounding Mr. MacKay's death, it obliged the trial judge to instruct the jury with far greater precision and clarity than occurred here.

[36] The judge began this critical section of his charge by properly reviewing for the jury the evidence that would qualify as meeting the requirement of "an unlawful act": that being, in the case of Stratton, the physical altercation between he and MacKay, the exchange of punches, the wrestling and grappling on the ground, ending when Stratton got hold of MacKay from behind by grabbing under his armpit and putting his arm up over MacKay's shoulder and alongside his neck; and in the case of Reid, the evidence of witnesses who said they saw Reid kick MacKay a few times while Stratton had a hold of MacKay on the ground. I note here as well that much of that evidence suggested that Reid was stumbling around drunk and only managed two or three glancing kicks that landed somewhere between MacKay's shoulders and hips.

[37] Justice Wright then went on to direct the jury as follows:

> If, on the other hand, you are satisfied that the Crown has proven beyond a reasonable doubt that an unlawful act of assault was committed by either or both of the accused persons against Mr. MacKay, that is, an unlawful act that was objectively dangerous, then you must go on to consider the fourth and final element of the offence of manslaughter and that is, Did the unlawful act cause the death of Mr. MacKay [unidentified comment of "yes" from courtroom] beyond a reasonable doubt?
>
> Whoever said that, I do not want to hear any such editorial comments again or you will be asked to leave the courtroom.
>
> Ladies and gentlemen, causation is obviously a key issue in this case. It is an issue that you, the jury will have to deal with because causation is a question of fact. The onus is on the Crown to prove beyond a reasonable doubt not only that an unlawful act was actually committed but also that such unlawful act caused the death of the victim.
>
> So I am now going to discuss that fourth element of causation. If the unlawful act committed by the accused or either of them did not, in any way, cause or contribute to the death of Mr. MacKay, then the Crown has failed to prove causation. On the other hand, you do not have to find that the unlawful act was the sole or principal cause of Mr. MacKay's death. It is sufficient if you are convinced beyond a reasonable doubt that the unlawful act of the accused or either of them was at least a contributing cause of the death and was more than an insignificant or trivial cause of the death.
>
> Now that is important, so let me restate it for you. If such an unlawful act was committed by either or both of the accused, did it cause the death of Mr. MacKay, bearing in mind that to establish the requisite causal connection between them, the unlawful act need not be the sole operative cause of death, it is sufficient if the unlawful act was at least a contributing operative cause of death that is not just trivial or insignificant. Or to recast that in the positive, it must be a significant contributing cause of death that is established by the Crown beyond a reasonable doubt.
>
> Now in dealing with this issue, you must, of course, consider the expert medical evidence. We heard three medical experts. We heard Dr. Phillips, we heard Dr. Bowes, we heard Dr. Markenstein.

. . .

The fourth point in my summary of the medical evidence, all three medical experts expressed the opinion that none of the superficial bruises, lacerations, or abrasions, either individually or combined were sufficient to cause death nor would any of them have even required medical attention with the possible exception of a stitch or two in the scalp, nor would they directly cause aspiration to occur.

. . .

This opinion that I have just related was concurred in by Mr. Markenstein, the forensic pathologist called by Ms. Malick. Dr. Markenstein agreed with Dr. Bowes' opinion that the medical cause of death was aspiration of stomach contents and that the superficial scrapes and bruises while consistent with an altercation were not life-threatening and did not contribute to the cause of death.

Ladies and gentleman, it is you, the jury, who will have to consider what caused that aspiration of the stomach contents to happen, whether it happened on its own, considered unlikely in this case by Dr. Bowes, or whether it was caused by a kick to the upper body by Mr. Reid, or whether it was caused by ill-administered CPR attempts whereby the pushing on Mr. MacKay's chest area caused him to vomit which was then inadvertently forced down his windpipe and lungs by mouth-to-mouth resuscitation attempts. You will recall that it is the latter that is considered by Dr. Bowes as the most likely scenario to have happened.

The evidence of the various witnesses paints a picture of confusion and disorganization in the CPR resuscitation attempts that were tried, tried in vain by various combinations of Joey Reid, Rachel Reid, Holly DeCoste, and Andrew Pace. Unfortunately, by the time they got Mr. MacKay to the hospital, it was too late.

So, ladies and gentlemen, it is within this chain of events that you must make your findings of fact and decide whether you are satisfied beyond a reasonable doubt that there was an unlawful act committed by either or both of the accused persons that caused the death of Mr. MacKay based on the legal principles I have explained to you.

I remind you once again that the Crown must prove each of these ingredients beyond a reasonable doubt in order to convict for manslaughter. If the Crown has not proved each of these ingredients beyond a reasonable doubt, with

> respect to either of these accused persons, you must return a verdict of not guilty of the offence of manslaughter accordingly.

[38] Regrettably, although he spoke of the ill-administered CPR attempts, among other causes, for the aspiration of stomach contents, and later spoke of a chain of events, the trial judge did not provide any instructions to the jury on the issue of intervening act and intervening cause as it related to the CPR resuscitation efforts which, on the unanimous view of all of the medical experts, was the cause of MacKay's death.

