R –v- BADEN CLAY

SUMMING-UP

Charge

1. The Accused, Gerard Robert Baden-Clay, is charged that on or about 19th April, 2012, at Brisbane, he murdered Allison June Baden-Clay.

2. He says he is not guilty.

3. Your role is to determine, on the evidence, whether he is guilty or not guilty.

Summing-up

4. I must now sum up the case to you.

5. You will then retire to consider your verdict.

6. Our functions are different.

7. My task is to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies.

8. You must accept the law from me, and apply all directions I give you on matters of law.

9. You are to determine the facts of the case, based on the evidence placed before you in this courtroom.

10. That involves deciding what evidence you accept.

11. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your verdict.

12. I may comment on the evidence if I think it will assist you in considering the facts.

13. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence.

14. You should ignore any comment I make on the facts unless it coincides with your own independent view.

15. You are the sole judges of the facts.

Unanimity of verdict

16. You must strive for a unanimous verdict: that is, a verdict on which you all agree, whether guilty or not guilty.

What is evidence

17. You must reach your verdict on the evidence, and only on the evidence.

18. The evidence consists of what the witnesses said, the materials received as exhibits, except for the transcripts of recordings, and the admissions made by the defence in Ex. 179.

19. As I mentioned when the admissions were announced, you should treat those admitted facts as proved.

20. The exhibits will be with you in the jury room.

21. You will have facilities for playing the electronically recorded exhibits and a descriptive list of all exhibits.

22. Documents will be available explaining how to access the interactive video and the timelapse photography.

23. A transcript of the testimony of the witnesses will be with you.

What is not evidence

24. Statements, arguments, questions and comments by the lawyers are not evidence.

25. A lawyer's question is not evidence.

26. Importantly, it is the answer of the witness that is the evidence; not the question asked.

27. Sometimes a lawyer includes an allegation of fact in a question asked of a witness.

28. No matter how positively that allegation was asserted, it will not form part of the evidence unless the witness agreed with it.

29. Let me give an example divorced from this case.

30. Imagine the lawyer says to a witness: “The toy was blue, wasn’t it?”; and the witness replies, “No, it wasn’t”. Given that answer, there is no evidence that the toy was blue.

31. Even if you do not believe the witness, still there is no evidence that the toy is blue.

32. In general, disbelief of a witness’s answer does not provide evidence of the opposite.

33. To prove that the toy was blue, there would need to be evidence from some other source, such as a photograph or the testimony of another witness.

34. On the other hand, if the witness had instead replied, “yes, it was”, there would be evidence that the toy was blue. In that event, the witness has adopted the suggestion made in the question. To that extent, there would be evidence that the toy was blue.

35. In short, a thing suggested by a lawyer is not evidence of the fact suggested.

36. Other things you have heard are not evidence.

37. The opening of the prosecution case near the outset of the trial was not evidence.

38. The purpose of that address was to outline the evidence the prosecution intended to put before you during the trial.

39. Nor was the opening of the defence case evidence. It, too, foreshadowed the evidence to be adduced when the defence witnesses testified.

40. Nor were the lawyers’ final addresses evidence.

41. They were their arguments, which you may properly take into account when evaluating the evidence. But the extent to which you do so is entirely a matter for you.

42. This summing-up is not evidence, although it does contain reference to some of the evidence.

Deciding the case exclusively upon the evidence

43. If, outside this courtroom, you have heard or read, or otherwise become aware of information about the events with which this trial is concerned, or about the Accused, it is of critical importance that you put any such information completely out of your minds.

44. Have regard only to the testimony, the exhibits and the admissions made here in this courtroom since this trial began.

45. Ensure that no external influence plays a part in your deliberations.

46. This means that you cannot take into account, or allow yourself to be influenced by, information from any source other than that presented in this courtroom during this trial.

47. Let me remind you of what I said about this topic at the outset of the trial.

48. Pay careful attention to the evidence; and ignore anything you may hear or read about the case out of court.

49. If you have heard or read or otherwise become aware of events with which this trial is concerned, or about the Accused, or any witnesses or Allison Baden-Clay (to whom I shall refer as “the deceased”), it is of critical importance that you put any such material out of your minds.

50. Remember, you have taken an oath, or made an affirmation, to decide the charge according to the evidence.

51. The confidence of the parties and the community, in the verdict you eventually announce – whatever that verdict may be – depends upon your faithful performance of that promise.

52. This means that you cannot take into account, or allow yourself to be influenced by, information from any source other than that presented in this courtroom during this trial.

53. You must not inquire, outside the courtroom, about anything that relates to the trial.

54. So you must not use any aid, such as a textbook, to conduct research; and, except in this courtroom, you must not in any way seek or receive information about questions that arise in the trial, or about the Accused, or any witnesses or the deceased: for example, by conducting research using the internet or by communicating with someone by phone, email, or on Twitter, through any blog or website, including social networking websites such as Facebook, LinkedIn or You Tube.

55. Avoid any form of communication that exposes you to the views of others who are not members of your jury.

56. You must not permit somebody else to make inquiries on your behalf.

57. And you must not visit any place connected with the incidents giving rise to the charge.

58. There are at least five reasons why this is so important.

59. First, information in the public arena is not always accurate. Often such information is, at least, misleading. Sometimes, it is just plain wrong. So to have regard to extraneous sources is to run the considerable risk of acting on false information.

60. Secondly, it would be unjust for you to consider information obtained outside the courtroom. The prosecution or defence would not be aware of that. So they could not test the information for accuracy. And because the parties would not know about it, nor could they present arguments to you about such information.

61. Thirdly, so critical is it to a fair trial that the information a jury considers is confined to material put before the jury in the courtroom that our Parliament has made it a

criminal offence, punishable by imprisonment, for a juror to inquire about an accused person.

62. Fourthly, if you were to make inquiries outside the courtroom, you would cease to be an impartial juror. You would become an investigator. And you are not detectives. You are judges of the facts.

63. Fifthly, in past cases, a juror has been found to have made private investigations: by using the internet, for example; and that has led to the abandonment of the trial. Sometimes, new trials have been ordered after a successful appeal. Such highly undesirable outcomes imperil community confidence in the institution of trial by jury.

64. In short, there are powerful reasons why you must not receive information outside this courtroom in relation to the issues, or privately attempt to investigate the case, or inquire about the Accused, or any witnesses or the deceased, directly or indirectly.

65. You can read more about that, and other things, in the Guide to Jury Deliberations. Copies of this booklet will be in the jury room for you.

66. You should not discuss the case with anyone except your fellow jurors, and then only when you are together in the jury room. This is because someone else you might speak to who is not a fellow juror could make some observation about the charges or the evidence. Such a comment or opinion might influence your view of the case, if only subconsciously.

67. Yet the comment or opinion can be of no value. That person would not have heard the evidence, nor the lawyers' addresses, nor my directions on the law.

68. So, confine discussion about the case to your fellow jurors, and then only when you are present together in the jury room.

69. If anyone else, including family and friends, attempts to speak to you about the case, stop them immediately. Should the attempt persist, report that to me as soon as possible; although you should not mention it to any other juror.

70. If any of you learns that an impermissible inquiry has been made by another juror, or that another juror had engaged in discussions about the case outside the jury room, again, you would be duty-bound to bring that to my attention as soon as possible.

71. Similarly, if at any stage material should find its way into the jury room that is not an exhibit in the case, you should notify me immediately.

72. The reason for bringing such things to my attention straight away is that, unless the difficulty is known before the trial finishes, there is no opportunity to attend to the problem and to put matters right if it is possible to do so. If it is not immediately addressed, the problem might cause the trial to miscarry.

73. A report about this trial may appear in newspapers, on radio, on television or in electronic media reports. Pay no regard to those reports. Such reports tend to be confined to some matter thought to be newsworthy. Such a matter may well be of little or no significance in light of the whole of the evidence. Do not let media reports influence your view as to what is important. And do not allow them to lead you into a conversation with a friend or family member about the trial.

Facts and inferences

74. How do you use the testimony of the witnesses and the other evidence?

75. Some evidence may directly prove a thing. A witness who saw, or heard, or did something, may have told you about that.

76. The admissions, documents, photographs, recordings of conversations and other things put into evidence as exhibits may also tend directly to prove facts.

77. But, in addition to facts directly proved by the evidence, you may also draw inferences – that is, deductions or conclusions - from facts which you find to be established by the evidence.

78. If you are satisfied that a certain thing happened, it may be right to infer that something else has occurred. That will be the process of drawing an inference from facts. For example, suppose that when you went to sleep it had not been

raining and when you woke up, you saw rainwater around. The inference – the deduction, the conclusion - would be that it had rained while you were asleep.

79. However, you may only draw reasonable inferences.

80. And your inferences must be based on facts proved by the evidence.

81. There must be a logical and rational connection between the facts you find and your deductions or conclusions.

82. You are not to indulge in intuition or in guessing.

83. Importantly, if, in light of all of the evidence, there is an inference reasonably open which is adverse to the accused – that is, one pointing to guilt – and an inference in his favour – that is, one consistent with innocence – you may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.

Evidence may be accepted in whole, in part, or not at all

84. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it.

85. You may accept or reject such parts of the evidence as you think fit.

86. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.

Assessing reliability

87. Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence.

88. Credibility concerns honesty. Reliability may be different. A witness may be honest enough but have a poor memory or otherwise be mistaken.

89. Many factors may be considered in deciding what evidence you accept.

90. I will mention some considerations that may assist you.

91. You have seen how the witnesses presented when answering questions. Bear in mind, however, that many witnesses are not used to giving evidence and may find the courtroom environment distracting.

92. Consider the likelihood of the witness's account. Does the evidence of a particular witness seem reliable when compared with other evidence you accept?

93. Consider the ability and the opportunity the witness had to see, hear, or know the things that the witness has testified about.

94. A matter for consideration in assessing the reliability of testimony is whether it differs from what has been said by the witness on another occasion.

95. Recollection may be unreliable, even where the witnesses presented as honest and confident of their recollections.

96. Honesty does not equate to reliability.

97. A witness’s self-confidence in the accuracy of the witness’s recollection is no sure guide to reliability either.

98. There are many reasons why the risk of unreliability should be considered when evaluating testimony.

99. Let me mention some.

100. In general, powers of observation, and of retention in memory of what is seen or heard, are fragile.

101. Minds do not function like recording devices.

102. An observation of something said or done might be mistaken.

103. Memory is also fallible. It fades with time. And it is exposed to distortion for other reasons.

104. Memory can be affected by the stresses of the event, particularly when the situation is emotionally charged, or by other distractions.

105. There is also the risk of memory distortion through susceptibility to the suggestions of other people and in like ways. As examples, speaking generally, some people can:

- come to believe that they have said things which they did not say but afterwards wish they had said;
- imagine that they have seen or heard things because friends or associates have suggested such ideas;
- persuade themselves that something will have happened because they imagine that it is likely that it did;
- be influenced, albeit subconsciously, by things created by others, such as photographs and records.

106. In this case, there is the additional consideration that the witnesses often spoke of events more than two years ago.

107. There is a need for care in evaluating the reliability of the testimony of witnesses whose recollections are two years old, even where the witness had, as it is said, refreshed recollection by re-reading, shortly before giving evidence, a statement given to police in April 2012.

108. That is especially so for those witnesses who testified to something which, when it happened, was ordinary: such as sounds in the night now recollected as screams, thuds, and car doors closing.

109. People do not always closely observe sights and sounds, let alone try to commit such impressions to memory.

110. And correctly assessing the source, nature or direction of a sound at night must be at least difficult.

111. You may well think that other considerations assist in your evaluation of the reliability of the witnesses, generally, as well as in respect of particular testimony.

112. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.

Burden of proof

113. The burden rests on the prosecution to prove the guilt of the Accused.

114. There is no burden on him to establish any fact, let alone his innocence.

115. He is presumed to be innocent.

116. He may be convicted only if the prosecution establishes that he is guilty of the offence in question or of some other offence of which he may be convicted on the indictment; and you will be directed later on as to this.

Standard of proof

117. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty.

118. This means that, in order to convict, you must be satisfied, beyond reasonable doubt, of the elements that make up the offence charged.

119. I will explain these elements later.

120. It is for you to decide whether you are satisfied, beyond reasonable doubt, that the prosecution has proved the elements of the offence.

121. If you are left with a reasonable doubt about guilt, your duty is to acquit: that is, to find the Accused not guilty.

122. If you are not left with any such doubt, your duty is to convict: that is, to find him guilty.

Circumstantial evidence

123. As no one claims to have seen the Accused kill his wife, this is a circumstantial case.

124. Circumstantial evidence is evidence of circumstances that can be relied upon not as proving a fact directly but instead as pointing to its existence.

125. It differs from direct evidence, which tends to prove a fact directly: typically, when a witness testifies about something which that witness saw or heard.

126. Both direct and circumstantial evidence are to be considered.

127. It is not necessary that facts be proved by direct evidence.

128. They may be proved by circumstantial evidence alone, by direct evidence alone, or by a combination of direct and circumstantial: that is, both direct and circumstantial evidence are acceptable proof of facts.

129. So you should consider all the evidence, including circumstantial evidence.

130. Importantly, to bring in a verdict of guilty based entirely, or substantially, on circumstantial evidence, guilt should not only be a rational inference: it must be the only rational inference that could be drawn from the circumstances.

131. If there is any reasonable possibility consistent with innocence, it is your duty to find the Accused not guilty.

132. This follows from the requirement that guilt must be established beyond reasonable doubt.

No sympathy or prejudice influential

133. You should dismiss all feelings of sympathy or prejudice, whether it be sympathy for, or prejudice against, the Accused or anyone else.

134. No such emotion has any part to play in your decision.

135. You must approach your duty dispassionately, deciding the facts upon the evidence.

Accused giving evidence

136. The Accused was not obliged to give evidence or to call other people to give evidence in his defence, or otherwise produce evidence.

137. That he has done so does not mean that he has assumed any responsibility to prove his innocence.

138. The burden of proof has not shifted to him.

139. His evidence, and that of the other witnesses called for the defence, is added to the evidence called for the prosecution.

140. As I have said, the prosecution has the burden of proving the elements of the offence in question, beyond reasonable doubt.

141. And it is upon the whole of the evidence that you must be satisfied, beyond reasonable doubt, that the prosecution has proved the case before the Accused may be convicted.

142. It is not a matter of making a choice between the evidence of prosecution witnesses and that of the Accused and the other defence witnesses.

143. You do not have to believe that the Accused told you the truth before he is entitled to be found not guilty.

144. Where, as here, there is defence evidence, generally speaking, one of three possible results will follow:

- The jury may think the defence evidence is credible and reliable, and that it provides a satisfying answer to the prosecution case. If so, the verdict will be not guilty;

or

- The jury may think that, although the defence evidence was not convincing, it raises a reasonable doubt about whether the elements of the offence under consideration have been proved. If so, the verdict will be not guilty;

or

- The jury may think that defence evidence, or some of it, should not be accepted.

145. If you consider that evidence of the Accused or that of other defence witnesses should not be accepted, be careful not to jump automatically from such a view to a finding of guilt.

146. Speaking generally, and subject to what will be said about lies by the Accused in testifying, if you find defence evidence unconvincing, set it to one side, go back to the rest of the evidence, and ask yourself whether, on a consideration of such evidence as you do accept, you are satisfied, beyond reasonable doubt, that the prosecution has proved the elements of the offence in question.

Declining a formal statement

147. On legal advice, he says, the Accused declined to make a formal statement to the police.

148. As you know, he had spoken to police officers in recorded conversations, and did so more than once.

149. His decision not to provide a statement is not evidence against him.

150. He was entitled to adopt that course.

151. It would be quite wrong to reason that, because he declined to provide a statement, he must have something to hide or be guilty of some offence.

152. Therefore, you cannot use against him the fact that he did not give the police a statement.

Elements of offences

153. A person who unlawfully kills another is guilty of murder or manslaughter.

Murder

154. A person who unlawfully kills another, intending to cause that person's death or to cause grievous bodily harm, is guilty of murder.

155. Grievous bodily harm includes any bodily injury of such a nature that, if left untreated, would be likely to endanger life or likely to cause permanent injury to health.

156. Any person who causes the death of another, directly or indirectly, is deemed to have killed that person.

157. And a person causes death if he does an act that is a substantial or significant cause of the death.

158. So, before you may convict the Accused of murder, you must be satisfied, beyond reasonable doubt, of two distinct matters:

- that he caused the death of his wife; and
- that he did so with an intention to kill her or at least to cause her some grievous bodily harm.

159. On the prosecution case, the Accused is guilty of murder on the basis that he killed his wife, and did so intending to kill or at least to cause her some grievous bodily harm.

160. The essence of the defence case is that:

- The Accused did not kill his wife;
- It is a reasonable possibility that she died of an unnatural cause consistent with the evidence; that is, she could have:
    i. drowned; or
    ii. fallen from a height to her death or to cause drowning; or
    iii. died from alcohol and/Sertraline toxicity; or
    iv. suffered the effects of serotonin syndrome which led to her drowning or falling from a height to her death.

Manslaughter

161. The indictment charges murder.

162. An alternative is, however, open: manslaughter.

163. Manslaughter is the unlawful killing of a human being in circumstances not amounting to murder.

164. Were you to find the Accused not guilty of murder, you would consider whether he is guilty or not guilty of manslaughter.

165. To establish manslaughter, the prosecution must prove, beyond reasonable doubt, that the Accused unlawfully killed his wife.

166. But intention to harm is not an element of manslaughter.

Alternative

167. Murder and manslaughter are alternatives. So you may not find the Accused guilty of both.

168. You may wish to consider first murder, which is the more serious.

169. If you find the Accused guilty of murder, you do not need to consider manslaughter.

170. But if you find the Accused not guilty of murder, then consider the alternative of manslaughter.

171. If your verdict is guilty of murder, you will not be asked to return a verdict on manslaughter.

172. As you know, neither the prosecution nor the defence contends for manslaughter.

173. In these circumstances, you may wonder why I advert to that prospect at all.

174. The answer is: the law obliges me to do so.

175. That I mention the manslaughter alternative does not mean that I have a view about such a verdict.

Motive

176. Motive is not an element of murder or manslaughter.

177. The motive by which a person is induced to do an act or to form an intention is immaterial so far as regards criminal responsibility.

