THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 131

[2012/272]

The President
Sheehan J.
Edwards J.

BETWEEN

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PHILIP DOYLE

APPELLANT

JUDGMENT of the Court delivered by the President on 18th June 2015

Conviction and Background Facts

1. In a trial that took place between 16th April 2012 and 15th June 2012, the appellant was convicted of the manslaughter of his partner's 3 ½ month old baby and was subsequently, on 31st July 2012, sentenced to imprisonment for 11 years. He now appeals against the conviction, and if he fails in that, he appeals against the sentence on the ground of severity.

2. Baby Ross was born by Caesarean Section on 10th December 2004 to Leona Murphy at Wexford General Hospital. She is from Gorey, County Wexford and she had met the appellant in September 2004 and began a relationship. He was not the father of her baby. In January 2005, after staying with her parents at their home for a period after Ross's birth, Leona and the appellant moved in together with Ross to a house in Gorey.

3. The appellant sought to have his name added to Ross' Birth Certificate, but Ms. Murphy would not consent to that. She gave evidence at trial that the appellant and Ross seemed to get on well together, although she did express some concern that the appellant would 'jerk' Ross if he was sleeping while he fed, and that she did not see the point of that and had asked him to refrain.

4. The baby was generally healthy, but it appears that in late March 2005, he had been suffering from a rash on his upper body and neck that came and went. An unusual incident occurred on Thursday 31st March 2005 shortly after the appellant had put the baby to bed at about 8pm. Mr. Doyle volunteered and went up to check Ross and was gone for some minutes when he called down to Leona to come up. He told her the baby had got sick and had now gone limp and apparently lifeless. The two adults brought the baby to the bathroom and splashed some water over his head and neck, which brought him around and back to normal.

5. Although Leona was greatly relieved by the fact that Ross had revived so quickly and so well, she was concerned at what had happened and as to the cause. She rang her mother and also spoke to her sister and their advice was to consult the out of hours doctor service, Caredoc. The appellant and Leona brought Ross to the doctor, who was concerned enough to recommend that they should proceed to Wexford General Hospital A&E Department. When they got there, the medical staff examined Ross and decided to admit him and he remained in hospital until Sunday 3rd April 2005.

6. Leona and Phillip and members of her family attended at the hospital over the weekend and some of them stayed overnight to be with the baby. He was kept under observation by the medical staff and given various tests and was seen and examined regularly by the doctors and nurses, but they did not find anything wrong with him and were happy to discharge him at about 11.00am on Sunday, when the appellant and Leona brought him back to Gorey.

7. Ross behaved normally on Sunday afternoon at home and gave no cause for concern. Members of Leona's family were around until the early evening. At about 6.00pm, Leona decided to go down the town to get a DVD from the rental shop, leaving Ross at home with the appellant. Soon after she left the house, she changed her mind about going to the rental shop and decided instead to go to her friend's house because she thought that the friend still had the film that Leona wanted to rent. Because she was not going where she said, she called Philip on his mobile phone but there was no reply on the first two times that she rang and his phone rang out. She was gone some ten minutes or so when she got through on the third occasion, when she discovered alarming news. Philip told her that he had Ross in his arms and that he was lifeless again, the same way he had been on the previous Thursday night. He had not phoned the doctor or an ambulance. Leona made her way home as quickly as possible, which took a little longer because the friend to whom she called said that their car was broken down so she had to get another friend to drive her home.

8. The situation at home was very serious. Despite taking similar measures to what they had done on the previous Thursday, they were unable to get Ross to come round. He was practically lifeless and was apparently having difficulty breathing. Leona phoned for an ambulance and got advice from the Controller while waiting for it to come to the house, which it did very quickly. The doctor had arrived before the ambulance and went with the baby to Wexford General Hospital, where Ross arrived and was admitted at 00.30 hours on Sunday night/Monday morning the 2nd/3rd April 2005.

9. On admission to hospital, Ross was in a very serious condition. The doctors at Wexford noted the various features of the baby's presentation, which included difficulty breathing; significant generalised bruising; evidence of ocular haemorrhaging and signs of brain damage. Realising the perilous condition of the baby, the medical team in Wexford transferred him to Our Lady's Hospital for Sick Children, Crumlin in Dublin. Ross arrived at 4.00am and was immediately admitted to Intensive Care. Despite the efforts of the medical and nursing staff, however, he did not recover and died on Tuesday 5th April 2005 in Crumlin Hospital.

The Investigation
10. The medical personnel in Wexford General Hospital and in Crumlin were concerned about the cause of the very severe and extensive injuries that Ross had apparently suffered. One doctor in Wexford thought that it might be a case of Shaken Baby Syndrome. The post-mortem examination that was carried out confirmed the general nature of the severe injuries and reinforced the doctors' suspicions that what had happened to Ross did not come about naturally and could not have happened accidentally. This was because of the spread of the evidence of trauma over his body in extensive bruising, externally and internally, the severe brain injury that had caused his death and the ocular haemorrhaging that was further evidence of trauma.

11. The Gardaí were duly notified and they began an investigation. Suspicion fell on the appellant and he was interviewed under caution. So, also, obviously, was Leona. She initially told the Gardaí that she and the appellant had both been at home with Ross during all of the relevant time. However, she later admitted having gone into town, leaving Ross in the care of the appellant.

12. In the course of a series of interviews, the appellant denied having done anything to harm Ross, or indeed knowing anything about how he might have come to have the traumatic injuries that the post-mortem had demonstrated. Ultimately, however, in the sixth and seventh interviews, Mr. Doyle changed his story. At this stage, he described how he had left Ross on the floor where Leona had placed him and gone to the kitchen to make tea. When he came back into the room a few minutes later he found that Ross had got sick and he picked him up, but again discovered, as he had the previous Thursday night, that Ross was limp and lifeless. He was holding him close to his body and was going to bring him to the kitchen to put water on his head when he tripped on the mat that Ross had been playing on and fell to the ground. Although he did his very best to avoid having the baby strike the floor, and twisted his body in order to do that, he thought that Ross had actually hit his head on the wooden floor. He had not wanted to admit that this had happened because he was afraid he would lose Leona.

13. The Gardaí continued their investigations, which included obtaining expert opinions of the medical witnesses on the new information from Mr. Doyle about the alleged fall.

14. In due course, Mr. Doyle was arrested and charged with the murder of baby Ross Murphy.

The Trial
15. Some features of the trial require mention before addressing the grounds of appeal in detail. At the close of the prosecution case, the trial judge withdrew the murder charge from the jury. He directed that the appellant be acquitted of murder on the basis that there was not sufficient evidence for the prosecution to establish the extra intent requirement that would elevate manslaughter to murder.

16. The accused was in sole charge of a healthy baby when the baby sustained severe injuries all over his body, externally and internally, including his head and brain and also internal bleeding in his eyes. Those injuries resulted in death. The prosecution's case is that they were not accidental and cannot be accounted for by natural causes. The expert medical witnesses accepted some suggestions made in cross-examination, and there are points of difference in the analyses of different doctors, but the severity and number and type of injuries are consistent only with inflicted traumatic injury, according to the prosecution.

17. The defence was that the injuries to baby Ross came about in the accident when Philip Doyle was carrying him and tripped and fell. This was an unfortunate accident and the baby sustained the injuries in the fall and in the course of the subsequent events. They included the attempts to resuscitate the baby by Philip Doyle himself and others. Although Philip Doyle did the best he could in what was a somewhat clumsy and amateurish manner, his efforts may have resulted in some of the bruising to Ross. Another cause of injury was the medical treatment, which included insertion of needles and tubes and the insertion of a cannula, could have involved a number of attempts.

