

IN THE COUNTY COURT OF VICTORIA

Revised  
(Not) Restricted  
(Not) Suitable for  
Publication

AT MELBOURNE  
CRIMINAL DIVISION

CR-17-00325

DIRECTOR OF PUBLIC PROSECUTIONS

V

EBONIE JANE WEYBURY

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JUDGE: HIS HONOUR JUDGE MEREDITH  
WHERE HELD: Melbourne  
DATE OF HEARING: 14 September 2017  
DATE OF SENTENCE: 6 October 2017  
CASE MAY BE CITED AS: DPP v Weybury  
MEDIUM NEUTRAL CITATION: [2017] VCC

REASONS FOR SENTENCE

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Catchwords: Dangerous driving causing death and serious injury.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Mr J. Champion SC with S. Ballek	
For the Accused	Mr A. Malik	

HIS HONOUR:

- 1 Ebonie Weybury, you have pleaded guilty to one charge of dangerous driving causing the death of Mr Anthony Cassidy, and one charge of dangerous driving causing the serious injury of the front seat passenger of your vehicle, Mr Matthew Walshe. The maximum penalties for these offences respectively are 10 and 5 years' imprisonment.
- 2 Exhibited on the plea hearing was a prosecution summary of the circumstances of your offending, as well as a bundle of photographs. These will remain on the Court file and having regard to this I will summarise them somewhat more briefly.
- 3 Your victims, Mr Cassidy and Mr Walshe, were respectively aged 36 and 30 at the time of your offending. Mr Cassidy was unknown to you, and Mr Walshe had known you for some eight years prior to the date of your offending. You and he had been in an on-and-off relationship over that period of time.
- 4 At the time of your offending, you were living with Mr Walshe at a Kilsyth address. Both of you had to move from that address and in the days preceding your offending you had both been arguing over the anticipated move.
- 5 On Thursday, 15 October 2015, in the afternoon, both you and Mr Walshe had been arguing, and you left your joint residence and attended at your sister's. Yours and Mr Walshe's dispute continued via text messages and phone calls over the afternoon and evening. You eventually returned to your shared residence at about 9.00 pm. You agreed that you would drive Mr Walshe to a residence in Ferntree Gully and you both left your shared residence at approximately 10.00 pm.
- 6 During the drive, arguing between the two of you again broke out. This involved yelling and verbal abuse. During the drive, you threatened to take Mr Walshe to the police and in fact you did drive to the Boronia Police Station in Dorset

Road. You pulled into the driveway of the station, however, changed your mind and exited.

7 You then commenced travelling on Boronia Road in a westerly direction. By this stage, you had begun exceeding the speed limit. Your passenger, Mr Walshe, told you to stop and slow down but you continued to drive at fast speed. Mr Walshe observed that you were driving at about 90 kilometres per hour.

8 In his first statement Mr Walshe states:

“ After we left the police station I can't remember where we went. All I remember is that her driving became worse in that she started speeding and driving really fast. I kept telling her to stop....”

9 Another road user, Mr Balakrishnan, who was driving in the same direction as you, observed your vehicle approaching him from behind. He describes you suddenly accelerating and overtaking him at a very fast speed. Shortly after overtaking Mr Balakrishnan's vehicle, you lost control of your vehicle as it began to swerve. You attempted to correct it, turning the steering wheel sharply to the right, the rear wheels locked and your vehicle commenced a sharp right hand slide, rotating across the two southbound lanes of Dorset Road.

10 Mr Balakrishnan an independent witness states as follows:

“Not long after I pulled out from the 7-Eleven, a car came up behind me and just accelerated suddenly, like someone had floored the accelerator – it was in the right lane travelling in the same direction that I was, it started accelerating while it was behind me. It sounded like that typical commodore roar when you floor the car. It past me going at a very fast speed and I could see it was a white car and it was definitely a Holden, from the way it started swaying it had to be rear wheel drive.

The white car started losing control, it started doing a big S pattern in front of me as it weaved over the road, then suddenly it lost complete control and it looked like the wheels locked turning the car into a sharp right turn.”

11 Dorset Road is a four lane carriageway with two lanes travelling in each direction. It is predominantly straight and flat and runs in a north-south direction.