178. In a criminal trial, an absence of evidence of motive is a circumstance in favour of an accused, to be given such weight as the jury deems proper.

179. But proof of motive is never indispensible to conviction.

180. Sometimes the motive, if any, will never be known to anyone but the offender, which shows why it would often be unrealistic to require the prosecution to prove a motive. And the law does not impose such an obligation.

181. So, here, the prosecution does not have to establish a possible motive for the Accused to have murdered his wife.

Caution about things said by deceased

182. Our law allows evidence to be given of things said by someone who has since died.

183. Because of this law, evidence has been put before you, through the testimony of others, of what Allison Baden-Clay said.

184. I must warn you about risks of unreliability of things said to have been spoken by her.

185. Evidence of such out-of-court statements may be unreliable, for number of reasons.

186. What she said comes to you second hand, through the testimony of others: mostly family and friends.

187. There is a risk that the witness's testimony is not a reliable account of what happened.

188. Errors can occur when the original statement is made, when it is heard, and when it is recalled and repeated in court.

189. So, even if the witness's evidence was given honestly, it might not be an accurate representation of what happened.

190. The statement of the source reaches you through the perceptions, interpretations and recollections of the witness, not through the recollections of the deceased.

191. A witness who tells you of what somebody else has said may have misheard or misinterpreted what was said.

192. Or the witness might not recall things accurately because of faulty memory or for other reasons.

193. Moreover, the statement made by the deceased to the witness might not have been accurate.

194. The statements said to have been made to the witness were not made on oath.

195. So, in saying these things to the witness, the deceased was not under the same imperative to speak truthfully as if here in court testifying.

196. No less importantly, what she may have told the witness is untested and untestable: that is, it cannot be examined to ascertain its reliability by the usual means for testing the honesty and reliability of witnesses: by cross-examination and the opportunity otherwise ordinarily given to a jury to see and hear the source of the information.

197. So there is need for caution:

- in deciding whether to accept as reliable things relayed to you as having been said by the deceased;

and, if you accept it,

- in forming a view about the weight to be given to this information.

Interviews with Baden-Clay children

198. Our law allows recordings of interviews given by children to be received as evidence.

199. Put before you in that way were the six interviews with the three Baden-Clay children.

200. They, too, are evidence.

201. The police spoke to Hannah, Sarah and Ella on 20 April and 27 June 2012.

202. None spoke of hearing the night before:

- a fight between their parents; or
- a car leave or return to the house.

203. The audio-visual recordings of the interviews with the children, and the transcripts of what they said, will be with you in the jury room.

204. Taking and presenting evidence of children in this way is now routine practice.

205. So you must not draw any inference adverse to the Accused merely because that routine measure was adopted.

206. The children's evidence is not to be given any greater or lesser weight because it is put before you in that routine fashion. And its probative value is not increased or decreased because it comes before you in that way.

207. You will not have the evidence of almost all the other witnesses in an electronically recorded form.

208. So be careful not to place undue weight on the children's evidence because you are able hear it on a number of occasions, if you choose to do so.

209. In estimating the weight, if any, to be attached to what the children say, regard is to be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement in question, including:

- whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
- the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

Transcripts of recordings

210. Transcripts were provided for your assistance when recordings were played.

211. The transcripts will be with you in the jury room.

212. May I remind you that such a transcript is not evidence.

213. It is merely an aid to your understanding of the evidence.

214. The evidence is what you see and hear – or, for an audio recording, what you hear - when the recording is played.

215. A transcript is someone's attempt to render into print the sounds that person believes that he, or she, has heard when the tape was played. That person may be mistaken.

216. Do not substitute what you read in the transcript for what you see and hear when the recordings are played.

Transcript of evidence

217. You will have a transcript of the testimony of the witnesses.

218. The transcript is made available to help you to remember the evidence.

219. The transcript itself is not evidence.

220. Do not regard the transcript as infallible.

221. Sometimes, the transcribers make mistakes or cannot hear what the witness has said.

222. The evidence is what you recall it to be.

223. If you see something in the transcript which you regard as wrong, it is your recollection of what the witness said that is decisive, not the transcript.

Jury judges facts

224. In a summing-up, it is neither practicable nor desirable to canvass all the detail of the evidence.

225. It is, therefore, quite likely that I will not mention aspects of the evidence that may seem to you significant.

226. If I do not touch upon such information, that does not mean that it is unimportant.

227. So also, that I mention particular evidence does not mean that it is more important than other evidence not referred to by me.

228. Act on your view of what evidence matters, whether I mention it or not.

229. Remember: you are the judges of the facts.

View

230. Let me remind you of the limited use to be made of the view of the house and the area near the Kholo Creek bridge.

231. Those views may be used to understand and to apply the evidence, especially concerning those two scenes.

232. What you observed during the views is not evidence.

233. You should not substitute what you saw at the views for the evidence.

234. Moreover, as you know, in particular from the testimony of Det Snr Constable McLeod, since April 2012, there have been changes to both the bridge area and the residence and its surrounds.

Police interviews

235. I turn to discrete topics related to the police interviews.

236. These concern things said:

- in the Accused's presence but not by him;

- by him which may tend to exculpate him: that is, are consistent with innocence;

- by him which may tend to incriminate him: that is, are consistent with guilt.

237. Statements by the Accused in the third category fall into two classes:

- truthful admissions of facts that may tend to incriminate; and

- lies that may tend to incriminate because they reveal a knowledge of the death of the deceased and were told because the Accused believed that the truth of the matter would incriminate him.

Comments made to the Accused

238. During the police interviews, the Accused was confronted with things said by others: for example, in a police interview, Snr Sgt Curtis raised the notion that the deceased was working in his business with Ms McHugh when his wife learned of the affairs. He denied that.

239. A statement made to, or in the presence of, the Accused is not, of itself, evidence of the facts stated.

240. Without more, such a statement cannot be used against him.

241. However, if the Accused, by words or conduct, acknowledged the truth of the facts stated then, to that extent, you may take the statement into consideration.

242. If he did not distinctly acknowledge the accuracy of what was stated, disregard the statement.

243. In short, things said in the Accused's presence cannot be used against him unless, and then only to the extent that, he accepted them as true.

244. One example of a suggestion not adopted is that in the interview with Curtis was an inquiry whether he and his wife were estranged. He answered: "No".

Statements by the Accused

Exculpatory assertions

245. Things said by the Accused to the police tending to exculpate him – that is, are consistent with his innocence – should be considered.

246. An example is his assertion that he slept through the night of 19/20 April.

247. What the Accused said to the police forms part of the evidence for your consideration.

248. You are not obliged to act on assertions the Accused made in his own favour.

249. What he stated during the police interviews was not said on oath.

250. And, unlike his testimony before you, such statements have not been tested by cross-examination in court.

251. You are not obliged to attach the same weight to all the statements the Accused made in the police interviews.

252. The weight, if any, to be accorded his exculpatory statements is, as with the rest of the evidence, a matter for you.

Inculpatory Assertions

253. The prosecution relies on things said by the Accused to police as admissions of facts tending to inculpate him in the death of his wife.

254. An example of what the prosecution contends is an admission with potential to incriminate is that the Accused says that he was at home on the night of 19/20 April when his wife was there too, which would mean that he had the opportunity to murder her.

255. In order to rely on any statement that the Accused made to the police as an admission that may tend to incriminate him, you must first be persuaded that what he said in that respect was truthful.

Lies

256. The next aspect of the Accused's statements relates to the prosecution contention that he told the police lies.

257. You will make up your own minds whether he told falsehoods to the police and, if so, whether he did so deliberately.

258. It is, however, necessary to approach, with considerable caution, the use you might make of a conclusion, were you to reach it, that he told lies to the police.

259. More will be said later on about your approach to suggested lies – not only to the police but also when the Accused gave evidence before you from the witness box.

Expert Evidence

260. Experts have given evidence: doctors, scientists, an engineer and a psychologist.

261. An expert witness is a person who has specialised knowledge based on training, study or experience.

262. Unlike other witnesses, a witness with such specialised knowledge may express an opinion on relevant matters within his or her area of expertise.

263. Other witnesses may testify only as to facts: typically, what they saw or heard, and are not permitted to express opinions.

264. Expert evidence is, like all evidence, for you to evaluate.

265. You should also examine the quality of the reasons offered for an opinion, and the facts that support that opinion.

266. A witness's opinion is only valuable if the facts on which it is based are true.

267. It is for you to consider the quality and weight of expert as well as non-expert evidence.

268. If you consider the expert evidence reliable, you may accept it.

269. If, having given the matter careful consideration, you are not satisfied by the expert evidence, you would not act on it.

270. The decision is yours as to what evidence you accept or reject, whether the evidence comes from an expert or anyone else.

Finding the deceased

271. You may think that the evidence discloses the facts, matters and circumstances about to be mentioned.

272. On 30 April 2012, the decomposed body of the deceased was found beneath the Kholo Creek Bridge.

273. The deceased had lived with her husband, the Accused, and their three children in a rented house at 593 Brookfield Road, Brookfield.

274. That house is about 13 kilometres by road from the Kholo Creek bridge, taking the shortest route.

275. Depending on traffic conditions, it takes about 13-20 minutes to drive to the bridge from the Baden-Clay house at 593 Brookfield Road.

276. The body was lying in soft, water-logged mud on the eastern bank of the creek, underneath the bridge, on the right side, facing towards the bank.

277. Hands and arms were up in front of the head.

278. The deceased was wearing ¾, or tracksuit, pants, socks with white sneakers, a singlet top, a bra, underwear and a jumper.

279. The jumper was wrapped around her neck, with her hands inside the sleeves.

280. Most of the jumper was inside out.

281. There were two rings on the wedding ring finger.

282. Although the deceased usually took her mobile phone with her when out on a morning walk, that phone was not with her.

283. It has never been found.

284. The body was on a natural plateau below the creek high water mark.

285. This plateau was above a steep slope down to the creek and about two metres beneath the cement foundation for pillars that support the bridge.

286. There were no obvious signs of disturbance of nearby mud or vegetation, except where a police scientific officer had fallen.

287. Botanical material such as twigs and leaves was taken from the deceased's hair.

Dr Milne

288. The forensic pathologist, Dr Milne, conducted the post-mortem examination.

289. He testified, in summary, as follows.

290. There was significant decomposition of the body.

291. The upper part revealed mummification. That condition occurs when the affected area is exposed to a dry environment.

292. Putrefaction was apparent in the region of the body that had been in contact with the moist mud.

293. The extent of the decomposition was consistent with death having occurred about 11 days earlier – which is when the deceased was last seen alive.

294. Hypostasis – that is, settling of the blood through gravity – appeared on the lower, right side of the body.

295. That is consistent with the body having come to the position in which it was eventually found within a matter of hours of death, and then remaining in that position.

296. The putrefaction and mummification were also consistent with the body having been positioned soon after death where it was found underneath the bridge.

297. The jumper could have been moved to the position around the head in which it was found before or after death.

298. If the body had been in tidal water, tidal movement could have moved it to the position in which the jumper was discovered.

299. Examination revealed no injuries to the hands.

300. Fingernails were detached. Four were found within the jumper.

301. There was no evidence of any bone fracture, including the hyoid bone. Nor was any haemorrhage seen around the hyoid bone.

302. There was a probable injury on the internal lining of the left front of the chest wall, associated with ribs 4-6.

303. This was probably a bruise.

304. Because of the significant decomposition, the possibility that that injury occurred after death could not be excluded.

305. There was a fairly small fracture of the lower left eye tooth. A portion of that tooth was missing. That chipped tooth appearance could not be aged.

306. There were no signs of trauma to the teeth or to the hard tissues of the jaw.

307. No other abnormalities were detected.

308. There was no sign of sexual assault.

309. There was no injury to suggest that the body had brushed up against sticks, rocks or other foreign objects in moving water.

310. A small amount of blood extracted from the liver was sent for toxicology testing.

311. Liver tissue and stomach contents were also analysed.

312. Zoloft is a brand name for the anti-depressant drug Sertraline.

313. Sertraline and its metabolite, Desmethylsertraline, were detected in the blood taken from the liver, in the liver itself and in stomach contents.

314. The level of Sertraline and its metabolite in the blood is higher than would be expected with normal therapeutic dosing. But decomposition can alter levels after death.

315. Alcohol was found in the blood. The concentration, put in familiar terms, was .095.

316. Much, indeed potentially all, of that alcohol could have been produced within the body itself during post-mortem decomposition.

317. Because of the significant extent of the decomposition of the body, Dr Milne:

- did not identify a cause of death;
- could not say when or where the deceased died.

318. The deceased did not die of natural causes, for three reasons:

- there was no medical history of natural disease that might have predisposed her to death;
- there was no sign of natural disease within the limits of his examination;
- Dr Milne's assessment of his observations where the body was found was that "that is not from a natural death".

319. Dr Milne considers that alcohol and/or Sertraline toxicity is an unlikely cause of death but because of the decomposition cannot altogether exclude such a possibility.

320. Dr Milne also said that:

- if the deceased had fallen 14m from the bridge to where she was found, he would have expected significant injuries such as fractures;
- no fractures were present;
- however, if she had fallen into "a depth of water", injuries might not have been detectible;

- a fall from a height cannot be excluded as a possible cause of death;
- a fall into water could predispose to drowning;
- the absence of diatoms does not exclude drowning as a possible cause of death, given the extent of decomposition;
- movement of the body in water cannot be excluded as a possibility;
- impact with a rock, with force, could have caused the internal chest injury observed.

Mr Giles

321. Dr Milne's view that, soon after death, the body was deposited where it was found underneath Kholo Bridge is supported by other evidence.

322. The hydraulic engineer, Martin Giles, considered data, including flood and flow levels in Kholo Creek, rainfall and data in the catchment area and other information, including personal observations of the bridge area.

323. Mr Giles concluded that the water in the creek would not have been enough to move the body from elsewhere to its location under the bridge.

324. He reasons that:

- the relationship between the tide level in Kholo Creek and the ground level where the body was found is of the order of 100mm at most;
- it is impossible to imagine that the depth of flow calculated would have been sufficient to move a body from elsewhere into that location.

Dr Wallman

325. Dr James Wallman has been a forensic entomologist since the early 1990s.

326. He was given insect specimens to see if he could state a minimum timeframe between death and collection of the specimens on the afternoon of 30 April 2012.

327. He was also asked to consider whether the body had been submerged in Kholo Creek.

328. According to Dr Wallman, what he observed could be consistent with the deceased having been dead for 11 days.

329. As an entomologist examining the insect specimens received, he could not say whether the body had been submerged in water and, if so, for how long.

Dr John

330. Dr Jacob John is a retired professor who looks after the diatom collection that he had made over 40 years.

331. He gave this evidence.

332. Diatoms are microscopic algae found in water. They are predominately made of silica. So the diatom does not decompose.

333. He was given water samples from Kholo Creek.

334. He also received a piece of bone of the deceased with marrow in tact and some liver tissue.

335. In a typical drowning, a person will swallow “heaps and heaps” of water.

336. Water rushes into the lungs and ruptures the lung tissue.

337. After that, the water may be transported through the lymphatic system to other internal organs such as liver, kidney and bone marrow; and remain there.

338. Dr John conducted a microscopic examination.

339. He did not find any diatoms in the liver or in the bone marrow.

340. That is not what would have been expected had the deceased died by drowning.

Amanda Reeves

341. Amanda Reeves is a forensic scientist.

342. She testified that:

- the nails of the right-hand of the deceased were profiled. An incomplete DNA profile was obtained from one of them. It was unsuitable for meaningful comparison. Attempts to obtain DNA profiles from the remaining four samples were unsuccessful;

- DNA breaks down over time, depending upon the storage and environmental conditions. Body decomposition is a major factor. During decomposition, chemicals are produced that interfere with the ability to see a DNA profile;

- as to the left hand, there were five fingernails. Swabs of each nail were submitted for DNA analysis. The profile of sample 4 displayed very low level indications of the possible presence of DNA from a second contributor. But these levels were below the reportable threshold of the laboratory; and so it is a possibility that there was not a second contributor;

- the swab taken from the Captiva matched the DNA profile of the deceased;

- scrapings were taken from the fingernails of the Accused. DNA profiles were obtained from them. There were very low level indications of the possible presence of DNA from an additional contributor. They, however, were also below the laboratory's reporting thresholds.

Professor Drummer

343. Professor Olaf Drummer is a forensic pharmacologist and a toxicologist who has been involved in the interpretation of the biological effects of drugs and poisons for over 25 years.

344. Professor Drummer spoke of the levels of Sertraline - that is, Zoloft - and its metabolite in blood and liver tissue.

345. He said that Zoloft can be used for mood swings related to menstrual tension.

346. He described the therapeutic range as being between a normal starting dose of 50mg and up to 200mg daily, depending on patient mood and response.

347. Asked whether Sertraline is a toxic substance, he answered: "Not particularly so".

348. Professor Drummer said that no records he has considered show any case where an overdose of Sertraline by itself has caused death.

349. He was asked about the blood alcohol reading of .095.

350. Professor Drummer said that such a concentration can be produced by fermentation when a body is exposed to the elements over days.

351. He described the process in this way.

352. Bacteria form alcohol by a fermentation process.

353. It is quite common to find alcohol concentrations in a body that has been exposed to the environment for some days after death.

354. According to Professor Drummer, the analysis of the stomach contents for Sertraline shows that:

- there was no recent – that is, hours before her death – ingestion of a large number of tablets;
- moreover, the small amount of Sertraline present – only a tiny fraction of one tablet – could be the result of some remnant from a previous, normal dose.