18. Obviously, the defence did not have to prove any of these things happened. When this issue has been raised, the onus was on the prosecution to disprove beyond reasonable doubt any such explanations.

19. The defence focused in cross-examination, objection and argument on issues it raised concerning expert medical evidence in criminal trials. They are broached again in this appeal in regard to admissibility of evidence and the judge's charge. Counsel made particular reference to recent English cases concerning sudden infant deaths and Shaken Baby Syndrome that illustrated the problems and dangers he said such evidence presented. These questions are discussed in the next section.

20. The defence says that the English cases of Shaken Baby Syndrome (*Harris* [2005]) and of Sudden Infant Death Syndrome (*Sally Clarke*) offer salutary lessons about medical expert evidence that must make a Court take great care in considering expert medical testimony. The defence says that this general point applies to all the specialist witnesses, and particularly to the treating doctors, who formed the opinion that the baby's injuries were not of natural cause origin.

21. The following summary of the medical evidence serves as an introduction to the detailed consideration of the grounds of appeal.

Treating Doctors' Evidence
22. Dr. Carson, a consultant paediatrician at Wexford General of 35 years standing, first saw Ross on 2nd April 2005. He observed petechial lesions around the baby's neck. He noted a bruise at the top of the right pinna and patechiae over the right side of the forehead, as well as bruising on the lower right chest and the right side of the abdomen. He also described bleeding in Ross's eyes. He said that, in view of the account given by the appellant and Ms. Murphy, he was surprised at the absence of a skull fracture considering the extent of the brain injury in a young baby. Dr. Carson is the subject of Ground No. 3.

23. Dr. Costigan, a consultant paediatrician practicing in the National Children's Hospital, Crumlin and Clinical Director for the three Dublin paediatric hospitals, had come in charge of Ross in the early hours of 4th April 2015, and testified as to having observed a bruise on the upper outer pinna of the right ear that was brown, which he said would have been unusual in a non-mobile baby of Ross' age; a fresh subconjunctival haemorrhage in the left eye; a number of circular bruises on the lower anterior chest and tight anterior abdominal wall as well as five such bruises on Ross' lower back; fixed and dilated pupils and severe bilateral retinal haemorrhages. He arranged for photographs to be taken, which he testified was standard practice when there was concern about a "non-accidental injury". He also said that he was of the belief that there was no underlying bleeding tendency.

24. Dr. Costigan also gave evidence of his interaction with the appellant and Ms. Murphy and his resulting notes. He was told that the bruise on the right ear had been present on admission to Wexford General on the Thursday, and that the appellant offered the information that the subjunctival haemorrhage was likewise. Ms. Murphy told Dr. Costigan that she thought the bruise may have been caused by the rocking of Ross' head and that Ross was inclined to put his finger in his eye. The appellant and Ms. Murphy had given an account of the incident to the effect that Ross during the morning had been shaking his head and had vomited; they had both

been out of the room for a very short period, and that when the appellant arrived back Ross was very unwell and not breathing.

25. Dr. Costigan's evidence, which followed a *voir dire* hearing to deal with defence objections, is considered below, is the subject of Appeal Grounds 4, 5 and 6.

Pathology
26. The State Pathologist, Professor Marie Cassidy, gave evidence in relation to the post-mortem examination that she had conducted on Ross. Her evidence dealt with internal and external injuries. She described stippled red bruising on the forehead; bruising on the right ear, on the back of the skull, on the shoulder, chest, upper abdomen, trunk, left buttock, hands and armpits. On her external examination, she also noticed oedema or swelling of the eyelids, small haemorrhages in the white of his eyes and that the fontanel was "bulging and felt boggy" which would indicate raised pressure inside the skull cavity.

27. With regard to the internal injuries, Professor Cassidy gave evidence that there was no skull fracture, but there was flat bruising on the under surface of right side of the scalp, underneath the external bruising described. The brain had started to necrose; where there is a lack of oxygen and brain, it suffers from hypoxic ischemic damage, starts to break down and becomes very soft. There was evidence of bleeding in and around the brain, into the skull cavity over both cerebral hemispheres, termed an extensive subarachnoid haemorrhage. In the eyes, small scleral haemorrhages were noted. There was subdural haemorrhage around the entire spinal cord, which had run down the canal "almost to the bottom area of the child within the spinal canal" from the brain. The abdominal and chest bruising was extensive and very deep; on the abdomen it went through four layers of the baby's body – through the under-surface of the skin, through the lining of the abdominal cavity and into the soft tissue of that cavity. There was also deep bruising on the left buttock, on the right shoulder and in the armpit area.

28. Professor Cassidy's conclusion was that Ross had died from head trauma. She stated that the external bruising and the extent of the internal trauma were not suggestive of the single impact as provided for in the appellant's account.

29. Professor Michael Farrell gave evidence of the extent of the baby's brain injury. He testified that it was a very severe injury. The haemorrhage was "everywhere, essentially." Professor Farrell declined in evidence-in-chief to speculate on the cause of death. He had not examined the scalp or the skull, and so his evidence was limited to brain injury.

30. In his statement, Professor Farrell said "It is entirely possible that the injuries could have occurred following a fall in an adult's arms, in which the rate of acceleration to the ground would have been that of an adult, rather than a child." In cross-examination, he stood over that proposition, but his evidence was that as severe damage could be caused by acceleration and deceleration as could be caused by impact and that it was uncontested, that there was a "severe fatal head injury."

31. In cross-examination, Professor Cassidy was questioned on the findings of Professor Farrell. She agreed that he was dealing only with brain injuries as opposed to external injuries. She agreed that the account of the fall could not be discounted, although it was unusual, and that she could not determine the exact mechanism of causation from the examination of the brain alone.

32. She was also questioned on the effects of medical treatment on Ross and whether that could have left the type and degree of bruising found on his body. She gave evidence that the bruising on the forehead was "highly unlikely" to have been caused by Mr. Doyle placing his hand on the baby's forehead while attempting mouth-to-mouth resuscitation, and that she had not seen such bruising before, and that research suggests such bruising might only occur around the mouth and forehead area.

33. She was asked about alternative reasons for the extensive abdominal bruising. The defence case was that the bruises could be explained by the account of the fall, panicked subsequent handling and the resulting medical interventions.

Ophthalmology
34. Dr. Donal Brosnahan, a consultant ophthalmologist at Our Lady's Hospital in Crumlin, gave evidence that there were very extensive haemorrhages in the retinas and also primacular folds in both eyes. This suggested some pulling of the retina caused by trauma, which he had said in his report "are strongly suggestive of Shaken Baby Syndrome in the absence of an abnormality of coagulation or trauma". He confirmed that there had been a coagulation problem, probably caused by trauma. This trauma could have been caused by impact or sharking, but as an ophthalmologist he was not in the position to assist the Court as to cause.

35. Dr. Susan Kennedy, a pathologist who specialises in ocular pathology, gave evidence of her examination of the deceased's eyes, which revealed "very extensive" retinal haemorrhage, not confined to one part of the eye. She indicated, in the context of Professor Cassidy's evidence, that the injuries were "highly-suggestive of non-accidental injury". In cross-examination, the doctor said she had not read Professor Farrell's report. The defence was critical because she admitted that she did not know of the decision in the English case of *R v. Harris*. She said that it was highly unlikely that a simple fall from a low height would cause such severe retinal haemorrhages without evidence of a fracture but she could not say "100% that it didn't occur".

Judge's Ruling
36. In the course of the trial, the trial judge directed that the appellant be acquitted of murder on the basis that there was not sufficient evidence for the prosecution to establish the extra intent requirement that would elevate manslaughter to murder.