- The applicable speed limit at the time of your offending was 60 kilometres per hour and the road conditions were unexceptionable.
- 12 Accident reconstruction evidence indicates that when your vehicle first commenced to yaw, it was travelling at a minimum speed of 97 kilometres per hour. That it continued to yaw across the road and footpath for approximately 42 metres before striking the front fence of a residence and then travelling a further 15 metres until its rested position. Examination indicates that there was no mechanical defect which contributed to your loss of control of your vehicle.
  - 13 Ms Clarke, another road user, was travelling in the opposite direction to you on Dorset Road. She saw your vehicle travelling at a fast speed and observed it to swerve across the road in her direction. Your vehicle slid across the two northbound lanes of Dorset Road and narrowly missed the front of Ms Clarke's oncoming vehicle. Ms Clarke who had slowed the speed of her vehicle to what she estimates was 20 kph or so, believes your vehicle missed hers by a metre or so.
  - 14 Mr Cassidy, a pedestrian, had turned from a side street onto Dorset Road and was walking a small dog on the footpath. Your vehicle continued across the northbound lanes hitting the kerb of the footpath and struck Mr Cassidy. Your vehicle continued at a fast rate, colliding with a front wooden fence, then a brick wall and ultimately hit and came to rest against the corner wall of a unit situated along Dorset Road.
  - 15 Mr Cassidy was duly taken to the Alfred Hospital suffering with significant injuries. He underwent a number of procedures and received treatment over the ensuing three week period. Mr Cassidy failed to recover from severe brain injury and died on 8 November 2015.
  - 16 Mr Walshe was taken to the Royal Melbourne Hospital and was noted to be suffering multiple facial fractures including two fractures to the left cheek and a fracture to the left eye socket, a spinal fracture, bruising and swelling to the eye,

blurry vision, multiple lacerations to the head, face and elbow and glass fragments having lodged in his face. He required surgical reconstruction of his cheek bone and self-discharged from the hospital after two to three days.

17 You were observed to be hysterical and shaking and on exiting your vehicle you helped Mr Walshe out from the passenger side. You were heard to say,

“I don’t know how this happened. I tried to use the brakes. I tried to use the brakes but it didn’t work.”

18 You have made a number of contradictory statements concerning how you lost control of your vehicle, in summary these indicate that you are unable to explain how it was that this came about.

19 You were taken to Box Hill Hospital for monitoring and were discharged the following morning. You were then arrested and participated in an interview.

20 In the interview you said that:

- When you commenced driving you and Mr Walshe had had an argument, that you had turned you vehicle around to return home but he was yelling at you and at one point he ripped off the rear vision mirror and at another he pulled on the handbrake.
- You described Mr Walshe as verbally abusing and threatening you, with him leaning across and yelling in your face.
- You said you tried to turn you vehicle around but were abused and that you did not feel safe. You said Mr Walshe threatened you and grabbed your arm, however, you changed your mind when you arrived at the Boronia Police Station because you did not want Mr Walshe getting into trouble.
- You stated that on Boronia Road Mr Walshe pulled on the handbrake, and the car skidded and the back end fishtailed. You said you were travelling at 60 kilometres per hour at the time, and that you pushed

Mr Walshe's hand away and released the handbrake. You described this as being the incident which caused you to go to the police station.

21 You described feeling shaky and not knowing what to do by the time you turned onto Dorset Road after the police station. You said Mr Walshe was becoming more aggressive and you said you did not know whether Mr Walshe had actually grabbed your steering wheel or pulled your handbrake.

- You stated that all you can remember is that the back end of your vehicle flicked out and you had no control over your vehicle at all. You said you believed you were travelling at the speed limit or possibly a touch over.
- You said that you could not account for nor explain what had caused your loss of control in the first place, that at the time you lost control there was arguing and you felt panicked, confused and stressed.

22 Several days later on 18 October 2015, you provided police with a sworn statement, the contents of which confirmed much of what you had earlier said during your interview. Additionally, however, you said:

"I was going about 60 kph then I remember my car skidding and stuff. My car flicked to the right and I remember a bump then I don't remember anything until I pushed the airbag out of my face and climbed out of my car... I wasn't aware that a Pedestrian and a dog had been hit until afterwards."