[39] This case raises squarely the issue of what constitutes proper and adequate directions when charging a jury on the standard of causation in a homicide case. I begin with the leading and most recent case in Canada, **R. v. Nette** (2001), 158 C.C.C. (3d) 486. The horrible facts surrounding the victim's death in that case were described by Arbour, J., writing for the majority:

> 17. On Monday, August 21, 1995, Mrs. Clara Loski, a 95-year-old widow who lived alone in her house in Kelowna, British Columbia, was found dead in her bedroom. Her house had been robbed. Mrs. Loski was bound with electrical wire in a way that is referred to colloquially as "hog-tying". Her hands were bound behind her back, her legs were brought upwards behind her back and tied, and her hands and feet were bound together. A red garment was tied around her head and neck and entrapped her chin. This garment formed a moderately tight ligature around her neck, but did not obstruct her nose or mouth.
>
> 18. One of Mrs. Loski's neighbours, Deanna Taylor, testified that she was standing in her backyard smoking on the afternoon of Friday, August 18, 1995 when she heard Mrs. Loski's door close and saw two male Caucasian youths leave through Mrs. Loski's back gate and run down the alley.
>
> 19. Some 24 to 48 hours after Mrs. Loski was robbed and left hog-tied on her bed, she died. At some point she had fallen from the bed to the floor. The Crown's medical expert, Dr. Roy, was of the opinion that the cause of death was asphyxiation due to upper airway obstruction.
>
> 20. The RCMP mounted an undercover operation with the appellant Nette as a target. In the course of this investigation, the appellant was induced to tell an undercover police officer, who was posing as a member of a criminal

> organization, about his involvement in the robbery and death of Mrs. Loski. This admission was recorded by the undercover officer and was put in evidence at trial.

[40] At trial Nette testified in his own defence and said he went to the victim's home alone just after midnight on Saturday, August 19 with the intention of breaking and entering but that when he tried the back door it swung open on its own as if someone else had already broken in. He said he found Mrs. Loski already dead in her bedroom and promptly left the scene. He said he had fabricated the story about robbing and tying up Mrs. Loski in an effort to impress the undercover officer.

[41] The only medical evidence at trial on the issue of Mrs. Loski's death was that of a forensic pathologist who testified for the Crown. He concluded that the victim died as a result of asphyxiation due to an upper airway obstruction. He was unable to isolate any single factor, among several, and state that it alone caused her death. In his view a number of things contributed to the asphyxial process; being left in a hog-tied position, the ligature around her neck, her age, and corresponding lack of muscle tone. In cross-examination the doctor agreed that other factors including the victim's congestive heart failure and asthma may possibly have speeded up the process of asphyxiation.

[42] The appellant was charged with first degree murder on the basis that he had killed her while unlawfully confining his victim. The jury convicted Nette of second degree murder. The British Columbia Court of Appeal dismissed Nette's appeal. The only issue on appeal both before the Court of Appeal and the Supreme Court of Canada concerned the test for causation applicable to second degree murder.

[43] While there are obvious differences between that case and this one, not the least of which was that in **Nette** the Court considered causation in the context of second degree murder, much of the Court's analysis is instructive and helpful.

[44] The Court was unanimous in the result, dismissing the appeal and upholding the jury's verdict of second degree murder. However, the Court was tightly split (5:4) on the appropriate terminology to be used when charging a jury on the

standard of causation. Arbour, J. writing for the majority (Justices Iacobucci, Major, Binnie and LeBel concurring) held that the trial judge did not err in his instructions on causation when he told the jurors that with respect to manslaughter and second degree murder they must find that the accused was “more than a trivial cause” of death in order to conclude that he caused her death. The majority found that the better way to instruct juries on this issue is to avoid Latin phrases or formulations that are expressed in the negative. The majority said it is permissible and perhaps preferable to explain the standard in terms such as “significant contributing cause” as opposed to “not a trivial cause” or “not insignificant.”

[45] The minority, Justice L’Heureux-Dubé (McLachlin, C.J.C., Gonthier and Bastarache, JJ. concurring in the result) opposed any re-casting of the “beyond de minimis” test. In the minority’s view re-framing the test in positive language as a “significant contributing cause” went far beyond simple semantics and constituted a drastic change in the law. At ¶’s 9, 10 and 14 L’Heureux-Dubé, J. opined:

> 9. Accordingly, I find that recasting the Smithers "beyond de minimis" test in the language of a "significant contributing cause" is unwarranted because it raises the threshold of causation for culpable homicide without any reasons for doing so and none, of course, is given since my colleague indicates that the proposed reformulation does not modify the Smithers standard.
>
> 10. Words have a meaning that should be given to them and different words often convey very different standards to the jury. In my view, describing a contributing cause as having a "significant" impact attaches a greater degree of influence or importance to it than do the words "not insignificant". As a recent editorial of the Criminal Law Journal observes: "Semantics, popular usage of words and expressions, and common sense all have their respective critical roles to play in the determination of causation in the criminal law" ("Semantics and the threshold test for imputable causation" (2000), 24 Crim. L.J. 73 at pp. 74-75).
>
> . . .
>
> 14. In conclusion, I reiterate that the causation test in Smithers remains the law and to rephrase it in the language of a "significant contributing cause", as my colleague suggests, would draw the line at a different place, thus drastically changing the law. I have found no legitimate reason to reformulate the Smithers

> test, rather it is my opinion that such alteration should be strenuously proscribed since it will elevate the threshold of causation. As a result, I consider the current language of "a contributing cause [of death] that is not trivial or insignificant" to be the correct formulation that trial judges should use when expressing to the jury the standard of causation for all homicide offences.

[46] While of course I am bound to follow the majority's view, the differing approaches and opinions are a reflection of the inherent difficulties in fixing and then expressing a standard of causation in many homicide cases.

[47] Before considering the standard of causation in the context of the facts before her in **Nette**, Arbour, J. referred to the Court's earlier decisions in **R. v. Smithers**, [1978] 1 S.C.R. 506 and **R. v. Harbottle**, [1993] 3 S.C.R. 306. This was important as one of Nette's submissions was that the effect of those two earlier judgments was to engage a different standard of causation in cases of murder (the **Harbottle** standard being a "substantial cause" of death) and cases of manslaughter (the **Smithers** standard, being a cause that is "not insignificant") and that therefore it might have made a difference to the verdict had the jury been instructed that the applicable test to apply was the standard in **Harbottle** and not **Smithers**.

[48] To better understand this distinction and Justice Arbour's subsequent analysis it would be helpful to briefly recall the circumstances of both earlier decisions.