The Appeal
37. The appeal is directed to the trial generally:

> Grounds 1 and 2: Admissibility of medical expert evidence Grounds 3 to 6: The direction application
>
> Ground 7: An element of the prosecution's closing speech Ground 8: The judge's charge
>
> Grounds 9 to 22.

38. Although the appellant acknowledges that the trial judge "summarised the expert evidence in the charge to the jury as part of a conscientious, comprehensive, and scrupulously fair minded summary of all the evidence in the trial", these grounds in respect of the charge make complaint, firstly, of the manner in which the judge dealt with medical expert evidence generally, in that he failed to give a specific warning in respect thereof; secondly, in regard to specific areas of the evidence; thirdly, concerning the presumption of innocence and reasonable doubt; fourthly, regarding the judge's directions on lies told by the appellant, and, finally, in respect of some general matters.

39. The Director submits that the appellant's arguments are, in effect, an attempt to rerun the case on the facts. The submissions

point out it was the appellant's contention that he and the baby fell together, with the baby in his arms, and that death was caused by trauma resulting from that fall. Counsel for the appellant made it clear in closing that:-

> "The Defence is making no suggestion whatsoever that death in this case was caused by anything other than trauma. I'm not suggesting that there is some undiscovered illness, virus, medical problem, that caused death. . ."

40. It was submitted that "much of the defence argument as to the minutiae of the medical evidence is irrelevant to the issues to be decided by this Court." Overall, the judge was correct in his decisions and rulings during the course of the trial and his charge was fair and proper.

41. The specific grounds of appeal are as follows.

1. Having regard to all the circumstances, the trial was unsatisfactory and the verdict is unsafe.

2. The learned trial judge erred in fact and in law in refusing the various applications made by counsel for the appellant in the course of the trial, and arising from said refusals, the trial was unsatisfactory and the verdict is unsafe.

These grounds are entirely general and do not require consideration outside of the specific complaints that are contained in the other grounds.

3. The learned trial judge erred in law in ruling admissible the opinion evidence of Dr. Carson that significant brain damage and bleeding to the brain, without a fracture, was unusual. The trial was unsatisfactory and the verdict is unsafe having regard to the evidence actually given by Dr. Carson to the effect that the trauma alleged by the appellant would "surely" result in a fracture of the skull.

This ground is that the trial judge erred in law in ruling that the prosecution were entitled to adduce the opinion evidence of Dr. John Carson that significant brain damage and bleeding to the brain without a fracture was unusual. The doctor felt that in the circumstances of the alleged fall then "surely that degree of trauma would result in a fracture of the skull." Prof. Farrell's evidence was that brain damage of the kind he identified happened without skull fracture in some 20% of cases, so there was not a conflict as to the unusual nature of this case.

42. At a *voir dire* hearing in the absence of the jury concerning the admissibility of Dr. Carson's proposed evidence, the defence had objected on the basis that Dr. Carson was not appropriately qualified or informed. The judge rejected the submission that because this witness was not a pathologist he was unqualified to give the evidence he proposed to give, and ultimately did give, before the jury in relation to causation. He held that having regard to his professional qualifications and experience, there was no reality in the proposition that Dr. Carson's opinion evidence was not admissible.

43. The judge cannot be faulted for his decision on this objection. He considered relevant authorities. He carefully assessed the admissibility of the proposed testimony and scrupulously rejected part as being affected by non-medical information. Accordingly, the Court is not disposed to uphold Ground of appeal No. 3.

> 4. The learned trial judge erred in law in ruling that the opinion evidence of Dr. John Costigan was inadmissible to the effect that his conclusion or opinion was that the deceased died as a result of non-accidental or abusive injury, and that if that opinion were tested in cross-examination, Dr. Costigan might refer to certain alleged statistical material to the effect that there was a proper basis for stating that the probability of that opinion being correct was 90%.;
>
> 5. The trial was unsatisfactory and the verdict unsafe given the failure to provide adequate notice of the alleged basis for the opinion evidence of Dr. Costigan;
>
> 6. Having regard to the fact that the respondent subsequently agreed to limit the opinion evidence of Dr. Costigan to the effect that the injuries were consistent with non-accidental or abusive injury, and having regard to the fact that Dr. Costigan gave evidence in excess of those terms and clearly conveyed his opinion implicitly, asserting that the injuries causing death were non-accidental or abusive, the trial was unsatisfactory and the verdict unsafe.

Dr. Costigan has been a consultant paediatrician, practising in general paediatrics at the National Children's' Hospital in Crumlin, the largest of the three paediatric children's hospitals in Dublin since 1985, and he was the Clinical Director for the three paediatric hospitals at the date of trial.

44. In relation to his clinical examination Dr. Costigan stated uncontroversially before the jury that he noted:

> • A bruise on the upper outer pinna of the right ear that was brown and which he contended would be unusual in a non-mobile baby of four months;
>
> • a fresh subconjunctival haemorrhage in the left eye;
>
> • a number of circular bruises that were approximately 1 centimetre in width, on the lower anterior chest;
>
> • the right anterior abdominal wall also had a number of circular bruises;
>
> • there were five similar bruises on the lower back;
>
> • the pupils of the eyes were fixed and dilated;
>
> • there were severe bilateral retinal haemorrhages, in respect of which Dr Costigan commented that although he was not an ophthalmologist even he could see the severity of these haemorrhages.

45. The witness was then temporarily stood down as the defence objected to the admissibility of certain proposed further opinion evidence intended to be led from Dr. Costigan as set out in a report he had earlier prepared and which formed part of his statement of proposed testimony in the book of evidence. The trial judge directed a *voir dire* hearing to determine whether this proposed further opinion evidence ought to be admitted before the jury. In the absence of the jury, Dr. Costigan then gave evidence of his opinion or conclusion that Ross was a victim of non-accidental injury which resulted in his death. He cited the apnoea, the external injuries, the very extensive and severe retinal haemorrhages and the extra-cranial haemorrhages as evidence supporting his said opinion and

conclusion.

46. In response to the suggestion in cross-examination that there was no logical or rational basis for the witness's assertion that he knew whether the injuries were accidental or deliberate, Dr. Costigan referred to articles in learned journals in support of his view, to the effect that one could form a conclusion as a matter of probability that injuries were abusive or non-accidental if a number of symptoms were noted together. Under further cross-examination he stated that he only downloaded the articles in question that very day. The doctor's testimony was to the effect that his original opinion was based on the clinical evidence he had observed at the time of examining baby Ross and that the articles he was now referring to served to reinforce in his mind the correctness of that opinion.

47. The appellant relied on the English Court of Appeal decisions [*R v. Sally Clark* [2003] EWCA Crim. 1020; and *R v. Cannings* [2004] 1 WLR 2607,] regarding Professor Sir Roy Meadow and the need for trial judges to assess carefully whether statistical evidence should be admitted and the danger of a miscarriage of justice arising from the incorrect admission of such evidence.

48. The trial judge ruled that Dr. Costigan could give his opinion evidence that Ross was the victim of non-accidental injury, which resulted in his death. The judge also held that the journal references were admissible in evidence but he would nevertheless disallow their use by the prosecution. He said:

> "It is plainly common place for experts to have regard to documentation in peer review journals. They're entitled to take the view that, on the face of it, this is a worth while contribution to scientific knowledge to which some weight might be attached. He doesn't over state it. His views were not based on the research subsequent to 2005, in particular, this -they were based on his clinical examination at the time. But lest there be any concern about it, I am excluding that so far as the prosecution is concerned."

49. The defence had the benefit of cross-examining the witness in the absence of the jury and deciding how to proceed in light of the experience gained. As it transpired, the topic of journal references did not arise in the course of Dr. Costigan's further testimony to the jury.

