



## Summary of Judgment

### *JESSE VINACCIA v THE QUEEN*

[2022] VSCA 107

7 June 2022

Today, the Court of Appeal (by a majority) refused an application by Jesse Vinaccia for an extension of time in which to appeal against his conviction. Mr Vinaccia was convicted of child homicide in June 2019 for causing the death of his partner’s 16-week-old child, Kaleb Baylis-Clarke, in January 2016.

On the evening of 23 January 2016, Mr Vinaccia was caring for Kaleb while Kaleb’s mother was at work. Mr Vinaccia found Kaleb unresponsive in his cot about half an hour after Mr Vinaccia had put him to bed. Mr Vinaccia called ‘000’ and Kaleb was rushed to hospital, where he was placed on life support but subsequently died. While Kaleb exhibited no external injuries, medical examination revealed that he had sustained a ‘triad’ of injuries, namely, subdural haemorrhages (bleeding around the brain), retinal haemorrhages (bleeding in the eyes) and encephalopathy (brain swelling). The prosecution case at trial was that those injuries (‘triad injuries’) were signs of abusive head trauma.

Mr Vinaccia admitted to handling Kaleb in a manner that could be described as ‘rough’. However, he denied shaking Kaleb or handling him with such force as to constitute conduct that was unlawful and dangerous or criminally negligent. The defence argued that Kaleb had a pre-existing condition that made him particularly vulnerable to ‘rough’ handling.

In the weeks prior to his sudden collapse and death, Kaleb’s head had been observed to be abnormally large, and his head circumference had increased at a concerning rate. On 14 January 2016, he was taken to hospital with a raised fontanelle and some vomiting, and he was kept there for investigation. A brain MRI conducted on 15 January 2016 recorded mild ventricular dilation together with small bilateral frontal subdural hygromas. While consideration was given to ‘tapping’ his raised fontanelle, his condition improved and he was discharged on 17 January for outpatient review.

At trial, in advancing abusive head trauma as the cause of Kaleb’s collapse, the prosecution adduced evidence from the forensic pathologist who carried out Kaleb’s autopsy, Dr Linda Iles, and forensic paediatrician, Dr Joanne Tully. Dr Tully’s opinion that Kaleb had most likely suffered abusive head trauma was based in large part on the presence of the triad injuries and, in particular, the extent and distribution of the retinal haemorrhages that were found.

At trial, the defence did not challenge the diagnostic utility of the triad injuries or propose an alternative cause of death. Although the defence obtained its own reports from forensic pathologists, they were not relied on at trial. The defence contended that, while the level or extent of trauma necessary to produce the triad injuries was unknown, for Kaleb it was less than would otherwise be the case, because of his pre-existing condition.

In the Court of Appeal, Mr Vinaccia sought to overturn his conviction, in large measure on the basis that the diagnosis of abusive head injury based on the presence of the triad injuries was the product of ‘junk science’. Three of the four proposed grounds of appeal ultimately pressed relied on the receipt of evidence not adduced at trial that challenged the diagnostic utility of the triad injuries and findings as to the cause of Kaleb’s death. That evidence, from three expert witnesses based in Sweden and Norway, called into question the scientific basis for the otherwise widely accepted association between the triad injuries and abusive head injury, and advanced an alternative, purely organic (or medical) cause for Kaleb’s death: Benign Enlargement of the Subarachnoid Space (‘BESS’). In response to those experts, the prosecution sought to rely on further evidence from Dr Tully and Dr Iles, and also from Professor Michael Ditchfield, who did not give evidence at the trial, but whose report had informed Dr Tully’s evidence.

A majority of the Court (T Forrest and Emerton JJA) declined to admit this new evidence, finding that it would not have resulted in Mr Vinaccia’s acquittal had it been led at trial and that Mr Vinaccia had not suffered a substantial miscarriage of justice as a result of his trial being conducted without the new evidence. The new evidence challenging the diagnostic utility of the triad injuries for abusive head trauma could have been led at trial, and a forensic decision was made not to do so. Further, the alternative organic explanation for Kaleb’s death was nebulous and speculative in character and did not displace the evidence given by Dr Tully and Dr Iles concerning the cause of Kaleb’s death.

Walker JA, in dissent, would have permitted the new evidence to be admitted. Her Honour held that, had the new evidence, including the further evidence given by the prosecution experts, been led at trial, it would not have been open to the jury to conclude, beyond a reasonable doubt, that Mr Vinaccia committed child homicide.

The majority rejected a further ground of appeal, that the probative value of the evidence of the triad injuries did not outweigh its prejudicial effect and should not have been admitted. The majority considered the probative value of the triad injuries to be high. Walker JA did not find it necessary to deal with this ground of appeal.

The majority also rejected the ground of appeal that alleged that the verdict of the jury was unreasonable or unsupported by the evidence led at trial (that is, without any consideration of the new evidence). Walker JA joined in this conclusion.

Finally, Mr Vinaccia contended that a substantial miscarriage of justice had occurred because Dr Tully did not disclose slides from PowerPoint presentations that she had used in 2017 and 2019 to teach medical professionals about abusive head trauma. These slides were said to show Dr Tully was aware of a controversy about the diagnostic utility of the triad injuries in identifying abusive head trauma, and that she gave incorrect evidence of there being a ‘consensus’ in the scientific community as to that diagnostic utility.

T Forrest and Emerton JJA found this ground to be unmeritorious. They held that Dr Tully was not expected to disclose the slides as part of her obligations as an expert witnesses. Further, in light of the explanation that Dr Tully gave about the slides, disclosing them would not have affected the outcome of the trial.

Walker JA, in dissent, considered the slides to be potentially significant to the way Mr Vinaccia would have conducted his case, and held that they should have been disclosed by the prosecution.