355. If an overdose had occurred, Professor Drummer would have expected much higher levels in the liver.

356. Professor Drummer was asked about serotonin syndrome. He said:

- that is a situation where excessive levels of serotonin are in the brain, as where Sertraline elevates serotonin levels to a large extent;
- the condition can cause confusion, anxiety, agitation and, in severe cases, delirium;
- Sertraline can cause the condition; but usually only when taken in overdose or in combination with other drugs;
- Serotonin syndrome would not be expected in people taking the normal prescribed dose of Sertraline.

357. Professor Drummer concluded that the levels of the drug do not suggest that Sertraline made any contribution to death.

Dr Robertson

358. Dr Michael Robertson has been a forensic toxicologist for about 20 years.

359. He conducted a review based on documents concerning the post-mortem results.

360. He spoke about levels of Sertraline found in the body of the deceased.

361. Based on studies of post-mortem redistribution of the drug, he thought that what was found in the liver blood was considerably higher than what the studies had indicated over the period examined in the studies: 28 - 48 hours or so.

362. Possible explanations are:

- ingestion of more than 100mg daily on the day or days prior to death; or
- an unusual amount of post-mortem redistribution; or
- which is less likely, some level of contamination during the post-mortem examination itself.

363. Dr Robertson said that serotonin syndrome:

- occurs where serotonin is at too high a level in the brain;
- can cause confusion, agitation, unusual behaviour and incoordination.

364. Speaking of the possible risk of suicide, Dr Robertson said:

- individuals on anti-depressant medication have a higher risk of suicide;
- suicidal ideation is a possible effect of selective serotonin reuptake inhibitors, which is “more an issue” in the first four or five weeks after starting on such medication.

365. As to what the post-mortem results reveal concerning the deceased’s ingestion of Sertraline, Dr Robertson:

- accepted that there had not been a recent ingestion of a large amount of the drug;
- said that, because of the decomposition, it is “absolutely” possible that the deceased may have had no Sertraline at all in her stomach when she died;
- having used the drug since 2003, she would have a tolerance to it, which, over time, would reduce residual adverse effects.

366. Dr Robertson also testified that:

- Sertraline is a drug of low toxicity that is not often reported to be associated with drug-related deaths alone;
- the levels of Sertraline in the blood were not consistent with the majority of Sertraline-related deaths;
- the levels of Sertraline in the liver tissue were not consistent with what might be expected following an acute overdose;
- the absence of significant amounts of Sertraline in the stomach suggests that an acute administration leading to death shortly after ingestion is unlikely.

Dr Guymer

367. Dr Gordon Guymer has worked as a botanist since 1980. He is the director of the Queensland Herbarium.

368. One of his fields of expertise is the identification of plants.

369. Dr Guymer examined plant material and identified six species.

370. Four of those species had been entwined in the hair of the deceased.

371. The common names of those four are crepe myrtle, cat’s claw creeper, fishbone fern and eucalypt leaves.

372. The other two species associated with the body but not entwined in her hair were Lilly Pilly and Chinese elm.

373. According to Dr Guymer:

- the crepe myrtle leaves entwined in the deceased's hair were fallen leaves;
- one of the cat's claw creeper leaves (that depicted in Ex. 138) was a detached leaf that had been pulled from a live plant after the claw caught on something: so it was not a fallen leaf;
- he was unable to say whether the other three cat's claw creeper leaves were connected to the creeper or else loose before becoming entwined in the deceased's hair;
- of the fishbone fern samples, some were fallen and some may have been fresh;
- the parts of eucalypt leaf were fallen leaves.

374. On Friday 13 July, Dr Guymer conducted a botanical survey at the Kholo Creek Bridge area.

375. Chinese elm was present. In the distance were some eucalypts.

376. They, however, were the only two species at that location of the six taken from the body.

377. At the Baden-Clay home at 593 Brookfield Road, a plant survey on 13 July 2012 revealed the presence of crepe myrtle, cat's claw creeper, fishbone fern and Lilly Pilly.

378. At the back of the house were fishbone fern, crepe myrtle, cat's claw creeper, a Chinese elm and not far from the boundary a eucalyptus tree.

379. Dr Guymer conducted a botanical survey along Brookfield Road within 800m of 593 Brookfield Road, surveying the area between the edge of the road and the edge of property.

380. He then surveyed Brookfield Road via Rafting Ground Road to Moggill Road to Mt Crosby Road and on to the Kholo Creek bridge – a distance of 13.6kms.

381. There was crepe myrtle in Rafting Ground Road at one address, and at five addresses on Moggill Road.

382. He saw one instance of cat's claw on Moggill Road: at Pinjarra Hills in a patch of bush along the fence line.

383. He saw some fishbone fern at 36 Boscombe Road and along Rafting Ground Road at a place he identified. And he saw some clumps of fishbone fern between those two addresses.

384. In relation to the 800m along Brookfield Road, he observed no cat's claw creeper or Lilly Pilly.

Affair

385. Toni McHugh gave this evidence.

386. She began an affair with the Accused in August 2008.

387. The relationship was up and down all the time, year after year, with discussions about their having a future together.

388. At one stage, the Accused told Ms McHugh that he was fearful that the deceased would not be able to manage a separation or a divorce, and he was concerned about the impact of that on his girls.

389. After the deceased learned of the affair, she remonstrated with the Accused.

390. He then informed Ms McHugh that their relationship was over.

391. She had to leave her employment at Century 21 Westside.

392. But the affair was not over.

393. Just before Christmas 2011, the Accused contacted Ms McHugh. They met.

394. He said he wasn't ready to leave his wife but that he was going to leave her.

395. He also told Ms McHugh that he loved her, did want to come to her unconditionally, and wanted to be out of his marriage.

396. On her account, the affair resumed.

397. At some stage in 2012, the Accused suggested to Ms McHugh that they not meet again until he had left his wife.

398. But he did say that he would be leaving his wife by the first of July.

399. Some email correspondence between the Accused and Ms McHugh is in evidence: see Exs. 61-64.

400. Ms McHugh had had previous assurances from the Accused about being together that had come to nothing. She did not believe the latest of them.

401. The email referring to 1 July was the first time that the Accused had nominated, in writing, a date by which he would be with Ms McHugh.

402. By mid-April 2012, they were in fairly regular contact.

403. On the afternoon of Thursday, 19 April, the two of them spoke by phone.

404. Call charge records reveal that they spoke for more than 29 minutes between 5.03pm and 5.40pm.

405. He was in the supermarket getting food for dinner at his parents' house with his children.

406. She told him that she was looking forward to attending the real estate conference the next day.

407. He said that there was something he had to tell her: two of his staff members were attending.

408. She realised that they would be the deceased and Kate Rankin.

409. According to Ms McHugh, she "lost it". She asked the Accused when he was going to tell her.

410. She went into a rage as the conversation proceeded.

411. She told the Accused that he needed to tell his wife "what is going on" because it was not fair to either of them to be in the same room together.

412. It was not an option for her not to attend the conference because she had just started a new job.

413. Ms McHugh also told the Accused that she needed to know what was happening: "What is your plan", asking him "what are you going to do to change things for us to be able to be together".

414. His response was to say that he was thinking of selling the business after he had left his wife.

415. Ms McHugh asked to meet with him. She wanted to talk things through. Without responding to that request, he said he had to go.

416. The next day, Friday the 20th, Ms McHugh went to the conference.

417. During a lunch break, she called the Accused.

418. He told her that the deceased was missing.

419. She asked: "What happened?...Did you argue?".

420. He said: "No. There was nothing. She's just gone missing."

421. He told her that she needed not to communicate with him and to "lay low".

422. The following morning, the Saturday, the Accused rang Ms McHugh and told her that the police would need to speak with her.

423. She asked: "what am I supposed to say?".

424. He advised her to: just tell the truth.

425. Later that day, while Ms McHugh was at the police station, the Accused called her. He asked her whether she could talk. She said no.

426. He then asked her to "just answer yes or no", and enquired: "Have you told them that we are back together again".

427. She simply answered: "Yes".

428. Ms McHugh complied with the request not to contact the Accused.

429. After a while, however, he telephoned her.

430. He said: “I need you to know that I don’t know what’s happened here. I need you to know I love you…”.

431. Later, on the Accused’s initiative, the two of them met at a block of units in the Valley for more than an hour.

432. He told her that she would have to fall in love with someone else.

433. He also said that he suspected that things weren’t going to be looking good for him.

434. That day in June 2012 was the last time they met.

Mental health

435. A number of witnesses mentioned seeing indicia of depression and anxiety in the deceased over the years.

436. The Accused gave a deal of evidence on the topic.

437. There is medical and psychological evidence about the deceased’s mental state after she was adversely affected by an anti-malarial drug that she took for a trip to South America.

Dr George

438. Dr Tom George is a psychiatrist.

439. He gave this evidence.

440. The deceased consulted him in 2003. Between then and their last consultation in mid-2009, there were 31 face-to-face consultations.

441. On the first occasion, the deceased was pregnant with her second child.

442. She had experienced panic attacks. She was becoming depressed.

443. Dr George diagnosed depression.

444. He started treatment, with 50mg of Zoloft daily.

445. Within the next six weeks, there was steady improvement. By the time the deceased gave birth, she was virtually symptom-free.

446. Her condition resolved and remained so for the vast majority of the time that she was under Dr George's care.

447. In 2007 and 2008, there were, Dr George testified, "no problems whatsoever" with depression or anxiety.

448. In early June 2009, the deceased and the Accused went together to see Dr George.

449. They spoke about problems in the marriage, including some related to the Accused's financial stresses.

450. The deceased did not want to end the marriage.

451. The Accused said he was contemplating doing so. But he felt guilty about the impact that such a decision would have on his wife and children.

452. Dr George gave them the name of a marital therapist to consult.

453. Dr George saw the deceased twice after that: on 26 June and 29 July 2009. On both occasions, she was free from depression but unhappy about the state of her marriage.

454. On 29 July 2009, she was still using 100mg of Zoloft daily.

455. Dr George prescribed 100mg daily as a standard dose which relieved her symptoms so that she was able to function normally.

456. According to Dr George, beyond the first two consultations, the deceased was never depressed. She was functioning well. She had plans for herself and her children and was living an active, interesting and social life.

457. Dr George said that suicide was "never an issue".

458. During their first consultation, on a rating scale used in assessing post-natal depression, she had answered a question: "The thought of harming myself has

occurred to me" with: "hardly ever". Speaking to Dr George, she said that she had not been tempted to do anything.

459. When the test was next administered, two months later, the same question was put. This time, her answer was: "never".

460. He did not ask her questions about suicidal thoughts because she was not depressed.

461. Moreover the deceased presented as extremely attached to her children; and a maternal attachment has a protective effect in terms of wanting to continue living.

462. Dr George agreed with these propositions:

- it is not uncommon for suicide to be unexpected, even to mental health professionals;
- persons very often harbour suicidal thoughts which are not shared;
- people suffering from depression and harbouring suicidal thoughts can keep that hidden to the eyes of both lay people and professionals;
- one does not need to be suffering from severe major depression to consider suicide;
- often the final decision to commit suicide is made quickly; and
- no doctor can with complete confidence guarantee that a person under their care with depression is free from risk of suicide.

463. He agreed with the last proposition, in general.

464. But he added that the proof of judgment is in the result achieved. And she had been under his care for six years and had not done anything to self-harm.

Dr Lumsden

465. On 9 December 2010, the deceased consulted a psychologist, Dr Lumsden, proposing that he speak to her husband about their relationship.

466. Dr Lumsden administered a DASS instrument. DASS stands for depression, anxiety and stress scale.

467. Her levels on that scale, Dr Lumsden said, were "absolutely normal".

468. He assessed her risk of being suicidal as "absolutely zero".

469. Her recovery from past depression was discussed. Dr Lumsden thought her "completely normal".

470. That was the only occasion Dr Lumsden saw the deceased. He later had three consultations with her husband.

Dr Bourke

471. On 30 May 2011, the deceased presented to Dr Bourke, a general practitioner, to tell of recurrence of some symptoms of depression. She mentioned two stressors: her relationship with the Accused and finances.

472. She had low mood, was anxious and at times teary.

473. She was keen to restart Zoloft, which had been previously used with success.

474. Zoloft, at 50mg daily, was prescribed.

475. Three months later, on 24 August, Dr Bourke performed a K10 mental health assessment.

476. It revealed that it was unlikely that the deceased was experiencing any significant distress.

477. On 20 September 2011, Dr Bourke saw the deceased to review the results of blood tests ordered in May. No mental health issues were raised.

478. On 6 October 2011, the deceased told Dr Bourke that she had found out in the preceding fortnight that her husband was having an affair. She was obviously distressed.

479. Dr Bourke thought that the deceased was experiencing a flare up of usual symptoms that recurred when acute stressors came along.

480. A daily Zoloft dose of 100mg was prescribed.

481. In Dr Bourke's opinion, the deceased was not at high risk of suicide.

482. His reasons for that opinion included that she had:

- a high degree of resilience;
- insight into her condition and its treatment by Zoloft and through counselling;
- not said anything to suggest that she was potentially suicidal.

Ms Nutting

483. On 13 October 2011, the deceased saw Ms Nutting, Psychologist, with the Accused.

484. She mentioned the affair with Ms McHugh and how it had impacted on her self-esteem.

485. The Accused said he wanted to "fix it" – apparently a reference to his relationship with the deceased.

486. The deceased told Ms Nutting that she was taking 100mg of Zoloft daily.

487. She related a history that included being an anxious child. But she had pushed through anxious situations. She also spoke of a panic attack during her second pregnancy and of experiencing another panic attack: vomiting before a ballet performance.

488. When Ms Nutting saw the deceased on this occasion, she did not seem to be experiencing too many of the symptoms of depression.

489. On 2 November 2011, the deceased again presented to Ms Nutting. This time, she appeared "more fragile" and less positive about her relationship with the Accused. She mentioned flashbacks in which she saw "Gerard's girlfriend's car at the gym".

490. On 7 December 2011, both Baden-Clays saw Ms Nutting. Both seemed to be stressed. But the deceased appeared more composed, and more confident that the relationship with her husband could be healed.

491. Ms Nutting expected them to return for another session. Neither did.

GP

492. On 19 March 2012, the Accused saw a local GP for a pap smear. She mentioned pre-menstrual mood swings.

493. The doctor wrote a prescription that would allow for a 100mg daily dose of Zoloft.

494. Zoloft is prescribed for pre-menstrual mood swings – not just as an anti-depressant.

495. The deceased last had a script for Sertraline filled on 13 March 2012. The script was for thirty 100mg tablets: see Ex. 179, Admission No. 27.

Dr Schramm

496. Dr Mark Schramm, who has practised as a psychiatrist for 20 years, had seen some medical and psychiatric reports and a transcript of the evidence of Dr George and Ms Ritchie. He had, however, not interviewed anyone in making his assessments.

497. Dr Schramm testified that:

- about 3% of people who suffer from major depression will take their lives;
- fewer than half of those who do so leave a note;
- it is not uncommon that suicide is a surprise; and about half of those who kill themselves will have seen a medical practitioner in the preceding two weeks and, presumably, not shown signs of suicide;

- one cannot be completely confident that someone would not commit suicide.

498. Dr Schramm, however, acknowledged that his evidence about a link between major depression and suicide consisted of general remarks that do not purport to express a view about the deceased.

499. He also said that:

- maternal attachment is a protective factor against suicide;
- an absence of a "triggering event" makes suicide less likely;
- where a person makes short and long-term plans, that would lead to less concern about the prospect of suicide;
- the deceased sought help when she was not coping.

500. As to the Zoloft taken by the deceased, in Dr Schramm's opinion, any adverse effects would ordinarily have become apparent at the time of initial use of the drug, adding:

> "If Allison had not experienced those side effects upon commencement…, she would have been unlikely to experience them when she was commenced on that medication again down the track."

501. There is no record of the deceased ever having indicated that she experienced any adverse symptoms from taking Zoloft.

502. Dr Schramm:

- said he did not know when the deceased was last actively depressed;
- did not think that recommencement with Sertraline, or increasing the dose, would very likely impact on suicide risk. Normally, any such increased risk would occur when a person first started on the medication.

Counselling with Ms Ritchie

503. Carmel Ritchie is a relationships counsellor.

504. She saw the deceased, alone, on 27 March 2012.

505. She told Ms Ritchie of her husband's affair, that her husband criticised her parenting, and that she feared that, one day, he would leave.

506. The deceased also told Ms Ritchie:

- the history of her relationship with the Accused and her goals;
- that she was a conflict avoider;
- that she had spent the last ten years saying that she was not depressed.

507. When talking about her depression, Ms Ritchie was left with the impression that it was well managed and not an issue at the time, although Ms Ritchie did not direct any specific enquiries to that and, importantly, does not have medical or psychological qualifications.

508. On 16 April 2012, the deceased returned to Ms Ritchie. This time, she brought the Accused with her.

509. Ms Ritchie gave this account of the session.

510. Ms Ritchie spoke first with the Accused, alone.

511. He said that he wanted to build a future together with Allison but that "Allison does not trust me. She questions me."

512. Ms Ritchie asked him to identify his goal for counselling. He replied: "I want to build a future together, not regressing. I want to get on with life and wipe it clean."

513. Ms Ritchie told the Accused that the first step in trying to heal the damage was to sit and listen frequently to his wife's expression of feelings about the affair. This was, she said, to happen every second night until the next appointment.

514. The Accused was very resistant to that proposal. He saw it as "regression".

515. Ms Ritchie was insistent, telling the Accused he had only to listen to what was going on for his wife.

516. Eventually, he agreed that he would sit down and listen to his wife's feelings for a minimum of 10, and no more than 15, minutes every second day.

517. His role was simply to listen.

518. Any talk of the affair was to be limited to that time. The rest of the two days was to be, as Ms Ritchie described it, "affair-free".

519. Ms Ritchie bought the deceased into the room. She told her husband that she was over the moon that he had spent the time with Ms Ritchie.

520. Ms Ritchie told the deceased what she had said to the Accused about listening to her expression of feelings about the affair, and of her plan to achieve that.

521. When the deceased left, she appeared to Ms Ritchie to be "very hopeful".

The journal – and Wednesday, 18 April

522. The deceased's journal (Ex. 98) contains points and questions, some of which the Accused said were raised with him by his wife on the night of Wednesday, 18 April.