50. In the presence of the jury, Counsel for the prosecution asked questions in accordance with an agreement with the defence, eliciting answers that the baby's injuries were consistent with abusive head trauma. The witness responded to another question with the opinion that non-abusive head trauma resulted in his death. He said that the alleged fall did not account for or explain all the injuries that were observable on the baby and mentioned, by way of addition to the matters that were not explained, the severity of the injuries.

51. Counsel for the defence complained to the trial judge that instead of testifying that the baby's injuries were consistent with abusive injury, as had been agreed between Counsel, Dr. Costigan gave evidence that in his opinion, death was caused by non-accidental or abusive injury, and that the severity of the injuries was inconsistent with the defence suggestion of a fall. Counsel for the appellant submitted that there would be no problem with opinion evidence to the effect that the injuries were "consistent with an abusive injury" but that the problem arose from the intention of the witness to assert that those injuries were inflicted deliberately. A complication is that the witness actually said "non-abusive" and that was not corrected but it was agreed that he meant the opposite and spoke mistakenly.

52. The trial judge ruled that a witness could not be told what to say; that the witness's evidence was admissible, and that what had occurred was a hazard of cross-examination. The witness could be recalled if the defence wished.

53. The appellant submits that a party can tell his expert witness that only a limited or qualified opinion is admissible and request that the witness confine his evidence to that, and if the party is not willing to comply with that request, then the party may, and indeed should, decline to call the witness. Having regard to the fact that the evidence was given in direct examination, it was open to the judge to discharge the jury. The defence declined to cross-examine the witness on the subject having regard to the trial judge's ruling.

54. This Court is satisfied that the judge was correct in holding that the witness was an expert who was qualified to give the opinion he gave. His qualifications and experience amply satisfied the legal requirement. Secondly, the *voir dire* hearing was the appropriate way to deal with the defence objection to the admissibility of the doctor's opinion. The judge was correct in ruling that if the witness was to be challenged in cross-examination by reference to other evidence that there was no logical or rational basis for asserting that he knew whether the injuries were accidental or deliberate, he was entitled to say that published material, of which he had become aware subsequent to the formation of his opinion, supported his position.

55. If the prosecution, being aware of them, intended to rely on such materials, they were obviously obliged to furnish them to the defence in advance. However, the appellant does not suggest that the prosecution knew that the doctor was going to look up published material on the very day that he was due to give evidence. When it emerged in evidence given on the *voir dire* that he had done so, the defence could, if they wished, have sought an adjournment in order to analyse it and to consult and take instructions as they saw fit. That was the advantage of the *voir dire* hearing.

56. Defence counsel in fact chose to proceed, and did not refer to the published information when he cross-examined the doctor in the presence of the jury. In those circumstances, there cannot be a valid complaint that this episode represented any prejudice or disadvantage to the appellant or that the trial was in any way unsatisfactory on account of it.

57. The judge was also correct in ruling as he did on the final point in regard to Dr. Costigan. Counsel could not order the expert witness to give a precise answer in just one form of words - the witness had sworn to tell the truth, the whole truth and nothing but the truth. The difference between what was agreed between Counsel and what the doctor actually said was slight and insignificant in the circumstances, both in the context of the trial as a whole and of the specific issue that was then being addressed. Moreover, the speaking error made by the witness further mitigated any deviation from script. And besides all that, it was of course open to Counsel to ask to recall the doctor for cross-examination on an area of admissible testimony he had given.

> 7. Having regard to all the circumstances and taking at its highest, the prosecution case, as it properly arose on all the evidence, the learned trial judge erred in failing to direct a verdict of not guilty of manslaughter.

In relation to this ground of appeal, the trial judge properly approached the application for a direction by taking the prosecution evidence at its height. He held, firstly, that on the prosecution case, there was an ample basis for reaching the view that the accused was lying as to the version of events he ultimately gave to the Gardaí. The jury would be entitled to reject the proposition

that there was any reasonable possibility of a fall of the kind described. Secondly, the prosecution case at its height on the medical evidence was that the injuries were not of an accidentally suffered kind and the jury would be entitled to reject the proposition that they were consistent with a fall of the kind described; there was ample evidence, if accepted, to allow a jury to consider that there was inflicted traumatic injury during the period when the accused was alone with the baby giving rise to a *prima facie* unlawful killing on the part of the accused.

58. There is no basis for criticising the judge for this ruling. His approach was in line with established authority in this jurisdiction adopting R v. Galbraith [1981] 1 W.L.R. 1039.

> 8. The learned trial judge erred in permitting counsel for the respondent to make the case in his closing speech to the effect that the appellant had injured the deceased on the Thursday prior to the fatal incident. Further, or in the alternative, the learned trial judge erred in not directing the jury as to (a) the appropriate legal standards to apply to the case made by the prosecution in that regard, and (b) the evidence relevant to the emphatic assertions by counsel for the respondent that the deceased was a healthy baby.

59. In *R v. Allen* [2005] EWCA Crim. 1344, the appellant was convicted of the murder of his baby son following an incident in which it was alleged the child suffered injuries caused by shaking, impact or a combination of the two. This incident had followed a previous one the week before, as a result of which the child was detained in hospital for a number of days.

60. On appeal, the Court held that the evidence of the previous incident was relevant in order to prove the necessary intent on the day of the fatal act, and that there was sufficient evidence for the jury to convict of murder as opposed to manslaughter. In addition to the triad of injuries, and the previous incident which the Crown said was due to the appellant's actions, evidence was found of bruising to the back of the child's head.

61. The Court also held that the acceptability of the medical evidence was a matter for the jury.

62. In the present case, the evidence as to the events on the previous Thursday was relevant as part of the history of the baby's illness and the accused's involvement with him and his mother. It was a matter for the jury to assess the materiality, if any, of that particular evidence in the light of all of the evidence in the case.

> 9. The learned trial judge erred in refusing to re-charge the jury in accordance with the requisitions made on behalf of the appellant;

The requisitions made by defence Counsel following the judge’s charge consisted, first, of some general observations in which he reiterated the points that he had made about the nature of the medical evidence and his concern that the trial judge should advert in instructing the jury to issues that Counsel said arose in relation to medical evidence. This goes back to the earlier discussion about the relevant English authorities that Counsel was keen to emphasise throughout the trial as being matters that should be present in the jury’s mind when considering the case and the testimony of individual experts.

63. Counsel said, with reference to Dr. Kennedy’s evidence that it was open to the jury to consider as a material factor in assessing that evidence that she was not aware of the *Harris* case and its implications for expert evidence. He also said that it was a matter for the jury whether or not certain comments made by the State Pathologist, Professor Cassidy, with reference to the *Harris* case, were relevant in assessing the medical witnesses.

64. Professor Cassidy had acknowledged under cross-examination being aware of the detail of the judgment in *R v. Harris*, and had agreed with defence Counsel that it had led to the UK Attorney General issuing advice or guidelines, insisting that experts should not give evidence in respect of matters that were beyond the scope of their expertise; that there should be full disclosure *inter partes* of relevant documents and information and that there was a need for experts to exercise care in choosing appropriate language in which to express their opinions in circumstances where it had been determined that in a number of cases, experts had expressed certainty in circumstances where they could not really be certain.

65. It would appear that Counsel’s allusion to this aspect of Professor Cassidy’s evidence was more in the way of general comment or background to the specific requisitions that Counsel made.

66. The judge was not sympathetic to these general observations. One of the grounds of appeal is that the judge should have given a general direction to the jury about how they should approach expert medical evidence. The judge did not agree; neither did Counsel for the prosecution. The warning sought related to whether the expert was speaking about matters concerning an area in which he or she had special expertise and knowledge, and Counsel cited the advice given by the English Attorney General following on from the cases that gave rise to widespread concern in that jurisdiction. This is discussed in more detail below.