23 You described being in fear for your safety as a result of Mr Walshe's violence and threats towards you. You detailed a number of previous incidents including his pushing you over during the course of a previous argument and fracturing your arm, some weeks before the incident, that on the morning of 15 October that Mr Walsh swang at your vehicle with a lump of wood as you were driving away that morning, that during your driving in the lead up to the incident and prior to you attending at the Boronia Police Station, Mr Walsh used both hands to grab your left arm in a menacing fashion, that is the arm which had earlier been fractured.

- 24 Eleven days later on 29 October, you provided a second sworn statement to police where you described Mr Walsh having earlier pulled the handbrake which caused you to immediately brake. That you regained control of your vehicle within a couple of seconds but felt petrified, and that Mr Walsh continued to yell at you. That you then drove to the Boronia Police Station.
- 25 Whilst it is accepted that the consequences of your driving were unintended and unforeseen by you; your pleas of guilty are an acceptance that your driving was at a speed dangerous to the public, such that it involved a serious breach of the proper management or control of your vehicle, creating a real risk that members of the public in the vicinity would be killed or seriously injured.
- 26 In your case, this risk crystallised with the tragic death of Mr Cassidy, an innocent pedestrian, and the serious injury of your front seat passenger, Mr Walshe.
- 27 Your collision appears to have occurred on a relatively straight stretch of road which was dry and where the weather conditions were generally fine. The dangerousness of your driving is informed by the degree of risk of harm being caused and the extent of potential harm or death.
- 28 Objectively viewed your driving was well over the speed limit, irresponsible, dangerous, and you were ignoring Mr Walshe asking you to slow down. The precise mechanism by which you lost control of your vehicle is unexplained, however a loss of control at that speed is inherently dangerous. Here, it involved careering out of control into the oncoming lanes of traffic and then mounting the footpath, self-evidently exposing persons, to a high degree, to the risk of significant harm or death.
- 29 In your interview you referenced arguing with Mr Walsh and having felt panicked, confused and stressed. You made the decision to continue to drive with Mr Walshe remaining in the vehicle notwithstanding the inherent risk involved.

- 30 In your interview your responses to Mr Walshe's conduct include: indicating to him that you had had enough of violence in your life that you will not put up with it, or of being abused and threatened, see Q 78; that you warned Mr Walshe that if he continued on with his behaviour you would drive to a police station or pull over on the side of the road and call police and have him removed from your car; that after he had applied the handbrake you said to Mr Walshe, "that's the last straw"; and that you "wouldn't put up with this", see Q 167, and 178. These answers indicate that you were not sufficiently overborne as to be incapable of taking steps to remove Mr Walshe should it be necessary.
- 31 You made a decision to withdraw from the Boronia Police Station. You had considered and appreciated the inherent risk involved in driving in these circumstances, however, rather than seeking to avert that risk, determined to continue on with your driving. You could easily have mitigated this risk by having attended inside the police station, or simply pulled the car over after you had left the police station.
- 32 I shall deal further with the circumstances operating on you at the police station and at the time of your loss of control of the vehicle at a later point in these reasons.
- 33 On the plea hearing Victim Impact Statements were tendered from Jane Adams, Neil, James and Shaun Cassidy, Lawrence Twinins, Dean Adams and Sally Rogers. They are eloquent testimony to the suffering which your offending has caused the friends, family and loved ones of your victim, Mr Cassidy. I commend the dignity which those present in the court displayed. Your offending has had a profound and ongoing impact and its consequences will continue well into the future. The authors of these Victim Impact Statements speak of their ongoing grief and sense of loss that they feel. I have had appropriate regard to the relevant and admissible portions of these documents.
- 34 In addition, a Victim Impact Statement was tendered on behalf of