[49] In **Smithers** a fight broke out after a rough and heated junior hockey game. The appellant punched the victim once or twice in the head and then, while the victim was doubled over, gave him a quick, vicious kick to the stomach. Within a few minutes the victim was dead. The post-mortem examination revealed that death had occurred from aspiration of vomit, said to be an extremely rare occurrence resulting from the malfunctioning of the victim's epiglottis. The Crown's theory was that the kick had precipitated the vomiting and aspiration such that the appellant had caused the victim's death. The jury convicted the appellant of manslaughter and the Ontario Court of Appeal dismissed his appeal. Two grounds of appeal were raised before the Court in **Smithers**. First the appellant argued that the trial judge had not made it clear to the jury that the act of assault

must also have caused the death of the victim. Dickson, J. (as he then was) writing for the Court concluded that the trial judge had properly charged the jury on the issue of cause of death. As to the appellant's second submission, that the evidence did not support a finding that his kick had caused the victim's death, Dickson, J. rejected this second ground of appeal stating at p. 519:

> . . . In answer to this question it may shortly be said that there was a very substantial body of evidence, both expert and lay, before the jury indicating that the kick was at least a contributing cause of death, outside the minimis range, and that is all that the Crown was required to establish. It is immaterial that the death was in part caused by a malfunctioning epiglottis to which malfunction the appellant may, or may not, have contributed.

[50] As noted by Justice Arbour, since the Court's judgment in **Smithers**,

> . . . the terminology of "beyond de minimis" or "more than a trivial cause" has been used interchangeably with "outside the de minimis range" to charge juries as to the relevant standard of causation for all homicide cases, be it manslaughter or murder.

[51] **Harbottle** arose out of an appeal from a conviction for first degree murder following the forcible confinement, rape and killing of a teenage girl. Harbottle with his friend Ross, forcibly confined a seventeen year old highschool student and subjected her to a litany of sexual atrocities that Cory, J. writing for the Court, described as revealing "a brutish insensitivity to human suffering and death." While she struggled, Harbottle and his companion discussed ways of killing her "nicely." When her persistent struggling prevented their slashing her wrists they decided to strangle her. While she struggled with her hands tied, Harbottle held her legs while Ross choked her to death.

[52] At trial the pathological or diagnostic cause of death was said to be the victim's asphyxiation. Harbottle was found guilty of first degree murder and given the mandatory sentence of life imprisonment with no eligibility of parole for 25 years. He appealed the conviction. At the Court of Appeal, it was conceded that Harbottle was a party to the murder while participating in the young girl's forcible confinement or sexual assault. The sole question for determination was whether

his participation was such that he could be found guilty of first degree murder pursuant to the provisions of s. 214(5) (now s. 222(5))of the **Criminal Code**. It was argued that while he had certainly participated in the murder, he had not occasioned her asphyxiation. Accordingly the Court's inquiry focussed on the causation requirement under s. 214(5) of the **Criminal Code** "when death is caused by that person."

[53] Writing for the Court, Cory, J. adopted what he described as "a restrictive test of substantial cause" that ought to be applied in any s. 214(5) analysis. He wrote:

> 33. Accordingly, I suggest a restrictive test of substantial cause should be applied under s. 214(5). That test will take into account the consequences of a conviction, the present wording of the section, its history and its aim to protect society from the most heinous murderers.
>
> 34. The consequences of a conviction for first degree murder and the wording of the section are such that the test of causation for s. 214(5) must be a strict one. In my view, an accused may only be convicted under the subsection if the Crown establishes that the accused has committed an act or series of acts which are of such an nature that they must be regarded as a substantial and integral [page324] cause of the death. A case which considered and applied a substantial cause test from Australia is R. v. Hallett, [1969] S.A.S.R. 141 (S.C. in banco). In that case, the victim was left beaten and unconscious by the sea and was drowned by the incoming tide. The court formulated the following test of causation, at p. 149, which I find apposite:
>
> > The question to be asked is whether an act or series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.
>
> 35. The substantial causation test requires that the accused play a very active role -- usually a physical role -- in the killing. Under s. 214(5), the actions of the

> accused must form an essential, substantial and integral part of the killing of the victim. Obviously, this requirement is much higher than that described in Smithers v. The Queen, [1978] 1 S.C.R. 506, which dealt with the offence of manslaughter. There it was held at p. 519 that sufficient causation existed where the actions of the accused were "a contributing cause of death, outside the de minimis range". That case demonstrates the distinctions in the degree of causation required for the different homicide offences. (underlining mine)

[54] These then were the two “tests” considered by Arbour, J. when undertaking her analysis in **Nette**. Her reasoning and conclusions in my opinion direct the approach to be taken in the special circumstances of this case and compel the conclusion that the judge’s charge was flawed and incomplete.

[55] Arbour, J. began by noting that:

> . . . it is important to distinguish between what the legal standard of causation is and how that standard is conveyed to the jury. The difference between these two concepts has been obscured somewhat in the present case by the parties' focus on the terminology used to describe the standard of causation. I agree with the appellant's submission that there is only one standard of causation for all homicide offences, whether manslaughter or murder. However, I do not agree with the appellant that the standard must be expressed for all homicide offences, including second degree murder, as one of "substantial cause" as stated in Harbottle. Nor must the applicable standard be expressed with the terminology of "beyond de minimis" used in the Smithers standard.

[56] Further at ¶’s 70-71:

> 70. There is a semantic debate as to whether "not insignificant" expresses a degree of causation lower than "significant". This illustrates the difficulty in attempting to articulate nuances in this particular legal standard that are essentially meaningless. I agree with Lambert J.A. that even if it were desirable to formulate a causation test for second degree murder that is higher than the Smithers standard for manslaughter but less strict than the Harbottle standard for first degree murder under s. 231(5), which I conclude it is not, it would be difficult to formulate such a test in a meaningful way and even more difficult for a jury to grasp the subtle nuances and apply three different standards of causation.