67. Counsel also made general comments about issues that had arisen, including a possible confusion between the rash that the baby had had and petechial lesions. The fact that the experts were drawing attention to petechial lesions would be lessened in significance as evidence of trauma if it could be shown or if there was a reasonable doubt about the matter that they were in fact more properly thought of as features of a rash. Again, it does not appear that Counsel was here requesting a recharge by the jury on this particular point, but was merely perhaps setting it as background.

68. Counsel then went on to make a number of specific requests for recharge on the topics that are the subject of separate grounds of appeal and will be considered in due course.

> 10. The learned trial judge erred in failing to direct the jury that in considering the evidence of expert witnesses, it was essential for the jury to consider, in respect of each category or type of evidence given by such experts, the weight to be attached to such evidence, having regard to each expert’s experience, qualifications and familiarity with the relevant facts and the expert opinions of others;

A major plank of the appeal and the submissions, as it was at the trial in cross-examination and argument by defence Counsel, was the suggestion that the expert medical evidence carried with it particular danger and complexity. Counsel suggested that the judge should warn the jury about it. The issue is raised again in the appeal. It is submitted that the trial judge should have given the jury specific directions as to how to deal with the expert medical testimony. The trial judge did not do so. Since the great bulk of the incriminating evidence came from medical specialists, this would be an important issue if there was such an obligation as Counsel proposes.

69. It is relevant to consider some of the English cases that Counsel submitted are relevant to the issues in this case. *R v. Sally Clark* [2004] 2 FCR 447 was a tragic case of a miscarriage of justice that happened when a mother was convicted of murder when a second infant died of Sudden Infant Death Syndrome. The conviction was ultimately set aside and the appellant released when evidence of a medical specialist about statistical probability of two such deaths occurring accidentally was utterly discredited, and when it was also discovered that relevant evidence showing that one boy died of natural causes had not been made known. The unfortunate victim never recovered from the disaster that the law inflicted on her. This case provides a salutary illustration of how errors can occur when high standards of professional conduct are not observed and when experts testify with seeming authority outside their fields. The case has little direct relevance but Counsel did challenge the capacity of some of the specialists to testify, as was discussed above.

70. *R v. Harris* [2006] 1 Crim App R 55, and *R v. Henderson* [2010] 2 Cr. App. R 24, are cases of non-accidental head injury, which was formerly known as Shaken Baby Syndrome. This subject has been controversial in recent years and these decisions of the Court of Appeal, Criminal Division in England and Wales represent the ends of a series of cases dealing with this phenomenon. Prior to this decision that covered four appeals, it had been thought by the medical experts that the presence in a case of an infant death of a cluster of three specific pathologies was diagnostic of Shaken Baby Syndrome. Experts gave evidence to that effect and convictions were obtained when juries accepted the opinion testimony. Then a series of studies led by Professor Geddes and known as Geddes I, II and III challenged the hypothesis of the triad of conditions. That is the situation that the Court addressed. In its judgments in the cases, the Court rejected the Geddes unified theory, but it did not uphold the diagnostic authority of the triad. It accepted that the presence of the three conditions was indeed evidence of death resulting from non-accidental head injury, as the Court now preferred to call the phenomenon.

71. The story is summarised by their lordships as follows at paragraphs 56 of of their judgment in Harris, which was delivered by Gage L.J.:

> "The triad and the unified hypothesis
>
> 56. At the heart of these appeals, as they were advanced in the notices of appeal and the appellants' skeleton arguments, was a challenge to the accepted hypothesis concerning "Shaken Baby Syndrome" (SBS); or, as we believe it should be more properly called, non-accidental head injury (NAHI). The accepted hypothesis depends on findings of a triad of intracranial injuries consisting of encephalopathy (defined as disease of the brain affecting the brain's function); subdural haemorrhages (SDH); and retinal haemorrhages (RH). For many years the coincidence of these injuries in infants (babies aged between 1 month and 2 years) has been considered to be the hallmark of NAHI. Not all three of the triad of injuries are necessary for NAHI to be diagnosed, but most doctors who gave evidence to us in support of the triad stated that no diagnosis of pure SBS (as contrasted with impact injuries or impact and shaking) could be made without both encephalopathy and subdural haemorrhages. Professor Carol Jenny, a paediatrician and consultant neuro-trauma specialist called by the Crown, went further and said that she would be very cautious about diagnosing SBS in the absence of retinal haemorrhages. In addition, the Crown points to two further factors of circumstantial evidence, namely that the injuries are invariably inflicted by a sole carer in the absence of any witness; and that they are followed by an inadequate history, incompatible with the severity of the injuries.
>
> 57. Between 2000 and 2004 a team of distinguished doctors led by Dr Jennian Geddes, a neuropathologist with a speciality in work with children, produced three papers setting out the results of their research into the triad. In the third paper "Geddes III", the team put forward a new hypothesis, "the unified hypothesis", which challenged the supposed infallibility of the triad. It was called the unified hypothesis because it relied on the proposal that there was one unified cause of the three intracranial injuries constituting the triad; that cause was not necessarily trauma. It is important to note that the new hypothesis did not seek to show that the triad was inconsistent with NAHI. It did, however, seek to show that it was not diagnostic.
>
> 58. When Geddes III was published it was, and still is, very controversial. It is not overstating the position to say that this paper generated a fierce debate in the medical profession, both nationally and internationally. In the course of the hearing of these appeals we have heard evidence from a number of very distinguished medical experts with a range of different specialities most of whom had in witness statements expressed views on one side or other of the debate. However, early on in the hearing it became apparent that substantial parts of the basis of the unified hypothesis could no longer stand. Dr Geddes, at the beginning of her cross-examination, accepted that the unified hypothesis was never advanced with a view to being proved in court. She said that it was meant to stimulate debate. Further, she accepted that the hypothesis might not be quite correct; . . ."

The Court said at para. 65, that "the triad of injuries becomes central to a diagnosis of NAHI when there are no other signs or symptoms of trauma such as bruises or fractures".

72. In concluding comments in the *Harris* cases, the Court said in remarks taken from paras. 267 to 270:

> "In our judgment, these appeals demonstrate that cases of alleged NAHI are fact-specific and will be determined on their individual facts.

Whether or not there has been a failure by the criminal justice system to control and manage expert evidence we are reluctant to give any new guidance on expert evidence arising from the facts of these cases. It may, however, be helpful to re-iterate current guidance.

As to expert evidence generally, the evidential rules as to admissibility are clear (see for example *R v Bonython* [1984] 38 SASR 45 and *R v Clarke* (RL) [1995] 2 Cr. App. R. 425 (facial mapping)). We see no reason for special rules where medical experts are involved. There is no single test which can provide a threshold for admissibility in all cases."

73. *R v. Henderson* [2010] 2 Cr. App. R 24 is of limited value to Irish Courts because it is addressing practice in regard to disputed expert testimony in the context of new criminal procedure rules but it does have observations that have some general relevance to experts.

74. The important points of distinction between these cases and the instant appeal are, first, that they were concerned with head-on clashes between medical experts as to medical science itself and the implications of finding a certain cluster of symptoms. Secondly, they were mostly dealing with internal head injuries in the absence of other evidence of trauma. This case is wholly different in that there is not conflict with one specialist asserting the contrary to others as to areas of their expertise. That is the situation that

Henderson specifically addresses.

75. By contrast, the question in the instant case was whether the jury were satisfied beyond reasonable doubt that the baby's injuries, which it was common case were traumatically caused, were inflicted by the appellant otherwise than by the accidental fall.