523. These included:

- how many times the Accused and Ms McHugh would lie together with the seats down in "Snowy";
- whether the Accused and Ms McHugh would kiss or hug;
- the layout of the house: presumably, a reference to Ms McHugh's unit where assignations took place;
- expressions of her feelings.

Thursday, 19 April 2012

524. At about 8.30am on Thursday, 19 April, the deceased spoke to Fiona Christ.

525. They discussed sleeping arrangements the following night for their children, helping out at a Mothers' Day stall, and the birth of the Accused's nephew.

526. About half an hour later, the deceased spoke to Mrs Swalwell about helping out at the Mothers' Day stall.

527. The deceased went to work. There she began a four hour training session with Mrs Nielsen.

528. They discussed strategies to grow the rent roll business.

529. When they parted at about 1.30pm, Mrs Nielsen thought that the deceased was very positive about growing the business.

530. The deceased left the Century 21 Westside office that afternoon.

531. She went to the hairdresser in advance of attending a real estate conference in the City the next day.

532. For about half an hour from about 5.00pm, the Accused and Ms McHugh spoke by phone.

533. At the hairdresser's, Ms Waymouth coloured the deceased's hair.

534. She left the salon around 7.00pm, apparently happy with the colouring and returned home.

535. The Accused's sister, Mrs Baden-Walton, spoke to the deceased by phone at about 8.30pm. The deceased was speaking quietly, saying that the children were going to sleep.

Friday, 20 April 2012

536. The Accused's mobile phone was connected to a charging device at 1.48am on Friday, 20 April 2012.

537. It was removed from a charging device at 6.18am.

538. In the morning, the Accused told his children and others, including police officers, that he had cut himself shaving while in a rush to get his girls ready.

539. At about 6.30am, he told his father that the deceased had gone for a walk and had not returned.

540. His father and sister took their cars to the Brookfield Road house.

541. At about 7.00am, the Accused drove away from the house, saying that he was going to look for his wife.

542. At 7.15am, the Accused made the triple 000 call.

543. There were two family cars – a white Prado, normally driven by the Accused, and a silver Captiva, usually driven by the deceased.

544. The Baden-Clays had had the Captiva since 25 February 2012.

Constable Ash

545. Constable Ash arrived at 593 Brookfield Road at about 8.00am on the Friday morning.

546. The Accused told Ash that:

- his wife had gone for a morning walk and not yet returned;
- he had last seen her about 10.00pm;
- she had fallen asleep on the couch while watching the Footy Show.

547. Ash noticed the marks on the Accused's face.

548. The Accused said that he had cut himself shaving that morning because he was in a hurry trying to prepare the girls for school: get them dressed and breakfasted.

549. Ash looked through the house. He did not see blood or sign of a struggle.

550. Ash looked for the deceased's mobile phone. It was not found.

551. In the Captiva, Ash found an empty box of medication prescribed for the deceased.

Sgt Jackson

552. Sgt Andrew Jackson arrived a little later.

553. He noticed that the bed in the main bedroom had been neatly made.

554. The Accused spoke to Jackson and Snr Sgt Narelle Curtis at about 8.20am. The recording is Ex. 86. The transcript is Ex. 87.

555. He was asked about his wife's state of mind: "pretty good", he said.

556. She had suffered depression "in the past". He said it had been managed by medication.

557. He was asked whether he and his wife had slept together last night.

558. He answered: "I don't actually know. I'm a heavy sleeper…I went to bed before she did last night…whether she slept there or not, I don't know…".

559. He was asked about morning routine. He said: "She does go walking in the morning". "If possible, she'll get up at about 5."

560. Curtis drew attention to the marks on his face. She commented that they could be consistent with having been scratched.

561. She asked whether that was the case. He answered no, saying: "I cut myself shaving".

562. The Accused said that he:

- had got up that morning just after 6;
- said he was rushing to get the girls up and then cut himself.

563. The Accused was asked whether any incident had happened the previous night that could have set his wife "off". He answered:

> "I don't think so…the counsellor on Monday suggested that we set aside 15 minutes a night…for Allison to be able to vent and grill me…and we did that."

564. Jackson asked: "when she vents, does she scream at you?"

565. He answered, "No. She's not like that…she didn't swear at me…".

566. Questions were asked about financial circumstances. "Things are pretty tight", he said.

567. The conversation reverted to the previous evening and the counsellor's strategy for a 15 minute discussion.

568. The Accused said that there was to be a 15 minute session "each day…each evening". He added:

> "We had one…last night and…there were some difficult things that we talked about. But we finished. Then we…talked about…what were the plans for today…"

mentioning a sleep-over for the children.

Snr Constable Simmons

569. Another interview took place with Constable Simmons and other police officers.

570. The recording of this conversation, which began at 10.02am, is Ex. 91. The transcript is Ex. 92.

571. The Accused said that:

- he got up at probably 5 past 6
- his wife was not there;
- that was "not unusual".

572. He spoke of sending her a text message and trying to call her phone.

573. He was asked whether she slept in the same bed as he did the night before.

574. He answered: "I honestly don't know", adding "I'm just a very heavy sleeper".

575. He said that:

- he had cut himself shaving in the morning while “rushing”;
- he was “doing everything” that morning because his wife was going to a seminar;
- he was rushing to make sure that he could get the girls ready “and everything”.

576. The enquiries turned to his wife’s medication for depression. He said that:

- she had been taking medication for that condition;
- it may be “that she’s not any more”;
- they had not talked about her medication for quite a long time.

577. He was asked how his wife had been the last week or so. “Pretty good”, he answered.

578. Simmons enquired whether there were any signs that she had been overly depressed.

579. He answered: “No”.

580. Questions were asked about compliance with the counsellor’s suggestions.

581. The Accused mentioned that one of the strategies was to spend “15 minutes a night, or every second night” discussing the issues, trying to rebuild trust, and for his wife to have an opportunity to vent her feelings and ask questions.

582. He mentioned that:

- there had been a 15 minute session “last night”;
- after the discussion, he had washed the lunch boxes;
- then they talked about what the plans were “for today”.

583. Those plans included that he was to get the children ready as his wife was planning to leave the house at around 7.00am.

584. Simmons asked whether there was anything in particular that had been discussed in the 15 minute block the previous evening.

585. The Accused replied:

> "She actually had a list of questions for me."

586. He went on to explain that he had expressed a concern to the counsellor about the plan because he did not want to keep dredging up the past. He did not see that as beneficial. The counsellor had disagreed.

587. The Accused said that:

- the discussion the previous night related to a list of questions that his wife had written down;
- they were "the sorts of questions which I felt weren't beneficial…because I didn't want to keep dredging that…up again."

588. The Accused mentioned that his wife would usually have her mobile phone with her.

589. There was discussion about his financial circumstances.

590. He described them as being, "at the moment", "pretty dire".

591. He had not bought new razor blades for six months.

592. So, ordinarily, in the morning, he takes a long time to shave, being as careful as he possibly can.

593. That morning he had been rushing. He also spoke of having a bandaid on, which he had later taken off.

594. The Accused mentioned his business prospects, saying that the market was getting better and that he had a fairly positive outlook.

Interview 21 April 2012

595. On Saturday, 21 April 2012, the Accused told Sgt Mathies that:

- he went to bed at about 10.00pm on the Thursday night, at which time his wife was watching The Footy Show;
- he woke just after 6.00am;
- he was a heavy sleeper and did not really know whether his wife had been in bed the previous evening;
- later, “she must have been” in bed that night because when he went to make the bed the next morning, “her side of the doona was folded back as well”, adding, “so she must have done that when she got up”;
- he had asked his daughter Sarah to put a band-aid where he had cut himself shaving as he was “rushing”;
- he had sent text messages to his wife’s phone;
- when she goes for a walk, she does not walk through properties or yards but just walks along or on the road and steps off if a car comes along;
- she would usually take her phone with her;
- as to her mental state, she had been “predominately up”;
- asked whether she was in a frame of mind that she would want to do anything to herself, he answered: “No”;
- his wife had a history of depression, but that was “pretty well managed by her medication”;
- to go for her walk, she might get up in the dark because she knew the route she took.

Visiting GPs

596. The Accused saw Dr Candice Beaven, a general practitioner at Kenmore, on 21 April 2012.

597. She noticed three superficial vertical abrasions to the right cheek.

598. The Accused told her that:

- the marks were caused by a blunt razor;
- he had cut himself whilst he was shaving, in a rush.

599. Dr Beaven asked him if he had noticed himself bleeding. He replied that he could not be sure, was in a rush and must not have noticed.

600. She asked him how many motions he had used in injuring himself.

601. Initially, he said one.

602. Then he said it must have been a couple, adding that he must not have noticed because he was rushing.

603. At 4.00pm on 21 April 2012, the Accused saw Dr Renu Kumar, a general practitioner, at Taringa.

604. He showed her marks, including those which she described as two marks on the right cheek.

605. By the time the Accused consulted Dr Kumar, facial hair had grown over the area of the cheek abrasions.

606. Dr Kumar could still see through to the injury.

607. The Accused said he had been using an old razor in a “rush job”.

Investigations continue

608. On 22 April, Simmons went with Sgt Dash to conduct a forensic examination of the house.

609. Other examinations were conducted in the following days, and things were taken for examination.

610. Nothing of interest was found.

Snr Sgt Taylor

611. Snr Sgt Taylor was the forensic coordinator.

612. A number of tests and examinations at various scenes were conducted under his direction.

613. Investigations were made inside the house and around it.

614. No blood was observed.

615. There was no positive response to a presumptive test for blood in the house or in the carport area underneath.

616. There was no indication of a clean-up inside the house or in the interior of the Captiva.

Captiva – initial examination

617. On 22 April 2012, the Captiva was examined.

618. Childrens' toys and storage crates were in the rear area, where the seats were folded down.

619. There was staining on the driver's side rear wheel cowling in the third row of seats.

620. The photographer, Brett Schnitzerling, thought that it looked like a drink stain.

621. Next day, a luminol examination was conducted.

622. A reaction indicated the presence of blood in the area photographed the day before.

623. It was blood of the deceased.

Snr Constable Carl Streeting

624. Snr Constable Carl Streeting is a forensic scientist.

625. Exhibit 96 is the photograph of the Accused's razor.

626. It was tested for the presence of blood visually, as well as by using TMB.

627. No blood was seen, and there was no reaction to the TMB.

628. Blood, however, can be washed away by water.

629. Streeting examined the razor blade by microscope. He saw no damage to it.

630. On 15 May 2012, Streeting looked at the Captiva.

631. On the driver's side, in the third row of seats, he observed a transfer blood stain.

632. There was also a flow rivulet of blood attributable to gravity acting on the transfer blood stain, allowing blood to drip down.

633. See Ex. 116, which also reveals another nearby flow rivulet which could be from blood transfer.

634. According to Streeting, a transfer blood stain occurs when an object, which could be a person, bearing a source of liquid blood, comes into contact with a surface and thereby transfers the blood to that surface.

635. Streeting acknowledged that it is not possible to say how long the blood had been there.

Facial injuries

Dr Stark

636. Dr Margaret Stark qualified as a medical practitioner in 1981. She has been a specialist forensic physician since 1989.

637. Her work involves interpretation of injuries and identification of their causes.

638. Dr Stark did not examine the Accused. She considered material given to her, including photographs of his right cheek.

639. In Dr Stark's opinion, the right cheek injuries are of two different types:

- three abrasion injuries, "yellowy" in colour;
- redder abrasions.

640. The differences between them suggest to Dr Stark that these may be two sets of injuries caused at different times, with the red more recent than the yellowy.

641. Looking at a photograph taken by the police on 20 April at 1.00pm, Dr Stark spoke of the yellowy injuries as "not perhaps within a few hours. Maybe a day or so…but it's very imprecise. They're not fresh…".

642. In Dr Stark's opinion those yellowy injuries:

- had resulted from contact with a rough surface; and
- are "typical of fingernail scratches".

643. She explained the variation in the appearance of each of the three yellowy abrasions by saying that a scratching of the face presents a dynamic situation. The person scratched will tend to move away from the threat. "It hurts. So they'll pull away", she said.

644. Dr Stark expects that blood might have been produced by those three injuries.

645. She accepted that there are serious limitations in the interpretation of photographs for forensic purposes, including that ageing injuries by photographs can be problematic.

646. Age can also be influenced by the particular characteristics of the injured person, including medication.

647. Dr Stark had seen photographs, the quality of which are “not great”, of the deceased’s fingernails.

648. In her opinion, the three yellowy abrasions could have been caused by those fingernails.

649. But there are, she acknowledged, no definite characteristics of the injuries to show that they were “100% caused by a fingernail”.

650. Dr Stark considered whether the yellowy abrasions could have been caused by the Accused’s razor and disposable blade head depicted in Ex. 96.

651. She considers that the yellowy abrasions are not typical of a razor blade injury, even if the razor is blunt.

652. Razor blades usually cause a finer skin abrasion such as a nick.

653. The possibility that the yellowy abrasions were caused by a razor blade cannot be completely excluded.

654. The lower on the cheek, redder injuries, however, present as almost pinpoint dots.

655. According to Dr Stark:

- those redder injuries may have been caused by a razor blade;
- it is possible that they were caused by a fingernail.

Dr Hoskins

656. Dr Robert Hoskins is a medical practitioner who graduated in 1982.

657. He holds specialist qualifications in forensic medicine.

658. Interpretation of injuries and their causes is part of his specialist role.

659. Dr Hoskins did not examine the Accused. He used photographs of the injuries in forming his opinions.

660. Dr Hoskins classifies the facial injuries into two groups:

- three abrasions, “browny” in colour. They are broad, relatively parallel injuries that are “raggedy- edged”;
- a second group that consists of scratches, located to the bottom left of the broader abrasions.

661. Dr Hoskins considers that the raggedy-edged abrasions are injuries “characteristic of fingernail scratches”, although there might be another explanation: for example, a tree branch with three protruding twigs could cause such injuries.

662. However, in the opinion of Dr Hoskins, it is “extremely implausible” that those injuries could have been caused by the Accused’s razor blade.

663. His reasons include:

- the device shown in the photograph – the disposable blade – has been designed over decades specifically to prevent injury;
- while people can injure themselves with such a blade, typically injuries produced in that way are small cuts, 1 or 2mm in size. They are not broad injuries of the character revealed in the photographs.

664. Dr Hoskins has seen photographs of the hands and nails of the deceased.

665. One nail was still attached to the hand. Having noted the characteristics of that nail, Dr Hoskins concluded that, if movement and pressure were applied, that nail would be likely to give rise to such injuries.

666. Those injuries would, in his opinion, have bled.

667. The second class of facial injuries – the scratches – have fresh dried blood within them.

668. According to Dr Hoskins, the blade head shown in Ex. 97 has the capacity to cause injuries of that second type, particularly if moved from side to side as it was drawn from front to back or back to front across the face.

669. Dr Hoskins addressed the difference in time between the infliction of the two classes of injuries.

670. He considers that the three broader abrasions were likely to have been caused earlier in time than the red scratches with their relatively fresh blood observable.

671. But he cannot say that with certainty. And in cross-examination he said of the red scratches: “I’m unable to say one way or the other whether that was separately caused or it was part of the broader injury itself”.

672. Ageing of injuries is difficult and imprecise.

Dr Griffiths

673. Dr Leslie Griffiths is a forensic medical officer. Interpretation of injury is part of his work.

674. Dr Griffiths physically examined the Accused at 7.15pm on 22 April.

675. Dr Griffiths estimated that the broad abrasions were at least 48 hours old. However, he acknowledged that there is imprecision in the ageing of injuries.

676. In his opinion, the abrasions resemble scratch marks and could have been caused by fingernail scratching.

677. There may be other explanations for those injuries.

678. But he cannot see how the razor shown in the photograph Ex. 96 could have caused the injuries he saw. That is highly improbable.

679. His reasons include that the injuries are abrasions, not cuts or nicks of the kind that a razor blade might cause.

Professor Wells

680. Professor David Wells has been a forensic physician for 28 years.

681. He assessed photographs of the Accused's injuries but did not examine him.

682. As to the right cheek abrasions, Professor Wells said that:

- The two linear abrasions are pronounced injuries, irregular, perhaps interrupted, broad and close to parallel;
- The first cause that comes to his mind when he sees such an injury is fingernails, or possibly a claw from a domestic animal such as a dog;
- Looking at the razor and blade depicted in Ex. 96, he cannot "reconcile that type of razor or those blades producing such an injury", adding that he cannot identify a mechanism whereby that blade could produce those sorts of injuries in normal use;
- Features of the broad abrasions are not consistent with having been caused by a razor, giving these reasons:
    i. the injuries are in an unusual site for a shaving injury. Shaving injuries tend to be located around skin protuberances;
    ii. the injuries are wide, whereas a blade in contact with the skin will produce a finer, or incised, wound;
    iii. the parallel nature of the injuries would mean reapplying the blade at what he called "that angle", which is unusual but, he added, "I suppose could occur if you were distracted";
    iv. the nature of the abrasions suggests a rough or irregular object as their cause, applied forcibly to the skin.

683. "I can't see how a razor blade from that type of razor…could produce that pattern of injuries", notably broad abrasions, Professor Wells said in reference to the Accused's razor depicted in Ex. 96.

684. The fine linear, perhaps incised, wounds nearby, which may be very fine linear abrasions, could have been produced by the razor blade.

685. In cross-examination, Professor Wells agreed that:

- In his report, he had written:

  "The fine linear incised wounds at the lower end of one of the abrasions may be caused by a shaving blade. That might also be due to the same implement that produced the abrasions, but applied at a different angle".

- If a blade of a razor is damaged, that increases the likelihood of producing skin injury.

Financial matters – evidence of friends and Ms Heath

686. After the floods at the beginning of 2011, the Accused borrowed money for his business from old friends, Robert Cheesman, Stuart Christ and Peter Cranna.