- Mr Walshe, and I have had appropriate regard to its contents.
- 35 My task in sentencing you does not represent a value being placed upon the life of Mr Cassidy, or the pain and suffering of Mr Walshe. My role in sentencing is to address the fundamental sentencing aims of punishment, deterrence, both specific and general, rehabilitation, denunciation and protection of the community. I must balance matters such as the seriousness of the offence, your culpability for it, your personal circumstances, the community's interest in deterring and denouncing your conduct, along with the community's interest in ensuring that so far as possible you are rehabilitated.
- 36 So far as your personal circumstances are concerned you are now 31 years of age. You have previously received a number of traffic infringement notices for exceeding the speed limit. You have not previously appeared in a court before, and I accept prior to this offending were a person of good character.
- 37 Much of your background appears in a psychological report of Mr Jeffrey Cummins, forensic psychologist. In summary your parents separated at age 5 and your mother has continued to reside in the family home in Kilsyth. Your mother re-partnered as did your father. You reported to Mr Cummins that you had had a number of falling outs with your parents and you initially left home at the early age of 14. At around this time your elder sister was killed in a motor vehicle accident and you reported to Mr Cummins that you had been raped at this stage of your life.
- 38 Once you left school, to your credit you continued on with your education achieving a Year 10 pass through what Mr Cummins refers to as you being linked with a youth programme.
- 39 You have had a variety of casual jobs and have completed some courses, including at Swinburne University. At the time of the incident you were working as a kitchen hand at an aged care facility, as well as cleaning. When you were around 24 your younger brother sustained serious injuries in a motor vehicle

accident.

40 Since your offending you entered into a new relationship and this has now lapsed given the uncertainty of your situation. You have participated within the workforce, and at the time of the plea hearing were unmedicated for any psychological or psychiatric disturbance. You undertook some psychological counselling and this is reflected in a report of 11 December 2015 from Grow Psychology. You were supported in court by your father.

41 Your counsel, relying on the authority of *R v Verdins (2007) 16 VR 269*, principles 1 – 4, submitted that at the time of your offending you were labouring under a mental abnormality, namely composite post-traumatic stress disorder, and this ought lead to a reduction in the sentence that I impose on you. In making this submission your counsel relied upon the reports of and evidence given before me by Mr Cummins; and submitted that in your case:

- Your moral culpability for your offending conduct is reduced, and so denunciation of your behaviour is of less relevance in sentencing.
- Your condition bears upon the kind of sentence to be imposed on you.
- That the operation of both general deterrence and specific deterrence as sentencing considerations ought to be moderated.

42 Superior courts have emphasised the need for a rigorous examination of the evidentiary foundation for the application of these principles. In your case you have not satisfied me that they apply to you.

43 In his report of 28 April 2017, which is based on an assessment of 19 and 24 April 2017, Mr Cummins opines:

44 "It is my opinion it is very probable she was the victim of repeated verbal and physical domestic violence in her relationship with Mr Walshe". Regarding this; I am not prepared to act on it beyond what is disclosed in your police interview

and two later statements which I have essentially already summarised in these reasons.

45 Mr Cummins further states, that,

‘... at the time of the offending she was suffering symptoms of what is clinically described as a Complex Post-Traumatic Stress Disorder (reflective of multiple and overlapping Post-traumatic stress disorders). In my opinion, at the time of the accident she was also in a very verbally volatile and most probably also physically volatile relationship with Mr Walshe, with whom she was endeavouring to reconcile.”

46 Mr Cummins opines that:

“In my opinion her perception, judgment and reasoning ability were impaired at the time of the collision of 15 October and this impairment was directly reflective of her suffering multiple post-traumatic stress disorders and her being simultaneously verbally and physically abused by Mr Walshe – which in itself would have, according to Ms Weybury, re triggered pre-existing symptoms of post-traumatic stress disorder.”

47 Mr Cummins states that you were traumatised by Mr Walshe whilst in a relationship with him, that included both physical and verbal abuse, and whilst in the vehicle immediately prior to the collision. At the time of his assessment of you in 2017, Mr Cummins nominated your reported indicators of PTSD as multiple traumas. Mr Cummins cites you having been raped at age 14/15, your sister having been killed in a motor vehicle accident when you were 14 your brother sustaining serious injury in a motor vehicle accident, and Mr Cummins references obsessional ruminative thinking, disturbed sleep, concentration difficulties, flashbacks, and occasional nightmares.

48 In his supplementary report of 11 September 2017 Mr Cummins had regard to the following factual assertions; all of which relate to conduct prior to your attendance at the Boronia Police Station.

- That Mr Walshe kicked the dashboard of the car – this is not referred to at all in statements to civilian witnesses, in your police interview, or the two statements made by you, however it is not disputed between the parties that it occurred, and I am prepared to act on that basis.