76. There was no rule applicable to this case that required the trial judge to instruct the jury about some particular methodology of examination or evaluation of the medical evidence. The judge might have done that and it would not have been wrong, but it is not obvious just what he was expected to tell the jury. The point is that the judge in a trial has considerable discretion as to the instructions he gives to the jury in the circumstances of the particular case. The Court is satisfied that there is no basis for criticising the approach the judge took in regard to the evidence in this trial.

77. The proper instruction to the jury does not require a specific direction as proposed by the appellant in every case where there is expert medical or other evidence. There are cases in which particular directions may be required as to the approach to expert testimony but that depends on the facts and issues of the trial.

78. The case of *The People (Director of Public Prosecutions) v Murphy* [2005] 4 I.R. 504 provides an example of a case where specific directions were given in relation to non-medical expert evidence. In that case, largely as a result of objections and interventions by Counsel for the accused, an expert witness from the Forensic Science Laboratory went into a lengthy, and perhaps over-technical explanation of DNA technology in the course of her testimony. Faced with a requisition that there was a danger that the jury could jump to the conclusion that the evidence was infallible and that he should give the jury assistance by describing DNA evidence, both in its biological and statistical aspects in understandable terms so as to enable them to properly perform their function, the trial judge recalled the jury and gave a simplified and accurate version of the essential requirements of what required to be proven in that context. The Court of Criminal Appeal was satisfied that the trial judge directed the jury appropriately with respect to the DNA evidence.

79. In the present case, the judge was satisfied that the medical experts were qualified by their studies and experience to give evidence of their opinions. Once the judge was so satisfied, it became a matter for the jury to determine what weight, if any, they should attach to the testimony of any particular witness. In doing so, they were required to do no more that bring to bear their ordinary critical skills and faculties in the performance of their task, and absent the existence of some extraordinary or special circumstances that might give rise to a need for it, they did not require to be given specific directions as to how to approach their weighing and assessment of the evidence.

> 11. The learned trial judge erred in failing to direct the jury as to the manner in which the jury should assess the expert opinion or conclusion of Dr. Costigan that the injuries that caused the death were non-accidental or abusive.

As appears from what is said above, there was no methodology of evaluation of this evidence that the judge should have put before the jury.

> 12. The learned trial judge erred in refusing to direct the jury in general terms that in considering the evidence of an expert witness called by the prosecution case, whose evidence was in apparent conflict with the evidence of another expert witness called by the prosecution, the jury was obliged to act on such expert evidence as favoured the defence, if, on a consideration of all the evidence, there was a reasonable possibility that such evidence reflected the true position.

Judge L.J., in the case of *R v. Kai-Whitewind* [2005] 2 Cr. App. R 31 at para. 84, dismissed as a startling proposition which was not sustained by earlier authority the notion "that whenever there is a conflict between expert witnesses, the case for the prosecution must fail unless the conviction is justified by evidence independent of the expert witnesses. Put another way, the logical conclusion of what we shall describe as the overblown *Cannings* argument is that, where there is a conflict of opinion between reputable experts, the expert evidence called by the Crown is automatically neutralised. That is a startling proposition, and it is not sustained by *Cannings*".

80. Judge L.J. went on to observe that disagreements between experts were not uncommon and added at para. 89 that "evidence of this kind must be dealt with in accordance with the usual principle that it is for the jury to decide between the experts, by reference to all the available evidence, and that it is open to the jury to accept or reject the evidence of the experts on either side".

81. It was therefore entirely a matter for the jury to decide what weight, if any, to attach to the evidence given by experts ostensibly in disagreement with each other, and determine whose evidence to accept and whose evidence to reject. Accordingly, the trial judge was under no obligation to give the jury the instruction requested by Counsel for the appellant.

> 13. In this regard, the learned trial judge erred in refusing to direct the jury (a) as to the legal implications of expressions of opinions by experts such as whether a particular fact was "likely" or "to be expected" or "possible" or "unusual" and (b) to direct the jury that such expert evidence should be assessed in the context of all the evidence and in the event that a particular possibility, favourable to the defence, arising on the evidence had not been excluded as a reasonable possibility, then the jury should act on that evidence.

The issues raised by this ground overlap with some of the issues just discussed in addressing Ground No. 12. It was not for the judge to translate the words of the witnesses or to put his own personal gloss on them. All of the words and expressions are commonplace.

82. Implicit in the submission is that where a doctor says something that is qualified in some way and that falls short of certainty, then the evidence has got to be disregarded as part of the prosecution case. That is not correct. Neither is it correct that simply because a particular assertion or statement made by one expert is qualified or even contradicted by another expert, that a similar result follows. The jury has to take into account all the evidence and that means putting into the scales the fact that a witness says that something is likely. Similarly, if the expert says that something is highly likely or that he or she has never seen a situation like that arising before, or has never seen a situation where that was not the case. All of those things are part of the evidence in the case and they are to be taken into account by the jury. It is not for the judge to parse and analyse every piece of evidence and to ascribe different weights to one statement as opposed to another by reference to some scale of provability that is to be determined by whether the witness used a particular expression in dealing with the degree of probability the event possessed in the doctor's view. If it was relevant evidence, as the opinions of the doctors were, in addition to the facts of the doctors' observations and tests and findings, then that was material for the jury to take into account in deciding, in all the circumstances and in light of all the evidence, including the expert evidence, whether the prosecution had proved the case or not.

> 14. In particular, with regard to the evidence regarding injuries and damage within the head of the deceased, the learned trial judge erred in refusing to direct the jury that in order to make a finding of fact that the said injuries had not been caused by a fall, as claimed by the appellant, on the grounds that there had been no fracture of the skull, it would be necessary to make a finding beyond a reasonable doubt that certain positive evidence from expert prosecution witnesses as to the possibility and frequency of such severe injuries being caused without any fracture, was not correct, and that evidence from other prosecution witnesses doubting that such injuries could be caused without a skull fracture, would not of itself be sufficient to make such a finding.

Professor Farrell gave evidence that this was a very severe head injury, and that the neuropathological findings in the case were those of a very severe head injury, with massive diffuse subarachnoid haemorrhage, overlying the vertex and base of the brain, together with intraventricular haemorrhage and some subdural haemorrhage. He stated in this case "the haemorrhage was on the vertex and over the base of the brain. So, it was everywhere, essentially". He noted some petechial haemorrhages involving the inferior frontal lobes on both sides which he described as bruises of the brain substance caused by the brain impacting against the inside of the skull.

83. The evidence of Professor Farrell was confined to looking at the brain injuries only, not including the baby's head injuries. He had not seen the scalp or the skull so he could not comment on the point of impact, but his findings were that there was a severe, fatal brain injury.

84. The prosecution submits that the defence overstates the testimony of Professor Farrell in a potentially misleading or distorting manner. His letter/report said:

> *"The neuropathologic findings are those of a very severe head injury with massive diffuse subarachnoid haemorrhage, overlying the vertex and base of the brain, together with intraventricular haemorrhage and some subdural haemorrhage.*
>
> *There are also petechial haemorrhages involving the inferior frontal lobes on both sides and haemorrhages located between the grey and white matter in the occipital lobes on both sides. Isn't that correct?*
>
> *Whilst it is entirely possible that the injuries could have occurred following a fall in an adult's arms [in which the rate of acceleration to the ground would have been that of an adult rather than a child] during which the child's head struck a hard object, it is not clear from the statement provided which part of the child, if any, actually struck a hard object.*
>
> *Now, this is a fatal head injury and I don't have access I don't know how it happened, but I'm telling you that you can have the same injuries produced with rapid acceleration, deceleration, without contact as you can with contact. So, it's really a matter of marrying up, as I said in the letter, the evidence for and against the contact phenomena and the scalp and the skull, 20 percent of people with a fatal head injury do not have a skull fracture. You know, so it's what remains uncontested, in my view, is the fact that there was a severe fatal head injury."*

85. Some of the comments made already by the Court are also relevant to this ground of appeal. The trial judge was not required to isolate every piece of evidence on which there was some difference of emphasis or approach or conclusion between the medical experts. Given the range of expertise in the experts who gave evidence, it was entirely to be expected that there would be variations and even differences.

