NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF VICTIM AND HER MOTHER PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 91/2025
[2025] NZSC 164

BETWEEN	MICHAEL JOHN TOPP Applicant
AND	THE KING Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: P J Shamy KC and H L Beaven for Applicant
M J Lillico and B So for Respondent

Judgment: 17 November 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Topp was convicted of the murder of his three-month-old daughter and also of two earlier assaults on her. Mr Topp's appeal against conviction was dismissed by the Court of Appeal.[1] He applies for leave to appeal to this Court against that decision.

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[1] *Topp v R* [2025] NZCA 348 (Thomas, Fitzgerald and Eaton JJ) [CA judgment].

Background

[2] The cause of the baby's death was blunt force head trauma. She had significant head injuries (including brain haemorrhages), multiple fractures and other injuries. Experts considered the injuries, including the fatal injuries, were inflicted on a minimum of three occasions.[2]

[3] The two earlier assault charges on which Mr Topp was convicted were a representative charge of causing grievous bodily (GBH) with intent to cause GBH (one of the earlier brain injuries) and a representative charge of causing GBH with intent to injure (an earlier fracture to her left tibia).[3] He was acquitted on a further GBH charge relating to an earlier fracture to his daughter's left tibia.[4]

[4] With regard to the murder charge, Mr Topp admitted causing the fatal injuries. The issue was whether or not he possessed reckless murderous intent. He denied being responsible for the earlier injuries.

Application for leave to appeal

[5] The application for leave to appeal is based on three grounds, essentially the same grounds as in the Court of Appeal.

[6] The first ground concerns inadmissible evidence given by one of the expert witnesses called by the Crown. The impugned passages are:[5]

> (a) Q. You've said: "Repeated." Are you able to put a number on it?
>
> A. I'm not able to put a number on it. I would agree that there are at least three but I would not be surprised if there were more than three. *We know from the literature, we know from people who confess to shaking babies and harming them that their history when they confess, their history is often that they've harmed the baby repeatedly and sometimes many, many times before the baby presents for medical care or presents in terrible condition.* So I agree that it's

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2 At [2]–[3].
3 At [4].
4 At [5].
5 Emphasis added.

at least three but I would not be surprised if it was more. And I don't know that — *there's only one person who knows how many times the baby was injured*.

(b) A. … so, again, I just said that *when people confess to shaking babies, it is most common that this has happened repeatedly*.

(c) Q. So the forces that were used to cause the injuries in [the baby], are you able to tell us, give us an idea, as to the level of the forces that caused the injuries in [the baby]?

A. I can't tell you the Gs of forces. I can tell you that they are not the forces that any young infant should be subject to. *That a reasonable person who saw someone do this to a baby would know that that was a very dangerous and terrible thing that happened to the baby*. And that it constitutes violence against the baby and this is clearly violence against this baby. Multiple bones were broken. Repeatedly, the brain was severely injured. *This is just terrible violence against this baby.*

[7] The trial Judge declined an application to abort the trial that was made after this evidence was given, but the impugned passages were deleted from the notes of evidence given to the jury. The Judge addressed the inadmissible evidence in her summing up in the following manner:

> [15] I will come back to the key points of the medical evidence when I take you through the question trail, but before moving on I have to inform you I have directed that two questions and answer exchanges with Dr Christian be deleted from the transcript.
>
> [16] In the first piece of evidence Dr Christian referenced a study of the offending history of other people who had admitted guilt of assaulting children in terms of what they had often done regarding other offending. That evidence was not directly in response to Ms Elsmore's question, and it is not admissible. Evidence and analysis of the study is no doubt within Dr Christian's expertise, but it is irrelevant in this trial what other people have done or not done. I want to be very clear about that. I am sure you will all understand that. And you can imagine it is even more irrelevant when it is only what they have "often" done, not what they have "more often than not" done. It adds nothing to the evidence, and you are to disregard what you recall of it. For those reasons I deleted that paragraph. There was a subsequent one-line reference only to that study which I have directed be deleted also.
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> [17] The other piece of evidence involved Ms Elsmore asking Dr Christian to describe the level of force that caused [the baby's] injuries. Dr Christian answered in part with reference to what a reasonable person would know. However, while it may come down to exactly how things are expressed, I

> consider it is outside Dr Christian's expertise to comment on what a reasonable person would know. Experts are only allowed, as I said before, to give their evidence on matters that are truly within their expertise, and we have to be fairly rigorous about that. In any event, as I will explain shortly, in terms of intent, the murder charge turns on the subjective knowledge of the defendant, not what a reasonable person would know. So that question and answer has been deleted also and you are to disregard what you recall of it, if you recall it.