687. Mr Cheesman, an accountant, lent $90,000 in March/April 2011, in instalments.

688. He expected to get his money back as the business achieved expenditure reductions and increases in cash flow.

689. By April 2012, a few instalments of interest had been paid to him. None of the principal has been repaid.

690. Stuart Christ responded to the call from the Accused in late February 2011 to lend money.

691. He understood that the Accused's business was not going so well. New premises had been taken at Taringa, and new staff hired.

692. Without an injection of cash, the business would have been in severe trouble, in Mr Christ's assessment of the financial records.

693. Mr Christ lent $90,000, on terms that the money was to be repaid as soon as the Accused was able to do so.

694. None had been repaid by April 2012, although a few instalments of interest had been made, the last of them in August 2011.

695. Peter Cranna, an accountant, began lending money in February 2006. That amount, and more lent in November 2008, were repaid promptly.

696. Between March 2009 and February 2011, Mr Cranna lent more than $90,000. $19,000 of that was lent in February 2011.

697. When the last advance was made, the business was going through a difficult time.

698. By April 2012, the Accused owed Mr Cranna about $96,000. But Mr Cranna was not pressing for payment. Interest accruing was being capitalised.

699. Mr Cranna recalled that sales picked up from the drop after the floods to a better level.

700. He was happy with the direction things were going in and expected that the business would improve and that profitability would come.

701. Suzanne Heath was a friend of Bruce Flegg, a member of State Parliament.

702. Around 12 March 2012, Ms Heath spoke to the Accused.

703. He said that he was having financial trouble and wanted to know if Dr Flegg could lend him money, mentioning about $300,000, which he had earlier declined to do in December.

704. He was distressed and said that if he did not get the money, he would go broke or bankrupt.

Lies

705. The prosecution contends that the Accused lied:

- on oath, in giving evidence; and
- when speaking to the police on 20 and 21 April 2012.

706. Essentially, the same lie is suggested: in effect, that the broad abrasions on the Accused's right cheek were caused by a razor blade when shaving on the morning of Friday, 20 April.

707. The prosecution contends that the Accused lied about the scratches because he perceived that the truth would have revealed that his wife scratched him with her fingernails while resisting his violent attack that caused her death; and in circumstances where he intended to kill her.

708. A statement by an accused person that is shown to be false may, in some circumstances, go indirectly to prove something: it may be something from which an inference concerning guilt can sometimes be drawn.

709. However, it would be wrong to approach the case on the basis that, if the Accused told lies, he must have killed his wife.

710. So bear in mind this warning: do not follow a process of reasoning to the effect that, just because the Accused has lied - if that is your view - that is evidence of guilt.

711. Importantly, with one possible exception, any lies he has told - whether to the police or when testifying - are relevant only to his credibility.

712. It is for you to consider whether any lies told do affect his credibility. It is a factor to take into account.

713. The Accused's assertion that his facial injuries were sustained when shaving, however, may have another significance, depending on your assessment.

714. For a lie to have a tendency to prove guilt, it must be a lie which an innocent person would not tell, and which was told for the reason that the Accused perceived that the truth is inconsistent with his innocence.

715. Accordingly, you cannot hold a lie against this Accused as supporting an inference that he murdered his wife unless the following requirements are met.

716. First, you must be satisfied, by other evidence, that the statement in question was false, and that the Accused knew that it was false: in other words, that it was a deliberate lie.

717. The prosecution contends that that assertion is a lie which tends to prove that the Accused murdered his wife.

718. To establish that the Accused lied about those facial injuries, the prosecution must first establish that they were not caused by his razor.

719. In the attempt to do this, the prosecution relies particularly on the evidence of Dr Stark, Dr Hoskins, Dr Griffiths and Professor Wells.

720. The defence, however, contends that the statement that he cut himself shaving is not a lie. Rather, it is the truth.

721. If you find that what the Accused said about injuring himself while shaving was false, still there is more for you to consider.

722. There is a difference between the mere rejection of someone's account of events and a conclusion that the person has lied.

723. Sometimes, where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told.

724. Secondly, the lie must be concerned with some circumstance or event connected with the death of his wife that reveals a knowledge of that event.

725. Thirdly, the lie must be told because the Accused realised the truth of the matter would incriminate him: that is, he must be lying because he believed that the truth would show that he had killed his wife.

726. An accused person might tell lies for reasons other than a realisation that the truth of the matter would incriminate him.

727. People do not always act rationally, and telling a lie may be explained in other ways.

728. If the Accused lied for some reason other than to avoid his incrimination in the death, that lie cannot be used as evidence that he killed his wife, let alone that he murdered her.

729. As people sometimes do have an innocent explanation for lying, take into account any such reason there was, or may have been, for the Accused not to tell the truth.

730. If a reason of that kind may account for the lie, you cannot regard the lie as indicative of guilt.

731. There is another, critical point for your consideration.

732. It relates to the difference between murder and manslaughter.

733. Both murder and manslaughter involve an unlawful killing.

734. Murder additionally requires proof, beyond reasonable doubt, of an intention to kill or to cause grievous bodily harm.

735. If you conclude that the Accused lied because he realised that the truth would implicate him in killing his wife, you would need carefully also to consider whether the lie reveals a consciousness of guilt merely with respect to manslaughter as distinct from also revealing an intention to kill or to cause grievous bodily harm.

736. You may only use the lie about cutting himself shaving – if a lie it is – as tending to prove the element of murder of an intention to kill or to cause grievous bodily harm if, on the whole of the evidence, the Accused lied because he realised that the truth of the matter in that respect would show that, in killing his wife, he had intended to kill her or to cause her grievous bodily harm.

737. It may be that, even if you were to find that the Accused lied about his facial injuries because he realised that the truth would show him to be the killer, still you would not conclude that the lie shows that he realised that her death after scratching him with her fingernails would show that he had killed her intentionally.

Other allegedly incriminating conduct

738. The prosecution relies on other conduct of the Accused as showing that he killed his wife and, in respect of some of the conduct, that he murdered her.

739. Let me deal first with conduct that is said to show that the Accused killed his wife but is not said also to prove that he did so intentionally.

740. The prosecution points to:

- disposal of the body at Kholo Creek, which, it is said, was to distance himself from his involvement in the killing;
- hiding the body in a remote location and delaying the discovery of her death, and thus the investigation into it;
- choosing a location that accelerated the decomposition of the body by exposure to the elements, which included water, thereby increasing the likelihood that any forensic evidence linking the Accused to the killing would not be able to be identified.

741. Depending on the view you take of it in the light of all the evidence, that conduct might tend to prove that the Accused killed his wife. So it is relevant to the alternative of manslaughter.

742. But it cannot prove that he killed her with the intent requisite to murder.

743. The reason is this.

744. There is no satisfactory foundation for a conclusion that her body, if examined promptly, would have revealed a state of affairs tending to prove that the Accused killed her with the intention requisite to murder.

745. That possibility is mere speculation.

746. That is why you cannot use his disposal of her body – if that is what he did - as supplying proof of an intention to kill or to cause grievous bodily harm.

747. I turn to other conduct which the prosecution contends shows that the Accused murdered his wife.

748. This is that:

- the Accused disguised the abrasions on his face by placing shaving cuts in that area in an attempt to provide an innocent explanation for the injuries; and

- this was done to conceal injuries which linked him to the killing of the deceased in circumstances where they evidenced a violent struggle and thus an intention to kill her.

749. The prosecution contends that that conduct occurred, and that it evidences a consciousness of guilt of murder: that is, it amounts to implied admissions of both elements of murder.

750. Before you may use the Accused's conduct as tending to prove an implied admission of either element, you must first be satisfied that the conduct is not explicable on some other, unrelated basis.

751. People do not always act rationally. A possibility to consider is that the conduct in question might be explained in some other way: for example, as the result of panic or for other reasons having nothing to do with the death.

752. Such matters need to be considered before you could safely draw an inference adverse to the Accused from the conduct.

753. Again, as with lies, carefully consider whether the conduct may be explicable on the basis that even, if the Accused, by his conduct, impliedly admitted that he had unlawfully killed his wife, his conduct may not impliedly admit that he did so with the intention requisite to murder.

754. In approaching the question whether the conduct tends to prove both elements of murder, you ought not simply infer from the fact that the Accused killed his wife – if that is your view – that he intended to kill or to cause grievous bodily harm.

755. Whether his conduct impliedly admits that he killed with the intention requisite to murder is a separate matter calling for careful consideration.

756. The defence contends that the evidence would not persuade you that the Accused tried to disguise the scratch marks inflicted by his wife's fingernails by afterwards using his razor to make the smaller incisions.

757. Or it may be that the conduct in question does not tend to prove an intentional killing, as distinct from manslaughter.

Accused's evidence

758. The Accused testified that he:

- did not kill his wife;
- had never been scratched by her;
- got the marks on his right cheek that were observed on 20 April 2012 when he was shaving that morning while getting ready for work and preparing the children for school.

759. He gave evidence about his wife's anxiety and depression, before and after the first consultation with Dr George in 2003.

760. Dr George mentioned possible side effects that included weight gain and loss of libido.

761. He told you that:

- after taking Zoloft, the deceased did put on weight, and that their sex life basically became non-existent;
- he "wanted sex";
- there had not been physical intimacy with his wife for years when he began a month-long affair when his wife was pregnant with their third child.

762. In August 2008, the Accused commenced a physical relationship with Toni McHugh.

763. Over the ensuing years, according to the Accused, he tried to break off with Ms McHugh on numerous occasions.

764. They always re-commenced their physical relationship.

765. "Physical" was how he characterised his relationship with Ms McHugh. "I didn't really want anything more", he said.

766. Over time, however, Ms McHugh began to press him to divorce his wife and to start a life with her.

767. He testified that he told Ms McHugh that his loyalty was to his wife and children, and that he did not want to jeopardise that.

768. When Ms McHugh “pushed for things”, he would “tell her whatever she wanted to hear”.

769. He was the one who would break off their relationship from time-to-time, typically saying that: “There wasn’t a future for us” because he was “not going to leave Allison and the children”.

770. Ms McHugh would become angry and agitated.

771. He would hold out against her for a day or a week – sometimes even longer.

772. But the physical relationship would eventually resume.

773. While the affair was maintained, the Accused and his wife attended counselling.

774. During those sessions, he did not reveal that he was having an affair. He was ashamed and had hoped to end it.

775. He wanted, he said, his family to be together forever and to be able to enjoy each other’s company again.

776. His testimony reverted to his wife’s depression.

777. She kept reiterating to herself: “I’m not depressed. I don’t have depression.”

778. She would go on to Zoloft and come off it again; and that could happen without discussion between them.

779. The Accused spoke of how his business had grown and become more successful after August 2008, when he and two others were partners in the business together: Jocelyn Frost and Phil Broom.

780. There were, however, problems in the business.

781. From about September 2010, Ms Frost and Mr Broom had stopped selling real estate.

782. This affected the capacity of the business to pay the three of them.

783. Eventually, he found new premises for his Century 21 franchise to rent space.

784. The business moved there between Christmas 2010 and New Year.

785. In January 2011, nine new sales people were hired. That meant a team of about 26 sales people.

786. For the first two weeks in the new premises, the Accused's job was to train the new staff.

787. Then the floods came.

788. That had a "catastrophic" impact on the business.

789. The Accused's partners wanted to take the business into liquidation or else dismiss all the staff and see if they could hold out.

790. He thought that if the business could hold out in the short-term, they could improve "moving forward".

791. His partners did not want the risk.

792. He offered to buy them out and regain sole control.

793. They would then remain as sales staff.

794. Mr Broom stayed for a while. He did not meet his targets and left about the middle of 2011.

795. Ms Frost left soon after receiving a cheque for $10,000 – a pre-payment on a bonus.

796. The Accused owned ¼ of the rental business. Ms Frost owned half. Ben Bassingthwaite owned ¼.

797. Towards the end of 2011, the Accused decided that he wanted to own the whole rental business.

798. He contracted to buy the interests of the other owners of the rental business for $300,000.

799. He was not able to get finance to pay that $300,000.

800. The vendors agreed that he might own the business from January and pay them by 30 June, with an extension of 90 days available, at his discretion.

801. He paid Mr Bassingthwaite and Ms Frost their $30,000 (in aggregate) deposits, and kept up interest payments to them.

802. The Accused borrowed money from three old friends to fund “immediate cashflow issues”: Mr Cheesman, Mr Christ and Mr Cranna - about $90,000 from each, with no time set for repayment.

803. He was, he claimed, confident in the viability of the business.

804. By early 2012, expenses had been reduced dramatically. Revenue slowly improved after the cash injection from the borrowings.

805. In late 2010 and into 2011, there was still what he called an “on again; off again” relationship with Ms McHugh.

806. The affair was in some sort of a hiatus at one stage in 2011, “and we got back together” for ‘the sake of the business”.

807. In September 2011, the Accused’s wife arranged to meet him.

808. He admitted to the affair.

809. He testified that:

- she asked him whether he loved Toni McHugh;
- he said no;
- she told him that he needed to make a choice;

- he told her: “I want to be with you and the girls”;
- his wife insisted that he end the affair and that she did not want Ms McHugh coming back to the business.

810. The Accused said that:

- he told Ms McHugh that he did not want to be with her but wanted to be with Allison and the girls;
- Ms McHugh was very angry. She yelled; and she threw things at him. She also said that she would never go back to work again.

811. At first, things were “very uncomfortable” with his wife.

812. On the night that she had first broached the affair with him:

- she said that if he was committed to her and their relationship, he needed to submit to conditions;
- he agreed.

813. The conditions included that:

- he could not go to night time appointments unless she approved;
- she needed control of, and access to, his phone.

814. So, every day, when he arrived home, he would give her his phone so she could check his texts, call history and emails.

815. They agreed that she would take over the property management side of the business, with the title General Manager, which happened.

816. Toni McHugh kept trying to contact him.

817. Before Christmas 2011, the Accused had heard, he said, that Ms McHugh was “really emotionally struggling”.

818. He felt a great deal of responsibility for that.

819. Around Christmas, he called her to let her know that he did not hate her and to apologise.

820. They met at a coffee shop. She asked him if he loved her. He told her that he did.

821. He testified that, in fact, he did not.

822. She continued to contact him.

823. According to the Accused, they did meet “on a couple of occasions” thereafter and had “physical intimacy”.

824. The last such occasion was “in February, maybe January”.

825. The last time the Accused saw Ms McHugh before his wife’s disappearance was about 2-3 weeks previously.

826. The Accused’s wife was unaware of his continuing involvement with Ms McHugh.

827. The Bruce Overland account, which the Accused operated, was used to communicate secretly.

828. When they spoke by phone, after the call, he would delete the history from his mobile device.

829. His evidence turned to his finances.

830. The Accused explained that his approach to Bruce Flegg was to enable him to purchase the rent roll.

831. Subsequently Bruce Flegg confirmed that he was not in a position to lend money.

832. After the deceased became aware of the affair, the two of them went to marriage counselling: first, to Ms Nutting at Bardon.

833. Next, they saw Carmel Ritchie – once – on Monday, 16 April 2012.

834. The Accused testified that:

- Ms Ritchie told them that it would be useful for Allison to express her feelings and to ask questions about the affair;

- he was resistant to that. It seemed to him strange to revisit painful experiences;

- eventually, however, he accepted that for 15-20 minutes, every second night, his wife could ask questions, and he would listen to feelings she expressed.

835. By this time, the Accused told you, he was doing his best to distance himself from Toni McHugh.

836. He was not seeing her. But he was responding to her emails. And he did answer the phone when she called.

837. She was wanting to reconnect and for him to leave his wife and to build a life with her.

838. He looked at Ex. 61 – an email dated Monday, 20 February 2012 – from Ms McHugh.

839. He said that, at that stage:

> "I was doing my best to help her to try and find something other than me to be fixated on" and to distance himself from her.

840. He added:

> While "I was trying to push her away, because of her volatile…personality…, in my weakness I tended to roll over and say whatever she wanted to hear."

841. Ms McHugh, however, was "constantly trying to make something happen": that is, to divorce his wife and be with her.

842. The Accused told you that:

- he never intended to do that;

- when speaking to Ms McHugh in person, he would "agree to anything she asked to keep her happy".

843. His attention was then drawn to the email dated 27 March 2012: Ex. 62.

844. He said that:

- Ms McHugh, who was upset, asked for "some sort of commitment";
- he "just said 1 July" as the date by which the two of them would be together;
- he doesn't know "where that came from";
- he expected that "nothing really" would happen;
- he thought that Ms McHugh would probably be able to get on with her life better if she were the one making the decision to leave him.

845. His attention was then directed to Ex. 63, in which he wrote:

> "I have given you a commitment and I intend to stick to it – I will be separated by 1 July."

846. He told you that:

- that was probably a response to some communication from Ms McHugh;
- it was his way of saying "stay away…; leave it to me".
- he "definitely" did not intend to be separated from his wife by 1 July.

847. In the email dated 11 April 2012 from him to Ms McHugh (Ex. 64), he said:

> "This is agony for me too. I love you. I'm sorry you hung up on me. It sounded like you were getting very angry. I love you GG. Leave things to me now. I love you. GM."

848. The Accused told you that that was his way of trying to placate Ms McHugh and calm her down.

849. Five days after that email, on the night of Monday, 16 April, the Accused spoke with his wife about Carmel Ritchie's plan.

850. They agreed to a no more than 20 minute deadline, and first to undertake this exercise on the night of Wednesday, the 18th.

851. On the night of the 18th, the two of them went to Mt Coot-tha.

852. His wife took along a journal in which she had written things she wanted to ask him.

853. The session occupied about 20 minutes. When it finished, his wife had not asked all the questions written in her journal.

854. Looking at the journal, the Accused spoke to you about the topics which had been the subject of the questioning that night, including going to movies, kissing, assignations in the vehicle "Snowy", and what he and Ms McHugh had done on her birthdays.

855. At his wife's request, he drew a diagram of Ms McHugh's unit on a page of the journal.

856. The journal has some questions not crossed out.

857. Those questions were not put to him that night.

858. The next day was Thursday, 19 April - the last day Allison Baden-Clay was seen alive.

859. That morning, the Accused went to a local Chamber of Commerce meeting.

860. Afterwards, he attended a school cross-country carnival.

861. His evidence digressed.

862. Asked about the box of toys depicted in photographs of the Captiva, he said that he did not put them in the vehicle. He supposes that his wife put the toys in the car.