> 71. The causation standard expressed in Smithers is still valid and applicable to all forms of homicide. In addition, in the case of first degree murder under s. 231(5) of the Code, Harbottle requires additional instructions, to which I will return. The only potential shortcoming with the Smithers test is not in its substance, but in its articulation. Even though it causes little difficulty for lawyers and judges, the use of Latin expressions and the formulation of the test in the negative are not particularly useful means of conveying an abstract idea to a jury. In order to explain the standard as clearly as possible to the jury, it may be preferable to phrase the standard of causation in positive terms using a phrase such as "significant contributing cause" rather than using expressions phrased in the negative such as "not a trivial cause" or "not insignificant". Latin terms such as "de minimis" are rarely helpful.

[57] Based on the Court's preliminary statements in **Nette**, to which I have just referred, the first part of the judge's instructions to the jury in this case were appropriate. He said the Crown was bound to:

> . . . establish the requisite causal connection between them, the unlawful act need not be the sole operative cause of death, it is sufficient if the unlawful act was at least a contributing operative cause of death that is not just trivial or insignificant. Or to recast that in the positive, it must be a significant contributing cause of death that is established by the Crown beyond a reasonable doubt.

> In this, the trial judge first expressed the notion of causation as was most often popularly framed in negative terms, "not just trivial or insignificant" and then restated it as a positive, a test that obliged the Crown to show beyond a reasonable doubt that the unlawful act amounted to "a significant contributing cause of death." To this point at least the trial judge's direction met the Court's approved formulation of the test. However, and with great respect, this was not enough. In light of the evidence adduced at trial I have concluded that the judge's instructions were incomplete.

[58] In her reasons Justice Arbour went to considerable lengths to emphasize that cause of death cases are fact specific and that **Nette**, and **Harbottle**, and **Smithers** were all to be distinguished from cases where the unlawful act may have been

interrupted by an *intervening event*. For example, under the heading Is Causation an Issue on the Facts of the Present Appeal she explained at ¶ 74:

> 74. As I mentioned earlier, causation issues rarely arise in murder offences. Thus, in the usual case, it will be unnecessary for the trial judge to explain the applicable standard of causation to the jury in relation to either second degree murder or first degree murder. Causation issues arise more frequently in manslaughter cases, in which the fault element resides in a combination of causing death by an unlawful act, or by criminal negligence, and mere objective foreseeability of death. As the cases illustrate, causation issues tend to arise in factual situations involving multiple parties (e.g. Harbottle), thin skull victims (e.g. Smithers), intervening events (e.g. Hallett) or some combination of these factors. (underlining mine)

[59] Further at ¶ 77 Justice Arbour wrote:

> 77. In a homicide trial, the question is not what caused the death or who caused the death of the victim but rather did the accused cause the victim's death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence. It will be significant, and exculpatory, if independent factors, occurring before or after the acts or omissions of the accused, legally sever the link that ties him to the prohibited result. (underlining mine)

[60] She went on to state:

> 78. In my view, this case does not involve truly multiple independent causes, as for instance, when improper treatment can also be responsible for the victim's death. An example of a case that involves multiple causes is Hallett, supra. In that case, the victim was beaten and left unconscious by the sea and was drowned by the incoming tide. The question in that case was whether the accused's actions were such that he should be held responsible for the death despite the intervening cause of the incoming tide. The court expressed the test of causation as follows at p. 149:
>
> > The question to be asked is whether an act or series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that

> it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.
>
> Unlike Hallett, no intervening causes arose in the present case between the appellant's action and the victim's death. (underlining mine)

[61] Later, referring back to the circumstances surrounding Mrs. Loski's death, Arbour, J. stated at ¶ 80:

> 80. It is clear on the medical evidence that the victim's physical conditions related to her advanced age may have hastened her demise. However, there was no evidence to indicate that Mrs. Loski's death would have occurred without the actions of the appellant and his accomplice. Nor is there any evidence that she was a thin-skull victim whose physical characteristics were unusual for a woman of her age. By all accounts, she was healthy and active. A much younger victim, subjected to the same treatment, may also have failed to survive. An example of a true thin-skull situation is Smithers, the facts of which are discussed earlier. There is also no evidence of any intervening cause which resulted in Mrs. Loski's death. The various potential causes of death that are advanced by the appellant in the present case would all be caught by the statutory or common law principles that preclude an interruption of the chain of causation such as to eliminate the criminal responsibility of the accused. (underlining mine)

and further at ¶ 82:

> 82. Nothing that occurred following the actions of the appellant and his accomplice in tying her up and leaving her alone can be said to have broken the chain of causation linking them with her death. (underlining mine)

[62] I take from these repeated and cautionary statements, that intervening causes do constitute a unique category of case such that in circumstances like these where, upon the evidence, the failed attempts at CPR clearly interrupted and therefore separated the acts of Stratton and Reid from MacKay's ultimate death, the trial judge was obliged to give the jury a clear and specific instruction with respect to intervening events. It was critical that the jury understood their obligation to

consider whether or not any independent, intervening and therefore exculpatory factors occurred after the two accused's acts, thereby severing the link in the chain which tied them to MacKay's death.

[63] I think it significant that both Justice Cory for the Court in **Harbottle** and Justice Arbour for the Court in **Nette** specifically referred to the Australian case of **R. v. Hallett**, [1969] S.A.S.R. 141 (S.C. in banco) to illustrate a situation where a legitimate question arises as to whether legal culpability might be avoided by an intervening cause. In order to understand the importance our Supreme Court attaches to the case, it will be necessary for me to refer to its facts and judicial treatment in some detail.