[8] The second ground is that the Crown wrongly relied on Mr Topp's admission to the fatal act as propensity evidence in relation to the other charges.

[9] The third ground alleges inappropriate judicial intervention while a witness, Ms Rusbatch, was giving evidence. The witness said that the baby's mother, Ms F, had admitted to shaking her baby on an occasion prior to her death. The witness was asked to describe the type of shake that the mother had demonstrated:

> Q. So you say that there was this conversation where [Ms F] said that she thought she might've shaken the baby. Did she describe the kind of shake?
>
> A. I guess she just said like a little light — I don't know. She didn't, no, she didn't describe much.
>
> Q. Show us what — did she show you what she did?
>
> A. I think, isn't there a video? I don't want to act it out, I'm sorry.
>
> Q. I'm going to ask you please to explain to us what [Ms F] said and did when she said this, okay? So you went and got her a teddy bear, you've said?
>
> A. Mhm.
>
> Q. And you've told us that [Ms F] — and you asked [Ms F] to show you what she did?
>
> A. Mhm.
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> Q. I think you said earlier that [Ms F] put her hands under the arms —
>
> A. Yep.
>
> Q. — and supported the head —
>
> A. Mhm.
>
> Q. — of the teddy bear. And then tell us clearly please, showing us exactly what [Ms F] did?
>
> A. "Why won't you stop crying?"

Q. So you've held your hands and you've moved them three times.

A. Mhm.

Q. How would you describe the way you're moving them?

A. I mean, it's not good, but I mean, I …

Q. I think it's best if we describe the movement.

A. Yep.

Q. You're showing the jury what you say [Ms F] did.

A. Like just a light little — like not a shake, just — I don't know. Just a little …

THE COURT:

Q. Was it more like a little jiggle?

A. Thank you.

Court of Appeal decision

[10] With regard to the first ground of appeal, the Court of Appeal appeared to accept that the first two impugned passages of the expert witness' evidence implied that, because Mr Topp had inflicted the fatal injuries, the literature suggested he had also inflicted the other injuries.[6] The Court also seemed to accept that the expert witness may have strayed into the role of an advocate, or at least appeared that way to the jury.[7] The Court of Appeal, however considered that the measures taken by the Judge meant that this evidence did not cause a miscarriage of justice. It considered that the Judge could not have said more than she did when directing the jury to disregard the objectionable portions of the expert's evidence. She had clearly directed them that the evidence was inadmissible and irrelevant. It was also understandable that the Judge did not directly address the expert's "clearly inappropriate and gratuitous" comment that "there's only one person who knows how many times the baby was injured", so as not to draw attention to it.[8] The Court said that "deletion from the transcript sufficed".[9]

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6 CA judgment, above n 1, at [32].
7 At [33].
8 At [34].
9 At [34].

[11] In relation to the third impugned passage, the Court noted that there had been a pre-trial decision that had made the proper limits of the expert evidence clear. The comment should not have been made. The Court said that it expected more from expert witnesses.[10]

[12] Nevertheless, in the Court's view, the Judge had carefully explained to the jury why this portion of the evidence was inadmissible. She had told the jury that the comment about what a reasonable person would know was outside of the witness' expertise and said the murder charge turned on Mr Topp's subjective knowledge, "not what a reasonable person would know".[11] The Court agreed with the Crown that, in the absence of the other offending comments, the witness' comment that the force used constituted violence against the baby would have been admissible. That comment was "a fair description of the injuries".[12] Overall, the Court was satisfied that the Judge had dealt with this matter in a way that sufficiently addressed the inadmissibility issues and cured any prejudice to Mr Topp.[13]

[13] With regard to issue of propensity, the Court of Appeal held that the Judge's directions were careful and considered. The Judge had directed the jury not to engage in the type of reasoning in which the expert witness had engaged — "that someone who has confessed to shaking a baby has often been shown to have done so many times before".[14] The Judge drew a distinction between that reasoning and reasoning focusing on the similarities between the fatal injury Mr Topp had inflicted on the victim and the injuries covered by charges 2 to 4. Those injuries were "very unusual and would not have been caused accidentally. That was the most powerful relevance of the propensity evidence."[15] The jury was directed to consider whether they accepted there was a pattern of behaviour and were told they still had to consider the evidence in relation to charges 2 to 4.[16]

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10 At [44].
11 At [45].
12 At [46].
13 At [47].
14 At [36].
15 At [36].
16 At [36].

