

***O'Driscoll v The State of Western Australia* [2011] WASCA 175 (10 August 2011) – Supreme Court of Western Australia (Court of Appeal)**

'Evidence' – 'Hearsay' – 'Murder' – 'Physical violence and harm' – 'Relationship evidence' – 'Remoteness of evidence'

Charge/s: Murder

Appeal Type: Application for extension of time for leave to appeal against conviction.

Facts: The appellant was convicted of the murder of his de facto partner.

Issue/s: One of the issues concerned whether the trial judge erred by admitting evidence of the relationship between the appellant and the deceased, particularly statements made by the deceased as to the nature of the relationship and previous violence she suffered at the hands of the appellant.

Decision and Reasoning: The appeal was dismissed. The prosecution relied on common law principles in relation to admissibility of the evidence. Martin CJ (with whom Pullin JA and Hall J agreed) at [25] – [41] considered various High Court decisions on the correct test to apply including *Wilson v The Queen* (1970) 123 CLR 334 and *Walton v The Queen* (1989) 166 CLR 283. The Court held firstly that the evidence was not hearsay, because it was only used to establish the deceased's state of mind. The jury could then draw an inference as to the nature of the relationship. The crucial issue was the way the evidence was used. If the jury had regarded the evidence as facts asserted by the deceased and then went on to conclude that the appellant was prone to violence, it would have been prejudicial to the accused. However, the prosecution did not use the evidence in this way and the trial judge directed accordingly. An argument that statements made by the deceased earlier than one or two weeks prior to her death was 'too remote in point of time' to be admissible was also rejected. The Court held that while it may be possible for evidence to be so distant as to be inadmissible, this was not the case here. The relationship was relatively short and the statements that were made completely spanned this period. This increased rather than reduced its probative value.