[64] The appellant was charged with the murder of one Whiting. The two men were employed by a railway company and left for a weekend holiday in the appellant's station wagon. After visiting a hotel they drove the vehicle on to the beach where it became bogged down in the sand. Considerable alcohol was consumed. According to the appellant a fight broke out when Whiting, whom he suspected of being a homosexual, made sexual overtures towards him. In his testimony at trial, Hallett said he indignantly rejected Whiting's advances, prompting Whiting to strike him with a stick. Hallett said he managed to get the stick away and struck Whiting with it across the side of his face. Whiting threatened to kill him and produced a knife. He then forced the appellant to remove his clothing and lie face down on the sand. While in that position the appellant said he noticed Whiting fumbling with the buttons on his underwear. Hallett moved backwards, pushed Whiting to the ground and managed to get the knife away from him. The fight continued with several punches being thrown. The next thing that happened according to the appellant was that Whiting took off into the water, to a depth just below his armpits. The appellant didn't know if Whiting could swim or not and set off after him. They struggled. Hallett managed to get his hands around Whiting's neck. He tried to drag him back towards the shore. He testified that he managed to get him to where the water was up to about his knees. Whiting continued to struggle and tried to twist away. Hallett said he grabbed him by the throat and began to notice the colour change in Whiting's face. He let go and Whiting slumped down at the water's edge. Hallett testified that the man fell onto his back, his ankles in a few inches of water and his head lying on the beach. He said Whiting was definitely moving his legs at that stage. Hallett

testified that he left Whiting there and went back to the car where he smoked a few cigarettes and tried to calm down. Apparently he drank some more wine. He fell asleep on a rug that had been spread out near the vehicle. When he awakened he looked around to see where Whiting was. He couldn't see him. He staggered to his feet, came around the back of the car and saw Whiting floating in the water, four to five feet from the water's edge. He said the water had come very close to where the car was stuck in the sand. He went over and saw Whiting face down in the water, bobbing up and down in the waves. He waded in and dragged Whiting back to the beach. At this point he realized that Whiting was dead. He became, he said, "unbalanced" and proceeded to cut off the deceased's genitals with a knife. He then dragged the body up to the sand dunes and buried it. Hallett was later charged with murder. He appealed his conviction alleging error in the trial judge's directions to the jury.

[65] According to the doctors at trial there were two large bruises on the skull with injuries to the brain. The pathologist testified that these injuries were the result of considerable force. Bruising and broken bones in the throat led the pathologist to conclude that such trauma was consistent with the application of pressure by hands around the throat. The injuries to the head would have caused unconsciousness. The actual cause of death, however, was drowning. There was sand in the pharynx and the trachea. The pathologist felt that the deceased had drowned in shallow water while unconscious. Further injuries had been inflicted on the body after death. The penis and testicles had been removed and there was a wound leading into the abdominal cavity through which the small intestine had been extracted.

[66] From that evidence it seemed clear that Whiting had been beaten and left unconscious by the water's edge where he later drowned. The issue was whether the appellant's actions were such that he should be held responsible for the death despite the intervening cause of the incoming tide. The appellant denied killing Whiting. He maintained that he stopped Whiting from drowning himself when he walked out into the sea, and that afterwards they were both exhausted and he just left Whiting lying on the beach, very much alive. In his statement to the police Hallett said:

> When I woke up later and saw the body I thought he must have got up and fallen into the water and drowned. I could not say whether the tide was coming in or going out when I left him at the water's edge. It is possible when I was asleep he went back to the water and drowned himself.

[67] After referring to the appellant's testimony and his statement to investigators the Supreme Court of South Australia observed:

> It is obvious that this story together with the medical evidence could raise the questions of causation, malice aforethought, drunkenness and provocation. The task of the learned Judge in explaining to the jury the law on these topics and their possible relevance to the facts, both as they appear from the appellant's story and as they might appear if that story was rejected, was not an enviable one.

The court then turned to the first issue concerning Hallett's complaint that the trial judge had given improper directions to the jury with respect to causation. Of this the court asked rhetorically:

> If the evidence of Dr. Dwyer is accepted, and Mr. Elliott did not challenge it, the deceased died from drowning. On the story just related the appellant did not drown him directly but left him as he thought in a position of apparent safety while he was lying on the beach with his ankles in a few inches of sand. If the jury accepted that story or had a reasonable doubt about it and also accepted the evidence of Dr. Dwyer, could they have found that the appellant caused the death of the deceased?

[68] Before framing what it considered to be the proper test of causation, the court referred in considerable detail to the judge's lengthy directions to the jury and interestingly to the trial judge's adoption of certain examples from *Smith and Hogan's, Criminal Law* at p. 172. In his charge to the jury the trial judge had said:

> But what in law is the position where an accused person inflicts injury on a man and afterwards some other act or event intervenes before his death? I raise this because on the account of the accused he left Whiting unconscious, but moving, his limbs moving, lying on his back, with his feet in the water, his body at an angle to the water's edge, and his head and the upper part of the body, or the body itself, and the upper part of his lower limbs as I understand it, out of the water.

> This type of thing has been considered, and I am now basing my remarks on *Smith and Hogan's Criminal Law*, p. 172.

[69] Then in instructing the jury on the subject of causation the judge cautioned the jury that this was a difficult area in which they would have to carefully distinguish between different situations. The first he described as instances where death from a subsequent act or event was the natural consequence of the act of the accused. In other words, it was one that was foreseeable as likely to occur in the normal course of events, in which case the accused may be held to have caused the death. The trial judge then turned to consider the different situation where death cannot be said to have occurred as the natural consequence of an accused's actions with the result that the accused may not be held criminally responsible. He instructed the jury:

> . . . On the other hand, cases may occur where death from the act or event was not the natural consequence of the accused's act; and here the accused is not to be held liable for homicide. . . . If one man knocks down another and goes away, leaving his victim unconscious on the floor of a building in which the assault occurred, and before the victim recovers consciousness he is killed in the fall of the building which is shaken down by a sudden earthquake, this is not homicide. The law attributes such a death to the act of God and not to the assault, even if it may be certain that the deceased would not have been in the building at the time of the earthquake had he not been rendered unconscious. The blow was the reason that the man was there, but the blow was not the cause of the earthquake nor was the deceased left in the position of obvious danger. On the other hand, if the blow had been struck on the seashore, and the assailant had left his victim in imminent peril of an incoming tide which drowned him before consciousness returned, it would be homicide. . . .
>
> The victim's being drowned in the latter example was a natural consequence of the action of the accused. That is, a consequence which might be expected to occur in the normal course of events. The victim's being killed by the falling building in the former example was an abnormal and unforeseeable consequence.