86. The brain and head injuries that the baby suffered were not to be considered in isolation. By way of contrast with the English cases in many of which there was no evidence of physical trauma, baby Ross was severely injured and there was a widespread distribution of injuries over his body.

87. The judge was not obliged to give an exhaustive description of all the evidence. More specifically in relation to this ground of appeal, it was not the function of the trial judge to take up a position on the question of a skull fracture.

88. It was a matter for the jury to consider the evidence in respect of the baby's head injuries and to assess in the course of their deliberations the evidence that it was unlikely or very unlikely that the baby's brain injuries would have been caused by a fall not involving a skull fracture.

> 15. Further, in particular, with regard to the ophthalmic evidence and bleeding in the areas of the eyes of the deceased, the learned trial judge erred in refusing to direct the jury that in order to make a finding of fact that the deceased was not suffering from a serious coagulation problem that could have contributed to the extent of such bleeding, it would be necessary to make a finding beyond a reasonable doubt that certain positive evidence from prosecution witnesses as to the existence of a serious coagulation problem was not correct, and that evidence from another prosecution witness doubting the existence of such a problem could not of itself be sufficient to make such a finding.

The submission asserts that the baby had a blood coagulation problem prior to the trauma that he sustained and which brought about his return to hospital. "The evidence was clear that in fact there was a coagulation crisis; the jury was given no guidance in respect of this contradiction and the apparent failure by certain witnesses to take this into account".

89. It is true that Dr. Brosnahan confirmed that there was a coagulation problem, probably caused by trauma, but that was at the time when he had sustained his fatal injuries. If the condition resulted from trauma, it was not previously present and therefore was not relevant to causation of the injuries and death. The appellant refers to the evidence of Dr. Sethi, but that does not support the case. This doctor rejected the suggestion that there might have been a coagulation problem evident during the baby's first admission to Wexford Hospital. On that occasion, tests excluded a problem. There was no need to repeat the test because the first one was normal.

> 16. The learned trial judge erred in refusing to direct the jury in clear terms as to the evidence of Dr. Susan Kennedy to the effect that she could not exclude the possibility that the retinal haemorrhages had been caused by the fall, as described by the appellant.

The appellant contended that the trial judge erred in refusing to direct the jury in clear terms as to the evidence of Professor Susan Kennedy to the effect that she could not exclude the possibility that the retinal haemorrhages had been caused by the fall as described by the appellant. To give such a direction would have actually resulted in taking answers out of context and a potential distortion of the testimony of Dr. Kennedy. The summation of her evidence that the judge gave the jury was fair and satisfactory in the context of the other medical expert evidence.

90. In his summary of the evidence of Dr. Kennedy, the trial judge included the following:

> "Counsel then came directly to the point and suggested to her that she was not in a position to say that she could exclude the possibility that the retinal haemorrhages was or could have been caused by a complex fall as described by Mr. Doyle. She did not agree and said that from her reading of the literature and the textbooks it was unlikely that a simple fall would cause such severe retinal haemorrhages or that a fall from a low height would cause such severe retinal haemorrhages without evidence of a fracture but she could not say 100 % that it did not occur."

91. In the course of her evidence in chief, Dr. Kennedy stated:

> *"But this was extensive retinal haemorrhage, not confined to one part of the eye; it was present throughout the peripheral and the back of the eye. . .Well, the retina is a very complex structure for light to be transmitted through it so it has several different layers and there are about nine layers in the retina, and so the haemorrhages - I'm describing that the haemorrhages were present throughout all the layers of the retina from the most superficial part, the part nearest the lens, right through the retina to the base, to its base . . .*
>
> *. . . it was a structurally normal eye, that this was an acute injury, which had occurred in a normal eye, not an eye that was previously malformed - or had any pre-existing disease.*
>
> *The pattern of multiple - such severe and extensive multiple retinal haemorrhages involving all the layers of the retina extending from the back of the eye right to the periphery in the context of the subdural haemorrhages described by Professor Cassidy and the brain haemorrhage without any pre-existing illness or other contributory factors is a constellation of changes that's highly suggestive of non-accidental injury.*
>
> *I'm here to talk about the retinal haemorrhages, not the brain."*

92. When defence Counsel put the evidence of Dr. Farrell to her, Dr. Kennedy said:

> *"But I am saying to you I don't think that you would get those severe retinal haemorrhages in this scenario as described. I don't think it's all that likely. I can't say it didn't happen. But in my reading of the literature if you get that severe retinal haemorrhages, it doesn't occur, in my reading with a fall from a low height.*
>
> *. . . but, you know, if somebody has a baby in their arms, and they're falling they'll try and protect the baby and, you know, it just babies fall so often and children fall so often and they don't get this degree of retinal haemorrhage, it just, it doesn't happen.*
>
> *Well, in as far as I know, unless there is impact with fractures and so on, you don't get, or it's pretty unlikely that you get such severe retinal haemorrhages. But, of course, nobody can say anything 100 %; it has to be a synthesis of all the information. I'm just giving you my opinion based on my experience and my reading of the literature on retinal haemorrhages."*

93. The Court is satisfied that the judge gave a fair summation of Dr. Kennedy's evidence.

> 17. The learned trial judge erred in refusing to re-charge the jury as to the evidence relevant to the bruising on the body of the deceased, the differences between the evidence of Dr. Marie Cassidy and the evidence of other witnesses and the appropriate test to be applied to that evidence including (a) regarding the petechial lesions on the forehead of the deceased and (b) regarding the possibility that an attempt to insert a cannula on the head of the deceased may have caused a substantial linear and associated bruising.

Some of the Court's earlier observations apply here also. It is important to remember the different functions of judge and jury and that it was not necessary for the judge to repeat all of the evidence.

94. It would have been legitimate for the jury to consider the possibility that some of the bruising on the baby's body might have been caused in the course of medical treatment and was therefore relevant in their consideration of the case. But, like many of the other points advanced in the appeal, while it would have been possible and permissible of the judge to mention them, it does not at all follow that not mentioning them is to be condemned as a failure to perform the judge's function.

> 18. The learned trial judge erred in failing to direct the jury adequately as to the evidence relevant to the question of whether the deceased was healthy prior to the fatal incident, including as to the fact that a Polymerase Chain Reaction report had not been procured in respect of a variety of potential viral causes of possible underlying difficulties relevant to observations made in respect of the deceased.

Any duty a trial judge may have to "put the defence" cannot amount to a requirement in the charge that the trial judge must instruct the jury on the specific minutiae of a case which according to the defence arguments or theories is relevant. A fair and extensive summation of the evidence which included many references to the cross-examination by defence Counsel on the aforesaid minutiae was given to the jury.

> 19. The learned trial judge erred in failing to put the defence case adequately to the jury.

On the ground of the failure to put the defence case, generally, and in respect of the detailed grounds, the respondent submitted that any duty that exists for a trial judge to put the defence cannot extend to a requirement to put the specific minutiae of the case which support a particular argument or theory.

95. Counsel for the appellant described the summary of the evidence as a "conscientious, comprehensive, and scrupulously fair-minded summary".