- Mr Walshe grabbed the steering wheel on three separate occasions, this is not referred to at all in statements to civilian witnesses, in your police interview, or the two statements made by you, however it is not disputed between the parties that it occurred, however the prosecution do not accept that it occurred on three separate occasions. Having regard to the state of the evidence I am prepared to act on the basis of an occurrence prior to the police station.
- Mr Walshe grabbed your arm, I accept that this occurred and it is referenced in your interview, for example at Q 157.
- While stationary Mr Walshe removed the rear vision mirror of the vehicle, I accept that this occurred and it is referenced in your interview, for example see Q 162, and 3.
- While in motion Mr Walshe activated the handbrake, I accept that this occurred, see Q 162, 163–177 of your interview , and,
- That Mr Walshe made reference to the death of your sister in a car accident while in the vicinity of the location of that accident. In his initial report at para [15] Mr Cummins states that you told him that, "Mr Walshe was screaming at me, reminding me of how my sister died."
- In his evidence Mr Cummins put it that you had stated in conference to him that Mr Walshe made "some remark" to the effect that something similar could happen to them ( that is you and Mr Walshe) as happened to your sister.
- In his supplementary report of 11 September 2017, Mr Cummins states that ". if Mr Walshe had not made reference to your sisters accident there is a reasonable likelihood you would have remained at Boronia Police Station."
- There is no reference to Mr Walshe commenting as described by Mr Cummins in the depositional material, either; by way of what you said at the scene, in your police interview, or your two subsequent statements to police. The only reference to something approaching this is at the end

of your answer to Q 129 of your interview , wherein you say, “ I didn't feel comfortable and I don't like driving and being abused or driving upset 'cause my older sister died in a car accident.”

49 Given the state of the evidence I am not prepared to act on the basis that the comments described by Mr Cummins occurred.

50 As I understood Mr Cummins' evidence before me, it was the comments attributed to Mr Walshe that Mr Cummins opines as the likely trigger for what he characterised as your composite PTSD and an impairment of your perception, reasoning and judgment during the driving the subject of the charges that you face.

51 Given that you have not satisfied me on the whole of the material that Mr Walshe made the comments in question, I cannot accept Mr Cummins' finding in this regard.

52 Having said that however, I do of course take into account in a general sense that you were in a pressured situation given the goings on in the car, and that the exigencies of your situation do contextualise your exceeding the speed limit and loss of control.

53 I can indicate to you, that even if I accepted there was a sufficient evidentiary basis for me to find that you were labouring under composite PTSD at the relevant time of your driving, it would be of little mitigatory value, and would not result in a materially different sentence. In my view the link between this and your capacity to control your vehicle is in my view modest, as is the link between this and your driving of your car at at least 97 kph in a 60 kilometre zone, nor could it be said that you were incapable of understanding the English language at the time or of hearing your passenger asking you to slow down repeatedly.

54 In your interview at Q 186 you state saying to Mr Walshe, “I won't put up with this, you need to stop, the aggression needs to stop.” At Q 162, 163, you

account for leaving the police station as a desire not to get Mr Walshe into trouble, feeling confused, scared and vulnerable with your belongings still in the shared house of Mr Walshe. I am prepared to act on this basis.

55 Your counsel further relied upon Mr Cummins' opinion that you will have significant difficulty coping with incarceration, that you present as a “significantly vulnerable person”, and your counsel argues that your incarceration will weigh more heavily on you than it would a person in normal health. Also, that there is a serious risk that your incarceration will have a significant adverse effect upon your mental health.

56 To the extent that you present with symptoms as described by Mr Cummins of obsessional ruminative thinking, disturbed sleep, concentration difficulties, flashbacks, and occasional nightmares, I accept your time in custody will be more burdensome and I have appropriately taken this into account in your favour.

57 So far as your incarceration presenting a "serious risk" of having a “significant adverse effect upon your mental health”, I am not satisfied on the material before me of this. I do appreciate however, that you are someone with no previous involvement in the criminal justice system and that imprisonment is a daunting prospect for you.

58 Your counsel submitted that I ought release you on a Community Correction Order, or a combined gaol term and Community Correction Order. This submission is to be seen in the context of the pronouncements of superior courts that general deterrence must be appropriately emphasised in sentencing for your offences.