[70] The trial judge informed the jury that these illustrations from *Smith and Hogan*, supra, were a correct statement of the law. He then charged the jury that in light of the medical evidence that Whiting died from drowning and, because of

the evidence of sand in the trachea, more than likely drowned in shallow water, together with the doctors' testimony that the injuries to the head as well as the choking could have resulted in Whiting losing consciousness, they would then have to carefully consider whether he may have committed suicide, that is after regaining consciousness may have gone back out and drowned himself.

[71] In concluding this section of the charge the judge instructed the jury:

> . . . The basic question I think that you must ask yourselves is whether the deceased was rendered unconscious by the unlawful act of the accused, and left in a hazardous position, hazardous either because he was so close to the edge of the water that he might roll in, or because the tide might be coming in . . .
>
> Ultimately it is for you to say whether you are satisfied that the drowning, which I think you will believe without any hesitation was the immediate cause of death, was caused by the accused leaving the deceased in a position of obvious danger on the beach. If so, you are entitled as a matter of law to come to the conclusion that the application of force which rendered him unconscious was the cause of death.

[72] It was necessary to have reproduced such a lengthy portion of the court's own very detailed reference to the judge's directions in order to provide context to the Supreme Court of South Australia's rejection of the appellant's appeal and its own expression of the test of causation which it framed as follows at p. 149:

> The question to be asked is whether an act or series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect <u>which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event</u>. (underlining mine)

[73] There is nothing in either **Harbottle** or **Nette** suggesting any aversion by the Supreme Court of Canada to this expression of the test. On the contrary it was adopted by Cory, J. in **Harbottle** and repeated by Arbour, J. in **Nette** as an

illustration of an intervening cause case and which therefore distinguished it from the circumstances before the Court in those two subsequent judgments.

[74] In fact, Arbour, J. went on to emphasize this difference, again at ¶'s 81-82:

> . . . Clearly, where an accused person hog-ties an elderly woman, places a ligature of clothing around her neck and abandons her, in the knowledge that she lives alone, without notifying anyone of her plight, it is not unexpected that death will result if no one rescues the victim in time.
>
> 82. In my view, it was unnecessary in this case to instruct the jury on the law of causation for homicide, beyond stating the need to find that the accused caused the death of the victim. . . . There was no evidence that anything other than the actions of the appellant and his accomplice caused Mrs. Loski's death. Mrs. Loski's death resulted from being left alone hog-tied in her bedroom with a ligature around her neck. Nothing that occurred following the actions of the appellant and his accomplice in tying her up and leaving her alone can be said to have broken the chain of causation linking them with her death. (underlining mine)

[75] If a natural, ordinary and entirely foreseeable event like the rising tide in **Hallett** is acknowledged by the Court as one necessitating a most careful consideration of causation, then surely an altruistic, urgent and unintended result like the failed attempts at CPR in this case, is deserving of equally serious treatment. The South Australia Supreme Court in **Hallett** said that in another, different situation, exceptional circumstances may well become a supervening cause thus interrupting the chain of causation and avoiding criminal culpability. It said:

> . . . there may be cases where the extraordinary as opposed to the ordinary operation of natural forces might be regarded as breaking the chain of causation, as in the case of the earthquake referred to in the passage from *Smith and Hogan* cited by the learned judge
>
> (such that) . . .
>
> . . . the earthquake and not the act of the appellant would be regarded as the cause of death . . . as being such a supervening cause.

[76] Accordingly, given the unique chain of circumstances in this case, I find that special, pointed and careful directions to the jury were required concerning the law of causation and in particular the law relating to intervening acts.

[77] I found little help in the reported cases that have considered the application of s. 225 (or its predecessors) of the **Criminal Code**. Cases like **R. v. Kitching** (1976), 32 C.C.C. (2d) 159 (Man. C.A.), **R. v. Torbiak** (1978), 40 C.C.C. (2d) 193 (Ont. C.A.), and **R. v. McCallum**, [1990] O.J. No. 3158 (Ont. Dist. Ct.) and other similar cases all address the conduct of doctors whose subsequent medical treatment or surgical intervention is said, by the accused, to have been the true cause of death. The matters and principles considered in those cases have little application here where the rescue efforts were attempted by young bystanders, many of whom were intoxicated and where, according to the uncontroverted medical evidence, the botched and lethal attempt to resuscitate him was the sole cause of MacKay's death.

[78] Before the hearing we referred counsel to the recent decision of the British Columbia Court of Appeal in **R. v. Pangowish**, (2003) B.C.C.A. 62, judgment released January 20, 2003, which had not been cited in their written facta. (Leave to appeal to the Supreme Court of Canada dismissed, September 11, 2003 [2003] S.C.C.A. No. 126.) We invited and received their oral representations at the hearing. After carefully considering their submissions I conclude that the matters addressed in **Pangowish** have little application to this case. There the female victim had been savagely assaulted and left in circumstances suggesting that she had been bludgeoned to death while a rolled up sock had been stuffed in her mouth. The medical evidence established that the victim's death was not instantaneous and that <u>both</u> blunt head trauma and asphyxiation were the principal contributing causes of death. In other words, it was a case of *competing* causes as contrasted with this case where the uncontroverted medical evidence points, arguably, to an independent intervening cause of Mr. MacKay's death.