96. In regard to the defence case, the respondent points to some extracts from the judge's charge as follows.

97. Having dealt with issues of mens rea the judge stated as follows to the jury:-

> *"Now, there was in this particular case, this case is relatively straight forward in this respect, two opposite contentions*

exist as to what occurred on that night in question. The prosecution says there was an intention that an intentional act occurred or that an injury was inflicted upon the baby causing his death. The defence says that, in fact, it was to put it somewhat colloquially, and I won't get into all sorts of legal debates about what it might or might not mean, but colloquially speaking an accident, a fall of the type which is referred to in the accused's statement. And, obviously, that if the event was of that type, it could not be a crime and would not be a crime. It is only if an intentional injury was intentionally inflicted in the way in which I have described that a crime could arise at all apart from any necessity to deal with the mental element."

Furthermore, the trial judge stated:-

"It was - and you will also know that it was on the sixth occasion, in the late afternoon, that he gave a version of events, which he says is the truth. The prosecution says that that is an untrue version of events, that its tenor is, from the defence perspective, is set out in full. It is in a statement as such. So, the defence rely upon it as a true account of what occurred on the night in question. The prosecution, as you know, reject that on either, on even on the defence view."

98. On the second day of the judge's charge, before the judge recommenced his summary of the evidence, he reminded the jury:

"And of course the position is in relation to the statement which he made, the version of events which he now gives, then of course you - the prosecution having the obligation to prove the case beyond a reasonable doubt, must prove beyond a reasonable doubt that that version is not the correct or true version, and you must be satisfied accordingly upon that basis that that is not so. In other words, you will be deciding merely whether or not the prosecution have negatived, beyond a reasonable doubt, the reasonable possibility that that version is true."

99. The judge's charge extended over two days and is not criticised in point of accuracy. He covered all the relevant evidence in considerable detail. The points cited in the appeal grounds would have required the judge to adopt positions on one side of matters that were in dispute. Indeed, they suggest that he ought to have accepted the defence interpretation, which in some cases represent misunderstandings of the evidence.

20. The learned trial judge erred in refusing to charge the jury adequately in respect of the presumption of innocence.

21. The learned trial judge erred in charging the jury to the effect that a reasonable doubt would be such as to cause a person not to pursue a contemplated course and in refusing to charge the jury that a reasonable doubt need not be of sufficient weight a to be decisive as to whether to pursue a contemplated course, but need only be sufficient to cause a person to pause or hesitate or delay in making a decision, for example, pending receipt of further information.

In charging the jury the trial judge had told them:

"Now, of course, fundamental to every criminal trial and, of course, a consequence of it is the level of - is the fact that the obligation to prove rests solely on the prosecution and never shifts to the defence, is the fact that every accused person enjoys a presumption of innocence in a real sense, not in a nominal sense. You as a jury proceed on the basis that this accused is not guilty of this offence, that he is innocent and you proceed on the basis that he is innocent at all times until or unless you reach a finding of guilty. That will infuse all your deliberations in respect of all aspects of it and it is a real and living thing, not a nominal thing."

100. The trial judge was later requisitioned to recharge the jury on the presumption of innocence. In particular, the trial judge was asked to recharge the jury using emphatic words to explain that the presumption of innocence is at the core of the constitutional right to a fair trial recognised internationally as being absolutely fundamental to a fair and reliable criminal process, in accordance with *People (DPP) v. DO'T* [2003] 4 I.R. 286.

101. On reasonable doubt, the trial judge told the jury:

"Now, sometimes it is also defined as the sort of doubt one would entertain in one's ordinary life in respect of a matter of the first importance, when on makes a decision say perhaps like moving job, perhaps emigrating, perhaps trying in these days to sell ones house and move to a new house, the sort of serious decisions at the most serious level, if you like, which we make in our lives. And in those circumstances, obviously one might consider the matter up hill and down dale applying one's common sense and power of reasoning on the evidence available to one. And if having done all that and if having thought of the matter deeply, if one was left with a doubt as to whether or not one should proceed, and if that doubt was such that one felt that one should turn away from and not pursue the contemplated serious course of action, you can see, ladies and gentlemen, that that being a doubt based on reason, a doubt based on common sense, would fall into the category of a reasonable doubt, or at least you might think it does because these are merely attempts to assist you in your conclusion as to what a reasonable doubt might be."

102. The appellant submitted that the traditional formulation, that of a doubt which would merit a pause before making a particular decision, is tantamount to instructing the jury to make a finding on the balance of probabilities, as they are encouraged to proceed to make such a finding. The appellant submitted that the appropriate charge should be that the mere presence of such a doubt, as it results to the circumstances of the case and the evidence provided, is sufficient to constitute a reasonable doubt.

103. On the grounds of the charge in relation to presumption of innocence and reasonable doubt, the respondent submitted that these were dealt with in a proper and adequate manner.

104. This Court considers that the concepts of the standard of proof applicable in criminal trials and reasonable doubt were adequately explained to the jury.

22. The learned trial judge erred in failing to charge the jury adequately as to the test to be applied in circumstances where the appellant had lied as to the circumstances in which the fatal event had occurred, in particular, that if there was a reasonable possibility that there was an explanation for a lie, other than that the appellant was guilty of the offence, then the lie should not be taken into account in favour of the prosecution.

The appellant submitted that the trial judge failed to direct the jury correctly in respect of the possible other reasons for the appellant's lies, beyond the desire to protect himself from criminal liability, the so-called Lucas warning.

105. The respondent submits that the charge, as it related to the appellant's lies, was fair, balanced, and tailored to the particular circumstances of the case. The respondent points out that the trial judge was in fact concerned that he had put the Lucas warning in strong terms that were overly favourable to the appellant.

106. The trial judge gave an appropriate warning as to the reasons people lie in criminal investigations, to avoid criminal responsibility and otherwise. The trial judge said in his charge:

> *". . . the law says, and again it's in accordance with common sense, that people tell lies for many reasons, not necessarily because they are guilty . . . Mr. Ó Lideadha, in his speech to you, referred to the following as factors: that amongst other that he was petrified or terrified by what has happened that he was fearful that he would lose Leona, afraid … of what people might think, that people would think the less of him, and that he also panicked. They would also think that he was incompetent."*

107. The Court is satisfied that the jury were adequately directed on this point.

Conclusion
108. The grounds of appeal, although numerous, are not made out and do not invalidate the trial or the result. This Court is of the view that the trial of the appellant was satisfactory and the conviction safe. The appeal must accordingly fail.

109. Some general concluding comments may be appropriate.

110. The principal objection, namely, that medical evidence called for special treatment in the form of a warning to the jury and specific directions by the trial judge is rejected by the Court as being inappropriate and unwarranted in the circumstances of the trial. The Court does not rule out any such warning in the case of expert evidence given by medical specialists or others in a criminal trial when it is necessary or desirable to do so. This, however, was not such a case.

111. In respect of a number of the grounds of appeal, it cannot be said that it would have been wrong to embark upon an analysis of differences that the trial judge perceived or that were suggested to him by Counsel from the evidence of the different witnesses. If the judge thought it necessary to do so, he could have chosen some or all of the points identified by Counsel and to have selected excerpts from the evidence to demonstrate points of similarity or difference or agreement or conflict. It is, however, a wholly different proposition to say that the trial judge was at fault in failing to do what he would have been entitled to do if he had thought it necessary.

112. This Court is satisfied the course adopted by the trial judge did not represent an erroneous presentation to the jury. There was no dispute between the experts on questions relating to medicine, as such. The issue that the jury had to consider was whether the number, nature, severity and distribution of the injuries to the baby might reasonably have been accounted for by the fall theory and the subsequent handling by lay persons and medical treatment. Clearly, the onus lay on the prosecution to refute such proposition to the satisfaction of the jury beyond reasonable doubt.

113. The trial judge correctly left the case to the jury for decision. He gave a thorough description of the evidence given by the various witnesses, but he kept comment on the evidence to a minimum. This Court is satisfied that the judge dealt with the evidence in an entirely satisfactory manner, having regard to the issues in the case.