863. He testified that he has no knowledge whatsoever about how the blood of his wife came to be in the Captiva.

864. He returned to a chronology of events.

865. After leaving the sporting carnival, he went to work.

866. Later that day, his hand was injured by a screwdriver in renovations at Mr Cheesman's house.

867. Other than the mark from the screwdriver, there was no mark or injury on his hands when photographed by the police – see Exs. 100 and 101.

868. At 3.45pm, he had a parent/teacher interview with Sarah's teacher at school.

869. His parents collected the children from school and took them to their place.

870. There, he joined them for dinner.

871. When the Accused arrived home with the girls:

- his wife was already there;
- he gave her his mobile phone.

872. He saw the phone that evening when she gave it to him to read text messages.

873. The girls went to bed about 7.00-7.30pm.

874. The Accused testified that:

- once the girls were in bed, he and his wife sat on the couch;
- they talked about the day: the cross-country, the parent/teacher interview; and they spoke about sleepover plans for the following evening;
- she asked questions about what happened on Ms McHugh's birthdays;
- he told her he could not remember;
- she asked whether he regretted "the whole thing or just being caught";
- he reiterated how he had appreciated her strength and forgiveness, and that he was very remorseful;
- the mood was "perfectly normal": "Certainly civilised".

875. At the time, his wife was wearing her pyjamas.

876. He did not see her wearing anything else that night.

877. He went to bed around about 10.00pm, having earlier that night changed into a t-shirt and old boxer shorts.

878. Asked whether he had put the phone on charger at 1.48am, he answered: “No, I did not”.

879. He testified that:

- he cannot say whether his wife came to his bed that night;
- he woke up a bit after 6.00am;
- he was a very heavy sleeper;
- when he got up next morning, his wife was not there;
- he went to the toilet and checked emails;
- he was “rushing that morning”;
- he started to shave;
- he heard Sarah make a noise;
- “I was”, he said, “really rushing, and that’s when I cut myself shaving”;
- he was using his normal razor which was quite old and blunt.

880. He demonstrated how he pulled the razor down his face, and then “flicked up”;

881. That is when he cut himself.

882. When he was “coming down” with the razor a second time, he released before the previous cut “to be sure that I didn’t cut myself there…in that first cut”.

883. He continued to shave and cut himself again.

884. He showered.

885. Afterwards, he put balm on the shaving cuts.

886. His daughter came through to him.

887. He asked her to help him put on a bandaid. It would not stick.

888. He began to be concerned that his wife was not home and sent text messages and made calls.

889. His wife “almost always” took her phone with her when walking: indeed, he cannot recall an occasion when she did not take her phone.

890. He spoke to his parents, who came to the house.

891. While his father looked after the girls, he went out to drive the streets, taking the Captiva.

892. He was out about 20 minutes: perhaps half an hour.

893. He called 000. Then he went home to speak to the police.

894. He permitted the police to search the house or surrounds, saying that he had nothing to hide.

895. A lawyer advised him not to give a formal statement to the police.

896. The lawyer suggested that he see a couple of doctors to get them to examine the marks on his face.

897. He had not previously consulted either Dr Beavan or Dr Kumar.

898. When he saw them, he told them that he was there because his lawyer told him to have the injuries inspected.

899. On Saturday, 21 April, he went to the command post at the Brookfield Showgrounds. There he spoke to the police.

900. The Accused took you through the call records in the collation Ex. 172.

901. He spoke with Ms McHugh for about half an hour after 5.00pm on Thursday, 19 April. There were two calls but was the one conversation.

902. He testified that:

- in the first call, he told Ms McHugh that his wife was going to be at the real estate conference the next day;
- Ms McHugh called him back, upset;
- she did not want to see his wife;
- Ms McHugh asked him to tell his wife that she was also attending the conference;
- he did not want to do that, and did not agree to it, because he did not want his wife to know that he was still communicating with Ms McHugh;
- he was not concerned that both would be at the conference. A few hundred people would be there. So there was no guarantee they would see each other. And his wife was a non-confrontational person who would have Kate Rankin with her;
- he deleted the call records from his phone.

903. By 8.20pm, he and his wife were in the lounge room. She was sitting on the couch.

904. By that stage, they had had "that discussion" – a reference to his wife's revisiting matters in her journal touched upon the night before.

905. There was a phone conversation between the deceased and the Accused's sister at about 8.30pm.

906. On the house plan which is Ex. 180, the Accused marked the bedrooms of the three girls. He spoke of the location of those rooms in relation to the carport.

907. He slept on the left side of the marital bed - looking at the plan - while his wife slept on the right.

908. He called the life policy insurers to determine how a claim could be made on his wife's life insurance policy on 1 May – the day after his wife's body had been discovered.

909. His father had told him that he had an obligation to the insurers to let them know of the death.

910. He was asked about admission 26: that no payments had been made on the Westpac credit card facility between 24 January and 30 May 2012.

911. He said that he and his wife had made a determination that any excess income needed to be focused on other debts and priorities of the business.

912. The Accused:

- denied that, on the night of 19 April 2012, he was under financial pressure and significant relationship pressure;
- said that he and his wife were working together very well on both their relationship and the business;
- testified that, financially, the business was turning around, "and we were moving forward. Things were getting better."

913. It was "absolutely untrue" that he wanted to leave his wife and be with Toni McHugh.

914. His intention was to end any relationship with Ms McHugh and continue to rebuild the relationship with his wife for their future together.

915. The cross-examination began with acknowledgements by the Accused that he had deceived his wife for nearly four years, leading her to believe that:

- he was faithful;
- he wanted to make things different;
- he had chosen her over Toni McHugh;
- until as late as 19 April 2012, Ms McHugh was "a thing of the past".

916. Although he allowed his wife to check his phone, to follow him through using an iPhone app, and to take him to counselling, he never mentioned that he was in continuing contact with Ms McHugh.

917. In particular, he did not tell his wife that he had slept with Toni McHugh after she had learned of the affair.

918. As to his deceit of Toni McHugh, the Accused acknowledged that:

- he had deceived her;
- he had told her in writing, by email on 3 April, that he intended to be with her by 1 July.

919. He was asked about assurances in the 11 April email, which was sent a couple of weeks after they had met at a coffee shop.

920. Things said in the email were to placate Toni McHugh: to calm her down.

921. The Accused said of his communications with Ms McHugh:

- "I often said things to her in order to placate her…what she wanted to hear."
- he often said he loved her, but he did not mean those words.

922. He said such things to Ms McHugh;

- for the sake of the business;
- because he was concerned about her;
- because he wanted to maintain their sexual relationship;
- when he told her he loved her on 11 April 2012, by which time she had left the business, just to placate her.

923. In the days before his wife's disappearance, he spoke "not very often" to Ms McHugh.

924. The 1 July separation date had been mentioned before he nominated the date in the email.

925. He gave a commitment to be with her by 1 July when earlier they had met and he had told her that he was leaving his wife.

926. He had told a couple of his staff that he loved Toni McHugh when he told them about the affair in September 2011.

927. He acknowledged that he:

- had subverted his wife's intention to check up on him;
- had deleted records of Ms McHugh's phone calls and told her not to SMS him;
- had used a hidden email account that his wife knew nothing about to communicate with Ms McHugh – an account not linked to his phone;
- did not propose ever to disclose such things to his wife ever, because he did not "want to put in jeopardy rebuilding our relationship together".

928. Asked how he would characterise his relationship with Toni McHugh from December 2011 through to April 2012, the Accused:

- mentioned two occasions on which they had a "sexual interaction";
- acknowledged that "we were communicating with one another";
- said: "I wouldn't have called it an affair".

929. The cross-examination turned to financial circumstances.

930. The Accused said that, at the start of 2012, "we had financial challenges".

931. There were loans from a number of people.

932. He was unable to meet some interest payments.

933. The $1,800 per month payable pursuant to the agreement to acquire the rent roll was being paid.

934. The questioning reverted to communications with Ms McHugh.

935. The Accused said that she was constantly trying to put pressure on him.

936. That continued until 19 April 2012, with Ms McHugh wanting him to leave his wife.

937. He testified, however, that he had consistently demonstrated his lack of intention or willingness or desire to leave his wife.

938. The Accused first told his wife that he did not love her in 2009, when he went with her to see the psychiatrist, Dr Tom George.

939. He then told her: "I still loved her but I didn't feel in love with her".

940. He did tell Toni McHugh that he did not love his wife; but did so just to placate her.

941. He was asked again about a conversation in December 2011 with Ms McHugh and acknowledged that he may have said to her:

- something like that he was not then ready to leave his wife but was going to leave her and wanted Ms McHugh to know that;
- one day he wanted to go to her unconditionally and be out of his marriage.

942. From that meeting in December 2011 on, there was intermittent contact between the two of them which, "on some occasions…was quite regular": in person, by phone calls and through the Bruce Overland email account.

943. Although he was sexually intimate with Ms McHugh on more than one occasion after December 2011, he did not consider that he was in a relationship with her.

944. By 19 April 2012, when the two of them spoke for about half an hour by phone, according to the Accused, they had not seen each other for a number of weeks.

945. The Accused testified that he was trying to assist Ms McHugh to end any idea she had that there was some sort of a relationship with him or a future with him.

946. He said: "I wanted her to be able to be the one…to tell me where to go, basically".

947. On the second last occasion, the Accused had met with Ms McHugh - a matter of weeks before the deceased disappeared - she asked him when things were going to change. He responded:

> "I will be out of my marriage by the 1st of July".

948. Later, they spoke by phone when he talked about stopping being together in the physical sense until he had come to her after he had left the marriage.

949. He was endeavouring, he said, to facilitate a determination by Ms McHugh herself that there was no future for the two of them, which is why he was making sure that there was no further physical contact.

950. The questioning then turned to conversations between the Accused and the police.

951. The Accused agreed that he had told Sgt Jackson that the affair with Toni McHugh had ended the previous year.

952. He maintained that, as he put it:

> "I, in my mind, did not believe that we had a relationship…"

953. The Accused was asked about the sessions on both the 18th and 19th of April. Both times, he said, his wife asked him, in effect, whether he regretted what he had done or just being caught.

954. He and his wife had recommenced their sexual relationship in about February 2012, "after the best part of nine years with hardly any".

955. He was asked again about the half hour phone call with Toni McHugh on Thursday, 19 April.

956. He said:

- Ms McHugh had started a job the previous week and spoke about it;
- she yelled at him and was quite aggressive;
- she complained that the Accused had not told his wife that she was going to be at the conference;
- nor had he told Ms McHugh that his wife was going to be there.

957. He testified that:

- despite that interaction with Ms McHugh, he expected that she would deal with things appropriately if she encountered his wife at the conference;
- he thought that there was no risk that Ms McHugh would tell his wife of the email of 11 April, where he had told Ms McHugh that he loved her and to "leave things to me now";
- he had no fear that there would be an altercation between the two women;
- it had not entered his mind that Ms McHugh might tell his wife about his promises to be with her by the first of July.

958. After the deceased's disappearance, the Accused spoke to Ms McHugh by phone more than once.

959. Pressed with the suggestion that he told the police that his affair with Toni McHugh had come to an end to distance himself from her, he responded: "That's not true".

960. His wife had a charger on her side of the bed.

961. He was asked about the charger on his bedside table and said that:

- when he woke up on the morning of the 20th, his phone was connected to the charger which was hanging on his bedside table;
- he did not put the phone on the charger.

962. He was asked about the blood in the Captiva.

963. He said that his wife had not:

- complained of having injured herself;
- mentioned bleeding in the car.

964. He had not noticed any injury to his wife.

965. In particular, he had not seen a chipped tooth. Nor had his wife complained of one.

966. The Accused said that, before 19 April 2012, he had driven across the Kholo Creek Bridge.

967. The questioning reverted to conversations with the police on the 20th.

968. The possibility that his wife had committed suicide was, he said, "not something that was at the forefront of my mind".

969. Nor was it at the forefront of his mind that she may have been affected by medication and wandered off.

970. The Accused did not disclose to the police at any stage his conversations with Toni McHugh on the Thursday afternoon.

971. He took the Captiva when he drove around looking for his wife because his Prado:

- had been in an accident on the Monday;
- is a bigger, heavier car, and the Captiva is easier to drive.

972. He had, however, driven his Prado after the accident on that Monday, as well as on the Tuesday, Wednesday and Thursday.

973. He said that he first noted the items in the back of the Captiva on the Friday morning. He denied putting them there.

974. When he spoke to the police on Friday the 20th, he did not think to tell them about the injuries on his neck and chest. He said that he had self-inflicted those. So they did not seem relevant.

975. After the police took photographs of those other injuries, however, the Accused went to Dr Kumar and showed them to her, which he says was probably done on his lawyer's recommendation.

976. He responded to the suggestion that he wanted to be with Toni McHugh by saying: "That's not correct", adding that he and his wife had recommenced their physical relationship in February and were rebuilding that.

977. The Accused rejected suggestions that:

- he killed his wife in or at the house that night or in the early hours of the morning;

- she responded to his attack by clawing at his face and leaving marks upon it, probably as he smothered her.

978. He was asked whether the deceased had grabbed at his clothing and in that way left the injury on his right shoulder. He answered: "No".

979. Asked "Why do you have that injury?", he answered: "I don't know".

980. The Accused said he never did anything to physically harm his wife.

981. It was suggested to him that her head had come into contact with the fallen leaves at the back or the side of his house.

982. He answered, "I don't know".

983. He also denied that:

- he had put her into the Captiva;

- he had anything to do with his wife's blood found in the Captiva;

- he had transported her to Kholo Creek and then dumped her underneath the bridge;

- he put the phone on its charger at 1.48am;

- he covered his tracks by:

    i. putting toys in the back of the Captiva;

    ii. cutting himself while shaving at the bottom edges of his wife's fingernail scratches to disguise what he had done and to give the appearance that the scratches were shaving cuts.

984. In re-examination, he gave evidence about how sound travelled in the house, by reference to the plan.

985. He said that he did not himself hear any noises that night.

986. He said that it was not a concern for him that Ms McHugh and his wife were both attending the same conference on the Friday. His wife was not confrontational. She would not cause a scene. And Ms McHugh had been "well calmed down" by the end of the conversation with him on the Thursday afternoon.

Rival contentions

987. This brings me to a summary of the rival contentions.

988. Much of my summary of the closing addresses of the lawyers will be repetitive of evidence already mentioned.

989. Please bear with me in this.

990. The duplication cannot be avoided.

991. I am obliged to summarise what the lawyers have said to you in their closing addresses even though their submissions to you cover information already discussed in this summing-up.

Defence Case

992. Mr Byrne pointed out that this is a murder trial in which your task is to assess the evidence, dispassionately and objectively.

993. He characterised the prosecution case in this way: the Accused somehow had violently ended the life of his wife in the home they shared with their three daughters, and disposed of her body.

994. He said that:

- family, friends and the Baden-Clay children had not ever seen the Accused and the deceased argue, let alone seen violence towards her;
- when confronted by an angry, aggressive Toni McHugh, the Accused did not become violent;
- nonetheless, the prosecution alleges that he erupted in violence on the night of 19 April.

995. Mr Byrne submitted that you would not be satisfied, beyond reasonable doubt, that the Accused had killed his wife and that, therefore, you would find him not guilty.

996. He also argued that the prosecution must prove that the deceased is dead; that the Accused killed her; and that he did so intending to kill or to cause grievous bodily harm.

997. The first is not contentious. The second and third are.

998. Mr Byrne spoke of the burden of proof, the presumption of innocence, and the standard of proof in this circumstantial case.

999. In relation to inferences, Mr Byrne submitted that:

- you should not speculate;
- there must be evidence to support any inference you draw.

1000. He illustrated the point by reference to the blood found in the Captiva.

1001. No blood had been found in the carport or in the garage or in or around the house. And no-one can say when the blood was deposited in the Captiva.

1002. You were shown a slide setting out the end of the Accused's cross-examination.

1003. Your attention was drawn to the possibilities it reflects, with emphasis on Mr Fuller's use of "perhaps".

1004. This matters, Mr Byrne submitted, because guilt cannot be established by what perhaps, or probably, happened.

1005. The first question, Mr Byrne said, is: on the prosecution case, how did the Accused kill his wife?

1006. The prosecution, he argued, cannot prove how the deceased died.

1007. He invited you to focus on Dr Milne's evidence.

1008. Although a meticulous examination had been conducted during the post-mortem and afterwards, Dr Milne could not establish a cause of death.

1009. Nor could he identify any definite injury.

1010. The jumper had been moved. Dr Milne could not exclude that having been caused by movement of water. Nor could he exclude the possibility that the body had been in water, such as Kholo Creek.

1011. Dr Milne found no evidence of fracture. There was no haemorrhage of the dura. The larynx was intact.

1012. The hyoid bone was not fractured. There was no haemorrhage or damage around it.

1013. Dr Milne could not say whether the possible bruise near the 4-6 ribs on the left side, if a bruise, happened before or after death.

1014. A CT scan revealed no defect to Dr Milne or to a radiologist.

1015. Dr Milne had said:

- alcohol and/or Sertraline toxicity, while "unlikely", could not be excluded as a cause of death;
- even the absence of diatoms does not exclude drowning as a possible cause of death;
- a fall from a height could not be excluded, particularly if the fall was into water.

1016. Dr Milne could not determine a place of death or whether the body was moved after death, by tidal water or a person.

1017. Dr Forrest had found a chipped tooth that could not be aged. There was no sign of trauma to hard tissues of the neck or jaw or excessive mobility of any tooth.

1018. That evidence, Mr Byrne submitted, suggests that there was no blunt trauma to the face.

1019. He argued that no detectible injuries are shown to have caused death.

1020. Nonetheless, the Accused is alleged to have had a murderous intent.

1021. Mr Byrne submitted that:

- the causes of death Dr Milne could not exclude are “on the cards”;
- there is no discernible cause of death – a matter which needs to be borne in mind in assessing the prosecution case.