[79] The most recent 2002 update of **Crimji**, Canadian Criminal Jury Instructions (3rd Edition by Ferguson & Bouck), contains a brief paragraph as a suggested instruction in a case when there is some evidence of an intervening cause. It reads:

> **20A. In this case, _____** [THE ACCUSED] **alleges that the death was caused by an independent intervening cause, namely _____**

> [SPECIFY THE INTERVENING CAUSE]**. However, the existence of an independent, intervening cause does not mean the _____** [THE UNLAWFUL ACT] **by _____** [THE ACCUSED] **is not also a cause of the death since there can be more than one cause for an event. However, _____** [THE ACCUSED] **does not, in law, cause the death if the independent intervening cause so overwhelms _____** [THE UNLAWFUL ACT] **by _____** [THE ACCUSED] **as a cause that _____** [THE UNLAWFUL ACT] **becomes merely the background or the setting for the independent intervening cause to take effect. In that case, the _____** [THE UNLAWFUL ACT] **is too trivial (or insignificant) to be a legal (i.e. significant) cause of the death.**

[80] With great respect to the authors of this important work, I am not convinced that this single paragraph is sufficient to explain what is essential to the jury's deliberations. Neither am I persuaded that the authors' characterization of the "independent" intervening cause having to be such that it "overwhelms" the original unlawful act as a cause, necessarily or accurately captures the jury's inquiry into causation.

[81] I have also had the privilege of reviewing the results of Justice David Watts' remarkable efforts in preparing the Ontario Specimen Jury Instructions (Criminal) published recently by Carswell. In the section dealing with Final Instructions on a charge of unlawful act manslaughter the specimen jury charge naturally includes a reminder that the Crown is obliged to prove each of several essential elements beyond a reasonable doubt, among them, that the accused *caused* the victim's death by an unlawful act. Using plain language to explain the point the text provides:

> For an act (or omission) to cause someone's death, it must be at least a contributing cause, one that is beyond something that is trifling or minor in nature. There must *not* be anything that somebody else does later that results in (NOA)'s act or omission no longer being a contributing cause of (NOC)'s death. (Italics in original)

This extract provides a footnoted reference to the Supreme Court of Canada's decision in **Nette**, supra, together with the advice that:

> Where it is preferable to phrase the standard of causation in positive terms, and in a more direct and affirmative way, the phrase "significant contributing cause" may be used. (Referencing Justice Arbour's reasons for the majority in **Nette**).

[82] With great respect, while undoubtedly sound as far as they go, I am not persuaded that this brief instruction, without considerably more, would be sufficient in circumstances such as these to provide an adequate and meaningful direction to the jury on intervening acts.

[83] Before setting out what I would consider to be appropriate instructions I suggest that it would have been prudent to separately relate for the jury the evidence surrounding the actions of Stratton, and the actions of Reid. This would avoid confusing the jury in their subsequent deliberations.

[84] Various terms or expressions were used by witnesses to describe the maneuver of placing one's arm around someone else's neck so as to momentarily restrain or incapacitate them. Descriptions included "cardiac sleeper," "choke hold," "sleeper," "purposeful hold," among others. In these reasons I will simply describe the move as a form of headlock.

[85] Dr. Bowes gave evidence as to the manner of applying it. He said it is often used by law enforcement personnel as a less than lethal means of force to subdue someone who may be violent or resisting arrest, but that "it can also be rendered by anyone." He said it did not require a great deal of strength as long as sufficient pressure were applied around the neck to decrease blood flow in the carotid artery. A reduction in blood flow of 85% will be enough to produce unconsciousness. Studies have shown that six seconds' worth of compression is all it takes to reduce blood flow in the neck by 85%. According to Dr. Bowes if compression is released at the six second mark at a point when one is just on the verge of losing consciousness, it will take fourteen seconds for blood pressure and blood flow to return to normal. If the hold were administered for thirty seconds Dr. Bowes testified that it "may be a couple of minutes before consciousness may return." He said it was "a dangerous hold" that "does result in a fair number of deaths as have been reported in the literature recently."

[86] From this evidence, together with evidence of witnesses at the scene and Stratton's own description of the way and very brief amount of time in which he applied the hold, it was open to the jury to conclude that if MacKay had simply

been left unattended, he may well have “come to” and returned to consciousness on his own.

[87] This was an important feature of the case that ought to have been identified by the trial judge when reviewing the evidence as to cause of death. The trial judge then ought to have provided the jury with examples of situations that the law would recognize as legitimate, intervening and exculpatory events, ones that would absolve an accused charged with causing the death of someone, from criminal liability. The illustrations from *Smith and Hogan’s Criminal Law* referred to by the Supreme Court of South Australia in **Hallett** would, in my opinion, have provided a correct statement of the law in Canada and served as helpful, cogent examples to assist the jury’s understanding. He might have explained that if A assaults B, leaving him unconscious on the floor of a building in which the assault occurred and before B regains consciousness he is killed when the building collapses in a sudden earthquake, A cannot be held criminally responsible for the homicide. The law would attribute B’s death to another intervening cause and not to A’s assault even though B would not have been in the building but for the force of A’s blow that rendered him unconscious. The assault was the reason that B was there but the blow was not the cause of the man’s death.

[88] Similarly, consider the situation where A strikes B and leaves him unconscious under a tree where later a branch falls killing the man by its own weight. Or A strikes B and the blow renders B unconscious. Other people carry B to a nearby clinic but on route they tumble down an open well where B drowns; or they are waylaid by a gang of thieves and in the ensuing robbery B is stabbed to death; or upon arrival at the hospital for treatment B contracts streptococcus, flesh eating disease from which he dies within days. These are all examples where the law would recognize a supervening cause, an interrupting exculpatory event. The intervening acts break the chain of causation. They interrupt the original infliction of injury. Some other act or event has intervened before death. The question for the jury is whether the initial injury can still be viewed as a significant contributing cause of the victim’s death. Such situations ought to have been mentioned to illustrate for the jury the notion of intervening cause in law so that the jury might then go on to decide as a matter of fact whether such had occurred in this case.