59 In *Director of Public Prosecutions v Oates* [2007] VSCA 59, a case involving a non-custodial disposition where the driving was found to be a result of momentary inattention, and where the driver had taken steps to alleviate his fatigue, Neave JA (with whom Warren CJ agreed) said:

“...general deterrence must be given considerable weight in sentencing an offender for dangerous driving causing death or serious injury. Members of the public must recognise that a person who kills or injures another while driving dangerously is likely to receive a significant term of imprisonment. As the New South Wales Court of Criminal Appeal said in *Whyte*, a custodial sentence will usually be appropriate for an offence of this kind, except in cases where the offender’s level of moral culpability is low.”

60 Having regard to the whole of the circumstances I am of the view that your moral culpability is not of a low order.

61 As long ago as in the 2009 case of *DPP v Neethling*, (2009) 22 VR 466. At [29], the Court endorsed the NSW approach in *Jurasic*, (1998) 45 NSWLR 209 that a non-custodial sentence for the offence of dangerous driving causing death should be seen as exceptional. At [30], the Court confirmed the principles as enunciated by Neave JA as follows:

- 1) General deterrence must be given considerable weight in sentencing an offender for dangerous driving causing death or serious injury.
- 2) A person who kills or injures another while driving dangerously is likely to receive a significant term of imprisonment.
- 3) The sentence which is imposed must take account of variations in the moral culpability of the person responsible.
- 4) A custodial sentence will usually be appropriate for this offence, except in cases where the offender’s level of moral culpability is low.

62 In the case of *Stephens v R* [2016] VSCA 121, which was handed down in May of 2016, the Court of Appeal of this State indicated that there is a need for a gradual increase in the sentences to be imposed for cases of dangerous driving causing death which fall within or above the mid-category of seriousness. I am satisfied that your case fits within this range.

63 To your credit you pleaded guilty at what I accept given the forensic realities of your case was an early stage. This has facilitated the course of justice and this

in conjunction with the whole of the material before me satisfies me that you are genuinely remorseful for your offending. You have not appeared before a court before and I am satisfied that in your case for these reasons specific deterrence is of reduced significance in my sentencing of you. I accept that your prospects of rehabilitation are positive.

64 Your offending occurred in mid-October of 2015, you were charged in September of 2016. You pleaded guilty to the offence of dangerous driving causing death at the commencement of your committal hearing and there was no cross-examination of witnesses on 22 February 2017. A plea hearing of 5 May was unable to take place and due to Mr Cummins' illness I have had to adjourn your matter from 14 September until today for sentence. I have taken into account in your favour the delay in this matter in two ways. Firstly, I accept that a process of rehabilitation of you has commenced and to the extent that it is appropriate I do not wish that process to be jeopardized. And secondly, fairness dictates that I take into account the fact that you have been kept in suspense regarding your fate over the ensuing period. This is evidenced for example by the impact which the uncertainty surrounding your position has had on your relationship.

65 Balancing all matters then I sentence you

66 Charge 1 dangerous driving causing death – 3 years' imprisonment.

67 Charge 2 of dangerous driving causing serious injury – 18 months' imprisonment.

68 Charge 1 is to be the base sentence and I cumulate on it 6 months of the sentence I have imposed on Charge 2, making a total effective sentence of 3 years and 6 months. I fix a non-parole period of 2 years. I declare four days having been served by way of pre-sentence detention.

69 I will indicate that but for your plea of guilty, I would have imposed a total



effective sentence of 4 years and 6 months' imprisonment and fixed a non-parole period of 3 years.

- 70 Regarding your licence, I will direct that all licences held by you are to be cancelled and you are to be disqualified from driving on Victorian roads for the period of 2 years and 6 months.

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HIS HONOUR: Are there any other orders required gentlemen? Licence?

MR CHAMPION: An order in respect of the licence Your Honour, it needs to be made.

HIS HONOUR: Yes. Regarding your licence, I will direct that all licences held by you are to be cancelled and you are to be disqualified from driving on Victorian roads for the period of 2 years and 6 months.

MR CHAMPION: Thank you Your Honour.

HIS HONOUR: Thanks for attending Mr Champion, and thank you both for your assistance.

MR MALIK: As Your Honour pleases.

HIS HONOUR: If there's nothing further then, if Ms Weybury could be removed please. We'll adjourn then until ten to eleven for the other matter.

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