1022. Mr Byrne took you to features of the police investigation.

1023. They were invited to the house early on the morning of Friday, 20 April, when the Accused was concerned about his wife.

1024. Constable Ash arrived about 8.00am.

1025. The Accused gave his consent for Ash to examine the cars and to look through the house.

1026. Ash found no sign of a struggle; no damage in the house; and no blood.

1027. Snr Constable Huth searched the garage and carport area.

1028. The Captiva was in the carport.

1029. Huth did not see blood.

1030. There was no chemical testing reaction on presumptive testing for blood.

1031. A crime warrant was taken out. It enabled police to take possession of the house and land on 20 April and for seven days thereafter.

1032. In that time, the police thoroughly searched the property.

1033. They found nothing of interest.

1034. Snr Sgt Taylor was the forensic co-ordinator.

1035. He oversaw scientific examinations of the house and vehicles.

1036. No blood was found in the residence, he testified.

1037. Nor was there any obvious indication of a clean-up inside the house.

1038. Mr Byrne referred to evidence of the Baden-Clay children, who were asleep on the night of the 19th.

1039. He submitted that it is a small house, with low ceilings and a timber floor, and you would expect noise to travel within it.

1040. Yet none of the girls heard a sound suggestive of a violent killing.

1041. Hannah saw her mother on the couch watching TV, when she got up to get a glass of water after going to bed. Her mother was wearing pyjama pants.

1042. Hannah had never heard a fight between her parents.

1043. Nor did she hear car noises on the night of the 19th.

1044. Sarah told police that her parents "never fight".

1045. That, Mr Byrne submitted, is consistent with evidence of other family members, friends and associates.

1046. Asked if her parents had a fight "last night", Sarah shook her head, twice.

1047. In her second interview in June, Sarah was asked about car noises on the night. She recalled none.

1048. Ella had heard no loud talking between her parents – ever.

1049. Mr Byrne argued that:

- if the prosecution case is that the Accused killed his wife on the night of the 19th, he must have dressed her in the outfit in which she was found;
- Hannah's evidence shows that her mother was wearing pyjamas on the night of the 19th, which accords with the testimony of the Accused, but was found wearing different clothes, and walking shoes.

1050. Mr Byrne asked:

- Is it the prosecution theory that the Accused, having killed his wife, dressed her in the outfit in which she was found?

- or does the prosecution contend that he killed her after she had got into her walking gear, perhaps the next morning?

1051. He argued that neither of those scenarios could justify a conviction for murder.

1052. He asked:

- why do the children hear nothing?
- why is there no blood around the house if the body was carried, or dragged, through the foliage and put into the Captiva?

1053. On the prosecution case, he argued, the body had apparently bled only in the Captiva.

1054. But that blood stain was not frankly red, cannot be aged, and was mistaken for a drink stain.

1055. Mr Byrne invited you to ask yourself: if the body was dragged, or carried, through the foliage in such a manner that leaves became attached to it, and the leaves are on or near the body ten days later, why are there no leaves in the Captiva?

1056. And how, he asked, does all this activity - including the car being driven out and returning after perhaps as long as 40 minutes - go undetected by the three girls.

1057. My Byrne says that on the prosecution case, at Kholo Creek, the Accused:

- stops the vehicle near the bridge; and
- manages to get the body through the grass and mud;
- must then have climbed back up, through mud and grass, driven the car home and parked it at the carport.

1058. Mr Byrne suggested that you ask yourselves: is such a scenario even possible?

1059. Your attention was drawn to Ex. 24, which shows the state of the Kholo Bridge area in late April 2012.

1060. You were reminded of evidence of Constable Huth, who had repelled down the side of the bridge on 30 April.

1061. Mr Byrne returned to the Captiva and submitted that the absence of mud in it is significant.

1062. Taylor had examined the vehicle's interior. "There was no obvious indication of a clean-up", he testified.

1063. Mr Byrne proposed that you ask the questions on the page of the slide that concerns mud and submitted that:

- if you cannot satisfactorily answer those questions about disposing of the body, the prosecution case collapses;
- the evidence reveals that the Accused did not transport the body to the bridge and dump it.

1064. Mr Byrne characterised the blood staining in the Captiva as an artefact of some earlier incident, unrelated to the death.

1065. He mentioned his client's actions on the morning of Friday the 20th: contacting the police at 6.53am and giving police full access to the house, surrounds and cars – conduct consistent with that of a man who wanted his wife found.

1066. Mr Byrne asked rhetorically: "why would the Accused have killed his wife?"

1067. They had been married for 14 years. There was no history of violence. Theirs was not a passionate union. They had a "companion-type" relationship.

1068. Mr Byrne said that:

- his client's morals may be despicable. But that does not mean that he is a murderer;
- the prosecution case, as opened at the start of the trial, is that the Accused wanted to leave his wife and be with Toni McHugh;
- that was not the case. And Toni McHugh knew that.

1069. You were referred to Ms McHugh's evidence concerning her relationship with the Accused.

1070. "He never really got practical" about leaving his family, she said.

1071. The Accused was good at making promises to her. Nothing came of them.

1072. The Accused, Mr Byrne pointed out, was not even faithful to Ms McHugh.

1073. She was not the love of his life, for whom he would abandon his wife and family.

1074. Even when he told Ms McHugh that he would be separated from his wife by 1 July, she "didn't believe it at all".

1075. Mr Byrne asked: why would you think that you know better concerning the Accused's intentions towards her than Ms McHugh does?

1076. As to the "leave things to me now" email, Ms McHugh said that there was nothing new in that.

1077. On the 19th April, the Accused told Ms McHugh that two people from his office were going to the conference that she was to attend the next day.

1078. She felt, Ms McHugh testified, that "I was being played again…it's a symptom of an affair".

1079. Mr Byrne argued that:

- his client had no intention of leaving his wife and children for Toni McHugh;
- there was no need to do that;
- therefore, it is "not likely" that he would kill his wife to be with Toni McHugh.

1080. The day after the phone call, the Accused told Ms McHugh that:

- his wife had just gone missing;
- she should "tell the truth" to the police.

1081. Mr Byrne argued that, when the Accused had confessed the affair to his wife, there were not raised voices.

1082. And when the Accused told Toni McHugh that the affair was over, he did not lose his temper.

1083. Mr Byrne submitted that you would reject:

- a premeditated killing;
- a sudden surge of emotion on the night of the 19th resulting in the death.

1084. Mr Byrne referred to his client's presentation in cross-examination, remaining calm except when reliving parts of his life with the deceased and the shock of her going missing, when tears flowed.

1085. Mr Byrne argued that:

- there is no evidence that the Accused has a violent temper. Indeed, the evidence is to the contrary;
- an unplanned, spontaneous murder is as unbelievable as a premeditated one.

1086. Attention turned to financial matters.

1087. Mr Byrne:

- submitted that the prosecution had opened a case that the Accused was under financial pressure in April 2012;
- asked you to consider whether that could be a motive to murder a wife of 14 years;
- submitted that it is ridiculous to suppose that the Accused would have murdered his wife because of financial difficulties;
- drew attention to the evidence of the friends who lent money, saying that they did not testify to financial pressure bearing down on the Accused;

- argued that all there is was an outstanding credit card debt of about $2,000.

1088. Your attention was drawn to the table of assets and liabilities, which refers to a number of entities, as well as to the circumstances of the Accused and his wife personally.

1089. It reveals an excess of personal assets over personal liabilities of more than $190,000.

1090. The two operating companies did have excesses of liabilities over assets.

1091. In April 2012, however, not only did the Accused have substantial personal assets but also the rent roll business was his; and he was confident that he could source the funds necessary to complete that purchase.

1092. The three friends who lent money had examined the figures closely.

1093. Robert Cheesman expected to get his money back. He and the other two friends who lent performed “due diligence”, and he thought the Accused “personally quite secure”: he could walk away from liabilities of the entities that controlled his two businesses.

1094. Mr Byrne submitted that there was not financial pressure to cause the Accused to kill.

1095. Mention was also made of evidence of Stuart Christ, who was happy to lend, after his own investigation.

1096. The other lender, Peter Cranna, said that there was not a problem.

1097. On some loans, interest was being capitalised. But that made cash available to use in the businesses.

1098. Dr Flegg spoke to the Accused on 11 March 2012.

1099. The Accused did not seek to pursue a loan with him. He had moved on from that.

1100. The Accused was confident of getting finance for the acquisition of the rent roll from other sources by September 2012.

1101. Reference was made to the insurance policies, Mr Byrne submitting that obtaining them was a prudent course for parents of three young girls.

1102. The insurance company had been contacted the day after death because of the intervention of the Accused's father. He had been involved in the insurance business and was instrumental in arranging the life policies. He told the Accused to tell the insurance company of the death.

1103. Attention turned to the plants and leaves found on or near the deceased's body linked by Dr Guymer's evidence to 593 Brookfield Road.

1104. Mr Byrne:

- drew your attention to the timelapse photography in Ex. 183;
- submitted that it provides a reasonable basis for inferring that the body had been in a moving body of water.

1105. He referred to the leaves entwined in the deceased's hair.

1106. Mr Byrne submitted that when Dr Guymer was at Kholo Creek, he was not looking for debris and had not studied the flow of Kholo Creek.

1107. Mr Byrne invited you to compare the timelapse photography exercise with Exs. 8, 9 and 10, which show the hair of the deceased and how the jumper had been moved up towards the head.

1108. Mr Byrne submitted that:

- the movement of water in Kholo Creek was substantial, from a substantial catchment area;
- that water could explain how the leaves came to be with the body but not in the car;
- movement of the water in the creek could also explain why fresh and old leaves were found together.

1109. Ex. 183 was played. Mr Byrne asked you to concentrate on the area under a pylon and pay attention to the amount, volume and size of the debris moving in the waterway.

1110. You were reminded of the evidence of Constable Huth that the body was positioned below the high water mark of the creek.

1111. Mr Byrne argued that, on the evidence of Dr Milne, the positioning of the jumper was consistent with the body having been in tidal water.

1112. As to the evidence of the hydraulic engineer, Mr Giles, Mr Byrne submitted that:

- his opinion was based on charts and other information rather than on personal observations;
- he did not carry out experiments concerning the location of the body;
- looking at photographs, he could not tell whether the body was above or below the high water mark;
- large pieces of debris are moved along Kholo Creek.

1113. Mr Byrne turned to the marks on the face.

1114. He submitted that:

- the Accused has never attempted to conceal the marks or to give an explanation of them other than that they are shaving scrapes;
- when he called the police to his house, he did not attempt to conceal his face;
- he has told everyone who asked that the marks were caused by shaving when using an old razor in a hurry;
- he demonstrated, in the witness box, how the marks came to be inflicted with his razor.

1115. Mr Byrne acknowledged that experts have given their opinions as to how the marks were caused.

1116. Dr Stark, he said, could not say “100%” that the marks were caused by fingernails.

1117. There were serious limitations for the interpretation of injuries of this sort without a physical examination.

1118. Although, according to Dr Stark, the marks were “typical” of fingernails scratches, there could be another explanation; and she could not exclude the use of a razor as having caused them.

1119. Dr Beavan, a general practitioner, had experience of biopsies.

1120. She agreed that what she saw on 20 April was consistent with shave biopsies.

1121. Another general practitioner, Dr Kumar, saw the injuries on the right cheek and could not be sure whether a razor had caused them.

1122. Dr Kumar said: “When you’re rushing, you can injure yourself”.

1123. Dr Hoskins had accepted that: “It is impossible to say that the marks on the face were caused by fingernails”.

1124. Dr Griffiths said the scratch abrasions he observed could have been caused by any sharp object drawn across the face with sufficient force.

1125. He had also accepted that interpretation of injuries from photographs is imprecise.

1126. Professor Wells had not examined the Accused. He based his opinion on photographs. There were important qualifications and limitations on his opinion.

1127. Although Professor Wells had said that he had “considerable difficulty” reconciling the facial injuries with shaving, he could not exclude a shaving injury as a possible cause. Things other than fingernails could have caused the injury.

1128. Professor Wells, Mr Byrne argued, had said that if you have a razor blade and get a fright or disturbance, that might include the risk of injury.

1129. Mr Byrne submitted that:

- there were serious limitations concerning the capacity of those experts to form opinions;
- it was necessary to consider carefully the evidence of the Accused as to how the injuries were sustained;
- if you think that the injuries were not caused by a razor blade, that does not mean that you would convict;
- the injuries are a piece of evidence, to be considered along with other evidence.

1130. Mr Byrne reverted to, what he called, reasonable possibilities consistent with innocence, mentioning:

- drowning;
- falling from a height to death or to cause drowning;
- alcohol and/or Sertraline toxicity;
- Serotonin syndrome leading to drowning or falling from a height to death.

1131. Mr Byrne turned to mental health issues.

1132. He submitted that the defence is that the Accused does not know what happened to his wife.

1133. But she did have, he argued, a depressive illness that kept coming back, which was triggered by stressors, including pregnancy.

1134. Reference was made to the evidence of Dr George, psychiatrist, who treated the deceased from 2003 to July 2009.

1135. When first she was treated, she was experiencing symptoms of guilt, anxiety, worry, low mood and tearyness.

1136. They were the symptoms of she complained in 2011 and which, or so Mr Byrne argued, signify a high chance that she was relapsing in her depressive illness when she disappeared.

1137. Mr Byrne made reference to Dr George's reference to transient suicidal thoughts in 2003.

1138. He argued that strong maternal instincts do not mean that the deceased could have controlled her illness.

1139. Mention was made of the evidence of Dr Bourke. The deceased had presented to him in 2011 with symptoms of guilt, anxiety, low mood and tearyness.

1140. She had last attended Dr Bourke's medical practice, seeing another practitioner, on 19 March 2012, suffering pre-menstrual mood swings.

1141. Her Zoloft script was increased from 50mg to 100mg daily.

1142. Reference was made to the evidence of Dr Schramm, including by reference to a slide displayed to you.

1143. You were reminded of evidence of Ms Nutting to the effect that the deceased's self-esteem had been impacted by the affair.

1144. The deceased had told Ms Nutting that her marriage was not good and she was struggling with three children.

1145. Evidence of Carmel Ritchie was mentioned.

1146. The deceased had told her that she was a conflict avoider.

1147. Ms Ritchie had made no enquiries concerning:

- medication the deceased was taking;
- her experience of flashbacks.

1148. Mr Byrne submitted that, two days after the Accused was told by Ms Ritchie to listen to his wife's expression of feelings, he was asked to draw a diagram showing where sexual activity had taken place with Ms McHugh.

1149. Mr Byrne argued that:

- symptoms of past depression were recurring;

- Zoloft medication had been increased;
- there had been questioning by the deceased of the Accused about the affair with Ms McHugh on the 18th and the 19th;
- there was a high chance that the deceased was relapsing in her depressive illness.

1150. Mention was made of the fact that the Accused had testified that his wife wanted a male child and that this topic had been raised by the Accused with Dr George in 2006.

1151. Mr Byrne said that on the eve of 18 April 2012:

- there had been a question and answer session about the affair at Mt Coot-tha.
- after that, the Accused and the deceased came home;
- they were met by news of the birth of a male child of the Accused's brother;
- the deceased had gone to bed, leaving her husband and his mother and father at the house.

1152. Mr Byrne submitted that, on the 19th, the deceased presented to her hairdresser, Ms Waymouth, as stressed.

1153. You were taken to evidence of Dr Robertson, toxicologist, who had said that:

- Sertraline can produce anxiety and confusion and agitation;
- Serotonin Syndrome can cause an increase in suicidal ideation;
- increasing a dose in a regular user can affect the brain chemistry and potentially affect both positive and adverse effects of the drug.

1154. Dr Schramm said that:

- there is a link between major depression and suicide;
- between a tenth and a third of people who suicide do not leave notes;

- suicide is often a surprise and even in retrospect impossible to predict.

1155. Mr Byrne asked you to consider:

- the deceased always wanted a son;
- on the evening of the 18th, after the Mt Coot-tha session, she learned that Cameron Baden-Clay had been born;
- Dr Schramm had given testimony about anxiety pressures;
- perhaps she increased herself the dose of Zoloft - something which would have been consistent with advice from Dr George;
- if she had increased the medication on the Thursday morning, its effect would peak after 6-8 hours, which is when she was "slumped" at the hairdresser on the Thursday afternoon;
- the hairdressing appointment clashed with a parent-teacher interview;
- and he asked rhetorically: why would she have missed that interview?

1156. Then he raised a possible scenario for your consideration, although pointing out that the Accused's position was that he did not know what had happened to his wife.

1157. It is this.

1158. After the Accused and the children returned home on the Thursday night to find the deceased in her pyjamas on the couch, the two adults revisited questions asked at Mt Coot-tha the night before.

1159. Possibly, she stayed up watching TV, thinking about what had happened in the affair and the "rawness" opened up.

1160. Mr Byrne asked:

- what if she decided to go for a walk to clear her head?

- what if, because of her depression, she took a Zoloft tablet about 10.00 or 11.00pm?
- she leaves the house after placing her husband's phone on the charger at about 1.48am;
- she walks her usual walk along Boscombe Road and then decides to walk a bit further;
- or she keeps walking, perhaps in disorientation;
- around 4.00am, the drugs peak in her bloodstream;
- she may have been affected by the effects of the Sertraline or suffered Serotonin Syndrome;
- she may have hallucinated and ended up in the creek.

1161. Mr Byrne said that the autopsy cannot rule out drowning, a possible fall or a jump from the bridge.

1162. He spoke of what he had raised for your consideration as "just a scenario", adding "you may reject it, but it's something you might think is open on the evidence".

1163. He submitted that his client had no apparent reason, and no apparent means, to kill his wife and dispose of her body.

1164. Mr Byrne reminded you of the evidence of the Accused, pointing out that he:

- had elected to give evidence and thereby exposed himself to cross-examination;
- wanted to give you a detailed history;
- admitted to lapses with women and keeping quiet about his liaisons.