[89] After providing such illustrations to explain the point and after then reviewing the evidence concerning the separate conduct of the two accused, the trial judge ought to have directed the jury in words to the following effect:

In order to be satisfied beyond a reasonable doubt that Stratton or Reid caused the death of MacKay, you are required to consider the whole of the evidence and decide:

> 1. whether the accused's unlawful acts (specifically, as I have reviewed with you, in the case of Stratton the so-called headlock and in the case of Reid the alleged kicks) in fact amounted to a significant contributing cause of MacKay's death?

If you are satisfied as to the first question, you should then go on to ask yourselves:

> 2. Whether any intervening cause which resulted in MacKay's death occurred between the accused's acts and the victim's death? Put another way, are you satisfied beyond a reasonable doubt that the actions of either Stratton or Reid are so connected to the death of MacKay that they can be said to have had a significant causal effect which continued up to the time of his death, without having been interrupted by some other act or event, in this case the failed attempts at CPR?

As I have already explained to you, in order for you to convict either Stratton or Reid, you must find that the Crown has proved each of the essential elements of the offence beyond a reasonable doubt. Here of course we have been considering the requirement that the Crown prove that the accused's unlawful acts caused MacKay's death. Remember that to meet that burden the Crown does not have to show that either Reid's kicking or Stratton's headlock was the sole cause of MacKay's death. It is enough for the Crown to prove to your satisfaction that in the case of Reid, his kicking; or in the case of Stratton, his having a hold of MacKay's neck, was a significant contributing cause of MacKay's death.

The question you will now want to consider during your deliberations is this. Were the actions by those at the scene to resusitate MacKay -

> which all of the doctors said was what caused his death - in your opinion an intervening event which broke the chain of causation between what Reid and Stratton are said to have done, and MacKay's death, such that the actions of either of them are no longer seen by you as being a significant contributing cause of his death?
>
> If you were satisfied that the chain of causation was unbroken, or you were not left with a reasonable doubt about it, you would then conclude that this element of the offence of manslaughter was made out. If on the other hand you decided that the CPR efforts had severed the chain of causation linking either of the accused to MacKay's death, or were left with a reasonable doubt about it, then the Crown would have failed to establish this essential element of the charge and would therefore be unable to convict that accused of manslaughter. Your deliberations at that point would be over.

[90] It is regrettable that counsel were not of greater assistance to the trial judge in either helping to formulate this part of his charge or in correcting this critical omission with a pointed recharge of the jury. Neither counsel raised the notion of intervening cause in their closing addresses to the jury. Rather their theory seemed to be that the medical evidence alone as to the failed CPR efforts being the cause of MacKay's asphyxiation, was enough to raise a reasonable doubt whether the actions of Stratton or Reid caused his death. Further, in Reid's defence, it was argued by his counsel that there was no evidence whatsoever that the kicks said to have been administered by Reid (if any were at all) caused or contributed in any way to MacKay's death. That said, neither counsel mentioned or sought from the trial judge any special directions as to the consequence in law - in this unique set of circumstances - of an interruption in the causal chain by an *intervening act* or an *intervening cause*.

[91] Counsel for both Stratton and Reid are senior, skilled and very experienced criminal lawyers. During argument in this court defence counsel suggested that they and most everyone else present at the trial were surprised by the verdict, believing that on the strength of the medical testimony and lay evidence from witnesses at the scene, their clients' acquittals were practically assured. Counsel felt the doctors' uncontroverted evidence alone was enough to establish a reasonable doubt as to either accused's actions having brought about MacKay's death. The idea that causation in fact and in law ought to have been better

explained to the jury or that they required specific instruction on the issue of intervening act and intervening cause as it related to the failed CPR procedures "just wasn't on counsel's radar," we were told.

[92] It is unfortunate that these issues were not brought to the trial judge's attention at a time when counsel's advice would have been most profitable.

Disposition

[93] On the basis of this court's decision in **R. v. Nugent**, [1988] N.S.J. No. 186, counsel suggested that this was a case where pursuant to s. 686(2)(a) we ought to quash the conviction and enter a verdict of acquittal. I disagree. **Nugent** was an entirely different situation. In that case once it was decided that the appellant's admissions and videotaped re-enactment were inadmissible by virtue of the police investigators' violation of the appellant's **Charter** rights then, in the absence of such admissions there was not sufficient evidence to sustain the conviction or to direct a new trial. It was on that basis that this court in **Nugent** set aside the conviction and entered an acquittal.

[94] Entirely different circumstances prevail here. Having concluded that the trial judge erred in law in his directions to the jury and that it cannot be said that his error occasioned no substantial wrong or miscarriage of justice, s. 686(2) of the **Criminal Code** directs that the conviction must be quashed and either an acquittal entered or a new trial ordered. The choice between these two alternatives is left to our discretion. **R. v. Haslam** (1990), 56 C.C.C. (3d) 491 (B.C.C.A.). Where reversible error of law has occurred but the evidence led at trial is such that a properly instructed trier of fact acting reasonably could have convicted, it is usually appropriate to order a new trial. **R. v. More and Melville** (1959), 124 C.C.C. 140 (B.C.C.A.). After carefully considering the record of these entire proceedings it cannot be said that there is "no evidence" linking Reid or Stratton to the death of MacKay (**R. v. Levy** (1990), 62 C.C.C. (3d) 97 (Ont. C.A.)). Nor is this a situation where I can say I am satisfied there is "no realistic possibility of a guilty verdict on a new trial." **Haslam**, supra.

[95] For the reasons set out I find that the trial judge's charge to the jury was seriously incomplete in that he did not specifically instruct them on the issue of intervening act and intervening cause as it related to the failed attempts at CPR

which, on the evidence, was the sole cause of Mr. MacKay's death. This omission constitutes a significant error of law.

[96] I would allow the appeal, quash both convictions and direct that a new trial be ordered for both Reid and Stratton.

Saunders, J.A.

Concurred in:

Oland, J. A.

Hamilton, J.A.