[14] With regard to the Judge's intervention, the Court noted that the word "jiggle" had not been repeated in the Crown closing or the Judge's summing up on charge 2. The Judge in summing up had noted that Ms F told Ms Rusbatch she had shaken the baby, and that Ms Rusbatch had demonstrated what Ms F had shown her, saying it was not really a shake.[17] The Court said that a judge may ask a witness any question that, in the judge's opinion, justice requires.[18] While interventions to clarify evidence are common, it is important that such interventions would not cause "a reasonable observer to think the court partial as between the parties".[19]

[15] The Court accepted Mr Topp's submission that it would have been better if the Judge had not intervened. But that intervention did not, in its view, create a risk of a miscarriage of justice. Ms Rusbatch had described the shake as "light", "little" and "like not a shake" before the Judge intervened, and had said consistently that Ms F said she was supporting the baby's head when she shook her.[20] The Court said: "The expert evidence was that if a baby's head is supported, then the type of injury the subject of charge 2 would not be caused."[21] The Court was satisfied the Judge's intervention did not deprive Mr Topp of a fair trial on charge 2.[22]

Submissions

[16] With regard to the first ground of appeal, Mr Topp submits that a line between expert witnesses and advocates needs to be clearly drawn. There is a point beyond which directions cannot realistically undo prejudice. Where jurors have heard evidence that directly intrudes upon the ultimate issues and is delivered by a highly influential expert, it is submitted that the expectation that the jury can simply put it out of their minds is untenable.

[17] With regard to the propensity evidence, Mr Topp submits that the propensity direction given by the trial Judge in this case essentially invited the jury to use Mr Topp's admission to causing the fatal injuries as making it likely he was also

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17 At [56].
18 At [57] citing Evidence Act 2006, s 100(1).
19 CA judgment, above n 1, at [57] citing *Tahere v R* [2013] NZCA 86 at [31].
20 At [58]–[59].
21 At [59].
22 At [60].

responsible for the earlier injuries. The inadmissible evidence of the expert essentially also used this reasoning. The other evidence referred to by the Court of Appeal did not provide independent evidence of Mr Topp's responsibility for the earlier injuries.

[18] With regard to the Judge's intervention in the questioning of Ms Rusbatch, it is submitted that this undermined the defence. It was not a benign clarification but an alteration of the evidential landscape.

[19] The Crown submits that no point of general or public importance arises.[23] The legal principles are well settled and the proposed appeal merely concerns the application of those principles to this case. In addition there is no risk of a miscarriage of justice.[24]

[20] With regard to the inadmissible evidence, it is submitted that the Court of Appeal was correct to find that the measures taken by the Judge cured the error. The jury were told to disregard that evidence and the Judge had clearly explained why it was improper for them to consider the objectionable evidence.

[21] The Crown submits that the evidence with regard to the murder was highly probative propensity evidence with regard to the other charges. There was other evidence, including text messages and other communications from Mr Topp around the time of the baby's injuries, relating to those other charges. The Court of Appeal was, it is submitted, correct to hold that the Judge's directions were careful and considered.

[22] With regard to the judicial intervention in the questioning, the Crown submits that it would not have given the impression that the Judge was not impartial. Further, the witness had already demonstrated to the jury the movement Ms F had shown her, and the jury would have been able to decide for themselves whether that term was apt to describe the action the witness demonstrated. The important point was, in any event, whether the baby's head had been supported during the "shake" and the witness had been consistent that the mother had said that the baby's head was

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23 Senior Courts Act 2016, s 74(2)(a).
24 Section 74(2)(b).

supported. Two of the experts opined that they would not have expected the type of injuries to have occurred if the baby's head was supported.

Our assessment

[23] We accept the Crown's submission that the Court of Appeal was applying settled principles to the facts of this case. There is therefore no matter of general or public importance arising. Nor do we consider that there is any risk of a miscarriage of justice.[25] Nothing raised by the applicant suggests that the Court of Appeal erred in its conclusions on any of the three grounds.[26]

Result

[24] The application for leave to appeal is dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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25 Senior Courts Act, s 74(2)(a) and (b).

26 We do, however, agree with the Court of Appeal's comments at [44] of its decision, summarised above at [11].