1165. But, Mr Byrne submitted:

- his client's only deception related to not broadcasting a lengthy affair;

- his client is not a person who would kill his wife and the mother of his children;
- he is not the kind of person to have exploded on the quick.

1166. Mr Byrne submitted that the only new factors preceding the disappearance of the deceased were her slipping back into recurrent depression and the birth of Cameron Baden-Clay.

1167. He argued that, apart from those things, things were normal in the household.

1168. On 20 April, his client had told Toni McHugh to just tell the police the truth.

1169. That is not, Mr Byrne argued, the conduct of someone who had just killed his wife.

1170. When the police came to the house, the Accused tried to help them.

1171. His conduct is only consistent with wanting his wife found.

1172. Mr Byrne contended that, once you have assessed the whole of the evidence, you would not convict his client, as there was no:

- cause of death;
- motive that withstands scrutiny;
- means to have done what the Accused is alleged to have done.

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1173. Mr Fuller argued that someone of an apparent previous good character may step outside of that and do something not done before.

1174. On the surface, he said, the Baden-Clays appeared to be the perfect couple. That was a façade.

1175. The deceased was a woman who struggled for years to keep her marriage together.

1176. The Accused lived a double life. For three years, he deceived; and he has confidence in his capacity to deceive.

1177. By mid-April 2012, pressures were building on him which culminated in the events on the night of 19 April.

1178. Mr Fuller acknowledged the prosecution case is a circumstantial case.

1179. A circumstantial case, however, can be powerful: its strength lying in an accumulation of facts.

1180. Mr Fuller:

- asked you to assess the evidence considered as a whole;
- illustrated his point by reference to a submission by Mr Byrne about the stressed state of the deceased when she was at the hairdresser on the Thursday afternoon.

1181. Mr Fuller said that the deceased was unhappy with the salon's previous treatment of her hair. She was looking to have the problem addressed on the eve of a conference which was important to her.

1182. It is no surprise that she missed the parent-teacher interview taking place at the same time.

1183. Mr Fuller has suggested that scientific certainty was not to be expected.

1184. He responded to the suggestion that the deceased may have been depressed by the news that her husband's brother had fathered a male child, arguing:

- it is six years since she had her last child;
- according to Dr George, she was initially disappointed when the third child was a girl. But she was disappointed because she thought her husband would be.

1185. Mr Fuller turned to circumstances relating to the death.

1186. He contended that the body was dumped where Mr Joyce found it, about 13kms from her home.

1187. It would take a considerable time to walk there.

1188. There is no suggestion that she was taken there by someone other than her husband.

1189. The deceased:

- was a reluctant exerciser;
- had plans for the morning - to be with Kate Rankin by 8.00am;
- did not walk to the Kholo Creek bridge to die there.

1190. According to the police, there had not been a single sighting of the deceased walking on the morning of the 20th.

1191. As to the scene where the body was found, Mr Fuller submitted:

- there was room for a vehicle to stop beside the road;
- the Accused knew the area, having been involved in the sale of a property nearby, having driven over the bridge;
- there have been significant changes to the area near the bridge since April 2012.

1192. Mr Fuller turned to the suggestion that mud might have been expected in the Captiva.

1193. Mr Giles had reviewed the rainfall records in the period 19-30 April 2012.

1194. Rain had fallen on the evening of the 27th and into the morning of the 28th.

1195. There was no rain on the night of the 19th.

1196. The area leading down to the creek was vegetated.

1197. Mr Fuller suggested that:

- you would not be distracted by the mud issue or by what you observed on the view, given the changes since April 2012;

- the police officer, Vernados, had said that there was a bit of a track down from the area near the road;
- Vernados did not fall walking down the side of, or along the ledge underneath, the bridge.

1198. Mr Fuller submitted that the location of the body and its surrounds were consistent with the body having been rolled or pushed off the ledge above.

1199. He argued that:

- the deceased did not fall from the bridge, intentionally or otherwise;
- there is no evidence that she was drug affected on the morning of the 20th;
- if the deceased had fallen from the bridge to where she was found, Dr Milne would have expected fractures. There were none;
- she did not fall into a depth of water.

1200. Mr Fuller submitted that:

- Dr Milne had indicated that the body did not have the appearance of having been in water;
- Post-mortem changes are consistent with the body having been positioned where it was found soon after death.

1201. Mr Fuller invited your attention to tidal records.

1202. He submitted, relying on the evidence of Mr Giles, that there was not a sufficient volume of water to have raised the body from the creek to where the deceased was found.

1203. The fact that Dr Milne cannot exclude drowning does not make it a reasonable possibility.

1204. Reference was made to the evidence of Dr John, who had said that although diatoms were in bloom in Kholo Creek, no diatoms were detected in the liver or bone marrow of the deceased.

1205. Therefore, Mr Fuller argued, you would be persuaded that the deceased did not drown.

1206. The body, Mr Fuller argued, had been dumped where it was found to:

- avoid suspicion;
- delay discovery.

1207. The deceased had no identification, no money, and no phone.

1208. Mr Fuller submitted that:

- the bruise to the chest and the chipped tooth were consistent with a struggle;
- decomposition was consistent with the deceased having been dead for 11 days.

1209. You were referred to the evidence of Dr Drummer:

- concerning the absence of recent ingestion of any Zoloft;
- that drugs did not contribute to death.

1210. Dr Robertson had spoken of Sertraline affecting naïve users and, occasionally, when there was change in the limited dosage.

1211. The deceased had first used Zoloft in 2003.

1212. Her usage had been monitored by Dr George.

1213. Dr Bourke increased the dosage in September 2011 – from 50mg to 100mg.

1214. That was seven months before the death.

1215. The evidence does not suggest that the deceased had any adverse reaction to that increase.

1216. Mr Fuller submitted that:

- the deceased did not experience Sertraline Syndrome;

- drug toxicity as a cause of death was excluded by the evidence.

1217. He turned to suicide.

1218. He drew your attention to evidence that:

- Kerry-Ann Walker, a long-term friend, testified that, in 2012, the deceased was “fantastic”;
- there was no suggestion from staff at the business that they saw signs of depression;
- the deceased had three school-aged children and was involved in their lives;
- she was also engaged in building the business and to making plans for its future;
- she was excited about going to the real estate conference on the Friday;
- She was not concerned by the birth of Cameron Baden-Clay. The day after she learned of the event, the 19th of April, she told Olivia Walton that she was thrilled about the birth;
- she had “survived” disclosure of the affair;
- by April 2012, she had taken her husband to two counsellors;
- she was “over the moon” about her husband’s response to Ms Ritchie’s advice;
- on the 19th, the deceased was not:
    i. depressed or suicidal; or
    ii. affected by drugs.

1219. The deceased died of unnatural causes.

1220. Mr Fuller submitted that she was dumped at the creek when she was dead, and by the person who had killed her.

1221. Only that person knows the particular method of death, he submitted.

1222. As to the children not hearing anything in the house that night, your attention was drawn, among other things, to a baby monitor on a bedside table.

1223. Mr Fuller turned to the place where death occurred.

1224. Leaves from six species were found in and around the hair and jumper of the deceased.

1225. Four of those species were entwined in her hair.

1226. All six species were located at 593 Brookfield Road.

1227. Mr Fuller submitted that the leaves did not get in her hair by being eddied around her body while it was in water.

1228. None of the other plants at the Kholo Creek area was found on or near the body.

1229. Mr Fuller:

- mentioned the places at the house where vegetation was found, drawing attention to Ex. 161, - the plan that depicts where the plants were at the Baden-Clay house;
- argued that the head of the deceased came into contact with leaf litter at the house; and that speaks of what had happened to her.

1230. Mr Fuller turned to the Captiva, which had been in the possession of the Baden-Clays only since 25 February.

1231. He submitted that:

- when the police first inspected the vehicle, the back row of seats was down and toys positioned there;
- the blood of the deceased was hidden from view until the row of seats was folded up;
- there had been no injury of the deceased before 19 April to account for this blood in the car;

- therefore, there was an injury to the deceased on the night that caused her to bleed.

1232. Mr Fuller turned to the scratches. He submitted that:

- the scratches were something the Accused had to explain that linked him to the death of his wife;
- the Accused usually showered before shaving, but on the morning of 20 April he reversed that order of events.

1233. Mr Fuller submitted that the experts:

- have identified two distinct types of injuries that occurred at different times;
- the more recent are shaving cuts, made to disguise the scratches from the deceased's fingernails.

1234. The only reason to disguise the marks on his face or to lie about them is that they show close hand contact with someone who was striking out to defend herself from him.

1235. Mr Fuller submitted that:

- the Accused has no explanation for the right shoulder injury – an injury consistent with the pulling of clothing and the friction that would be created by that;
- that is consistent with a struggle.

1236. Dr Kumar thought the facial abrasions were not consistent with the use of the razor depicted in Ex. 96.

1237. Reference was also made to the evidence of Dr Griffiths, who examined the Accused on 22 April.

1238. He thought that the injuries represented finger scratch marks and could not have been caused by the razor.

1239. You were taken to the evidence of three experts who used photographs to reach their conclusions that, in effect, the broader abrasions were typical of fingernail scratches.

1240. Mr Fuller submitted that the fingernail scratches occurred after the last time the children saw their mother on the night of the 19th and before the children got up in the morning.

1241. There had, he argued, been a struggle.

1242. She had left her mark on him.

1243. The fingernail scratches show that he used violence towards his wife.

1244. Turning to the element of intention, Mr Fuller submitted:

- the violence the Accused inflicted on his wife was close-up;
- the only injury she inflicted on him were the scratches on his face;
- he inflicted injuries that caused her death;
- the outcome – the death - accorded with what the Accused had in mind.

1245. As to the phone charger that was used at 1.48am on the morning of the 20th, Mr Fuller submitted:

- it was on the Accused's side of the bed;
- the only evidence that his wife had his phone that night was the Accused's, and you would reject it.

1246. Mr Fuller argued that there were three pressures on the Accused on the night of the 19th. They related to his:

- relationship with his wife;
- relationship with Toni McHugh;
- business difficulties.

1247. Mr Fuller said that the pressures do not mean that the killing was premeditated. Nor do they necessarily mean an explosive outburst.

1248. Mr Fuller submitted that, in testifying, the Accused:

- tailored his evidence to meet the case against him;
- denied that he was under pressure in his marriage, in his relationship with Ms McHugh or in his business;
- wanted to play up his wife's depression in the hope that you would accept that she had committed suicide.

1249. You were reminded that the Accused did not tell the police about his conversation with Toni McHugh on the afternoon of the 19th.

1250. Mr Fuller characterised the Accused's testimony as a scripted performance.

1251. He adverted to evidence of Dr George, suggesting that the Accused had told him in 2009 that he was contemplating ending the marriage.

1252. You were taken to evidence of Dr Lumsden and Dr George concerning the state of the deceased's mental health.

1253. Lengthy references were made to the journal, Ex. 98.

1254. Mr Fuller reverted to finances saying that, in 2011, the Accused had moved his business to Taringa, employed a large number of inexperienced staff, and then his business was adversely affected by the flood.

1255. His wife had become involved in the business, sharing his goals from September 2011, when she had discovered the affair.

1256. But the Accused resumed the relationship with McHugh.

1257. This time, however, the relationship was different.

1258. Restrictions the deceased had imposed meant that there were brief windows of contact.

1259. You were taken to the emails, Exs. 61-64.

1260. Mr Fuller submitted that the Accused:

- had a decision to make in relation to Ms McHugh;
- was in love with her and made that decision - he wanted to be with her;
- did not have the courage to leave his wife.

1261. Further pressure occurred on the 19th, when Ms McHugh spoke with him by phone and discovered that the deceased was to attend the real estate conference the next day.

1262. Mr Fuller spoke of business pressures by early 2011:

- the expansion had not gone well;
- the Accused had borrowed;
- partners had gone;
- three long-time friends had invested $270,000, and interest was not being paid;
- the Accused had to sell his Lexus, reduce his insurances, and decide which interest payments would be made;
- $300,000 needed to be raised to buy out the other owners of the rent roll; and
- interest of $1,800 monthly had to be paid to keep the revised contract to buy the rent roll in place.

1263. Reference was made to:

- the conversation with Ms Heath; and
- the fact that the Accused had told Toni McHugh that he was thinking of selling the business.

1264. The three pressures were coming together.

1265. On 16 April – three days before Allison was last seen alive – the Accused spoke to Carmel Ritchie.

1266. The Accused was to listen to his wife's expression of feelings.

1267. She was "over the moon" at his having attended the session with Ms Ritchie.

1268. Mr Fuller submitted that, in testifying, the Accused made up a story in an attempt to explain why, in the emails, he had told Ms McHugh that he loved her.

1269. Mr Fuller submitted that:

- on 19 April, the deceased had expressed happiness about the birth of Cameron Baden-Clay;
- that is not consistent with having been upset by her failure to produce a male heir.

1270. Mr Fuller submitted that on 19 April:

- the deceased was eager to grow the business;
- staff at the business saw her laughing and joking.

1271. You were reminded of:

- the phone conversations between Ms McHugh and the Accused on the Thursday afternoon;
- Ms McHugh having said that it was unfair on her and on the deceased for the Accused not to have told his wife that she would be at the conference next day;
- Ms McHugh had asked: "What's your plan";
- the Accused had responded: "I'm thinking of selling the business".

1272. That conversation. Mr Fuller argued, involved Ms McHugh putting pressure on the Accused.

1273. The Accused appreciated that any disclosure by Ms McHugh to the deceased next day, that he had been misleading his wife, would have had catastrophic consequences for him.

1274. He had two choices: tell the deceased about the impending meeting at the conference the next day; or else do nothing. He testified that he decided to do nothing.

1275. Mr Fuller submitted that the Accused had tried to live without Ms McHugh, and could not do that.

1276. The risks, professionally and for his family life, if the two women met at the conference were significant.

1277. That consideration needs to be added to the scratches on his face, the leaves in her hair, and her blood having been found in the car.

1278. You were reminded, yet again, that the Accused had not told the police of his conversation with Ms McHugh on the 19th.

1279. You were taken in detail through text and phone calls the Accused made on the Friday morning.

1280. As to police conversations with the Accused, Mr Fuller emphasised that:

- when asked about his wife's mental health, he said that he was not sure if she was currently medicated;
- he made no reference to her having experienced any adverse reaction to medication or to any recent sign of depression.

1281. The latter is in contrast to the picture he sought to paint when testifying.

1282. Mr Fuller submitted that:

- the deceased was unlikely to have gone for a walk on Friday morning. She was time poor. She and the Accused had to change their domestic roles that morning because she had to be somewhere by 8.00am;

- it was therefore highly unlikely that the deceased would be walking the streets of Brookfield that morning.

1283. More reference was made to the contents of the journal and the deceased's questioning of the Accused before you were reminded of conversations between the Accused and Ms McHugh after the deceased's disappearance.

1284. Mr Fuller submitted that the Accused had:

- an opportunity to kill;
- scratches on his right cheek; and had lied about them;
- long-term tension in his relationship with his wife;
- tension in his relationship with Ms McHugh;
- problems in his business, including debts to friends;
- discussions with Ms McHugh on the night of the 19th;
- the real prospect of his relationship with Ms McHugh being exposed to his wife at the conference the next day, and her being unwilling to forgive him a second time.

1285. Mr Fuller contended that the case is not about pressures on the deceased. Rather it is about a man having to deal with the consequences of his conduct.

1286. It is not suggested that the killing was premeditated.

1287. Mr Fuller referred to matters he characterised as highly unusual:

- for a tolerant person to suffer Serotonin Syndrome;
- for a person who drowns not to have diatoms in her system;
- for a person who falls 11.5m into water or on to land not to have fractures or other evidence of a fall;
- for a combination of plant species to be entwined in her hair;

- that a person would cut himself with a razor such that it looks like fingernail scratches;
- that the Accused should happen so to cut himself on the very day his wife disappears;
- for the deceased's blood to be in the position it was in her car;
- for the Accused's phone to be plugged into the charger at 1.48am.

1288. Mr Fuller contended that:

- the facial scratches reveal close contact while the deceased was struggling for her life;
- the encounter was personal, violent and effective, as the Accused killed his wife;
- you would convict of murder.

Delivering the verdict

1289. If you find that you need further direction on the law, please send a written message through the Bailiff.

1290. Likewise, should you wish to be reminded of evidence, let the Bailiff know, and make a note of what you want. In that event, the Court would reconvene. When you return to the courtroom, I would provide such further assistance on the law as I can or arrange for the relevant part of the transcript to be found for you and read out, if need be.

1291. Let me turn to the procedure for announcing your verdict.

1292. When you return to the courtroom after having reached your verdict, my Associate will ask:

> "Have you agreed upon a verdict?"

1293. If so, you will all then say, "Yes", to show that you have.

1294. My Associate will then ask: "Do you find the Accused, Gerard Robert Baden-Clay, guilty or not guilty of murder?"

1295. Your speaker will then state your verdict: that is, whether guilty or not guilty.

1296. My Associate will then ask you all: "So says your speaker, so say you all?", which is the time-honoured method for inviting the whole jury to signify that the verdict announced by the speaker is indeed the verdict of every one of you.

1297. If that is so, you will collectively confirm that the verdict is unanimous by saying, "Yes".

1298. If the verdict is guilty of murder, no further verdict will be taken.

1299. However, if the verdict is not guilty, my Associate will ask: “How do you find the Accused, again naming him, guilty or not guilty of manslaughter?”

1300. Your speaker will answer.

1301. Then you will again collectively confirm that the verdict is unanimous in the manner just mentioned.

Discharge of reserve jurors

1302. The following remarks are directed to the reserve jurors.

1303. Your participation in this trial is no longer required; and I discharge you.

1304. However, I thank you for your careful attention throughout the trial, and for the dedication with which you have approached your task.

1305. I understand that you may feel disappointed that you are to play no further part in this trial.

1306. I again acknowledge the very considerable service that you have performed over these many weeks.

1307. You are free to leave or to remain, as you wish.

Jury retires

1308. I ask you now please to retire to consider your verdict.