SWEET & MAXWELL

Issue 1 February 23, 2018

Archbold Review

Cases in Brief

Adjournment—magistrates' courts—proper approach—requirement for rigorous scrutiny of applications

DECANI v CITY OF LONDON MAGISTRATES' COURT [2017] EWHC 3422 (Admin); October 25, 2017

The justices had been wrong to allow an adjournment in a driving with excess alcohol case when a prosecution witness required by the defence had not attended because he had not been warned. The court reviewed the authorities on adjournment in the magistrates' court. While the principles were drawn together initially in *CPS v Picton* [2006] EWHC 1108 (Admin), in cases since then, more particular emphasis had been given to the need for the court to subject applications to adjourn to rigorous scrutiny: *Balogun v DPP* [2010] EWHC 799 (Admin), [2010] 1 W.L.R. 1915; *R (Jenkins) v Hammersmith Magistrates' Court* [2015] EWHC 3961 (Admin); and *DPP v Petrie* [2015] EWHC 48 (Admin). The magistrates had failed to scrutinise the application with sufficient rigour; and a suggestion that the defence tactics deprecated in *R (Hassani) v West London Magistrates' Court* [2017] EWHC 1270 (Admin), [2017] Crim. L.R. 720 were evident was misplaced where the issues raised by the defence were within a relatively narrow compass and in relation to the missing witness arose because D was raising his statutory right under s.16(4) of the Road Traffic Act 1988 to have a certificate from an Intoximeter analysis proved, where the accuracy of the machine was genuinely in issue.

Adjournment—magistrates' courts—non-attendance due to fatalities in witness' family—whether failure to adjourn Wednesbury *unreasonable*

R (DPP) v BIRMINGHAM MAGISTRATES' COURT [2017] EWHC 3444 (Admin); December 7, 2017

D was due to stand trial in the magistrates' court for a series of sexual assaults on the complainant. As soon as was possible on that morning, the complainant's fiancé (also a witness) telephoned to say that five members of the complainant's family had been killed in an accident abroad overnight, so neither would attend that day, but would attend any adjourned trial date. The district judge refused the prosecution's application to adjourn on the basis that there was only limited information available; that there was no confirmation that an accident had taken place; that the exceptional remedy of an adjournment required cogent evidence of which there was none; and that whilst the decision might seem hard-hearted, if the complainant or her fiancé had actually attended the court that morning with the information, and had then stated that they were unable to continue, the decision would have been different. The judge's decision was plainly wrong and outside the range of reasonable decisions available to her, and thus *Wednesbury* unreasonable. There was no reason to believe that the accident had not occurred; it was an unrealistically high standard to expect the complainant and her fiancé to attend at court; and the judge made clear that if they had attended the information would have been accepted. The explanation had been volunteered at the earliest moment on the day of the trial, rather than needing to be sought after nonappearance. There was also an absence of consideration of the various balancing factors in the doing of justice between the parties, including the seriousness of the offence, the public interest (including that of the complainant), the fact that the prosecution had done no wrong hitherto; and the lack of prejudice to D of some additional delay. The court endorsed the general approach to adjournment in *CPS v Picton* [2006] EWHC 1108 (Admin) and other cases such as *DPP v Petrie* [2015] EWHC 48 (Admin); [2015] Crim. L.R. 385 and underlined the need for trial dates to be met and for rigorous scrutiny to be given to any application to adjourn. The present decision was specific to the very particular facts of the case.

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Bail—remand in custody between conviction and sentence—whether amenable to judicial review—Senior Courts Act 1981 s.29(3)

R (ALI) v CROWN COURT AT KINGSTON [2017] EWHC 2706 (Admin); October 19, 2017

A decision of a judge in relation to bail between the verdict of the jury and the sentencing decision was a matter relating to trial on indictment (Senior Courts Act 1981 s.29(3)), and accordingly the High Court had no jurisdiction in relation to it. Either, properly understood, *R (on the application of Rojas) v Snaresbrook Crown Court* [2011] EWHC 3569 (Admin) did not support the contrary proposition; or it had been wrongly decided, applying *R v Coroner for Greater Manchester* [1985] QB 67. *Rojas,* (which concerned bail between conviction and sentence) relied on *M v Isleworth Crown Court* [2005] EWHC 363 (Admin). In *M*, it was accepted that a bail decision early in criminal proceedings was not excluded by s.29(3), but that it was a jurisdiction to be exercised very sparingly indeed. In *Rojas,* no consideration was given to s.29(3) in relation to Crown Court bail decisions.

Defences—insanity—M'Naghten Rules—whether available where no mens rea required—application to harassment (Protection from Harassment Act 1997 s.2)

LOAKE v CPS [2017] EWHC 2855 (Admin); November 16, 2017

The Crown Court, on an appeal from the magistrates, had been wrong to rule that on a charge of harassment contrary to Protection from Harassment Act 1997 s.2 where the prosecution relied on the objective limb (D "ought to know" the course of conduct amounted to harassment), the defence of insanity was not available. The recorder relied on the lack of a mens rea requirement in such circumstances.

(1) While it was be true that the first limb of the M'Naghten Rules (D must be found not guilty by reason of insanity if, because of a disease of the mind, he did not know the nature and quality of his act, in the formulation in Smith and Hogan's Criminal Law 14th ed. para.11.2.2.2) relied on the absence of mens rea (and therefore may add little, in that D would in any event be not guilty), that was not true of the second limb (even if D knew the nature and quality of the act, he must be similarly acquitted if, because of a disease of the mind, he did not know it was wrong – that is, legally wrong: *Codere* (1917) 12 Cr.App.R. 21; *Windle* [1952] QB 826 and *Johnson* [2007] EWCA Crim 1978).

(2) It followed that the statement in *Archbold* 2018 at para.7-74 that: "Insanity at the time of the commission of the alleged offence is merely a particular situation where mens rea is lacking" went too far. The court considered that McCowan LJ's dictum in *DPP v Harper* [1997] 1 WLR 1406 that the defence was based on the absence of mens rea was misleading and should not be followed, based as it was on obiter dicta in *R v Horseferry Road Magistrates Court ex parte K* [1997] QB 23, which relied on the then equivalent statement in *Archbold* to that disapproved above (and should similarly not be followed). The court distinguished *C (Sean Peter)* [2001] EWCA 1251, [2001] 2 F.L.R. 757, where there was no suggestion that C was insane within the M'Naghten Rules.

(3) If insanity were available as a defence even to a person who possessed the mens rea for the offence of harassment, then even if that person committed conduct which, viewed objectively, amounts to harassment then he or she would not be guilty if he or she did not know that what he or she had done was wrong, in the sense of the conduct being contrary to law. Further, if the sole question on which criminal liability turned were whether a reasonable person in possession of the same information as the defendant would think the course of conduct amounted to harassment, then this would lead to the conclusion that even a person who did not know the nature and quality of his or her act, and thus was insane under the first limb of the M'Naghten Rules, would nonetheless be guilty. This could not be right (the court gave the example of a dementia sufferer repeatedly texting the same person). If the Crown's submission that if mens rea were made out, then insanity was not available were right, one consequence would be that the defence of insanity would not apply to any offence with an objective form of mens rea. Parliament had created serious offences in which the fault element was explicitly objective (e.g. offences in the Sexual Offences Act 2003, the Terrorism Acts and some money laundering offences in the Proceeds of Crime Act 2002).

(4) The court added that, although the M'Naghten Rules applied to the offence of harassment contrary to s.2 just as they did to all other criminal offences, this should not be regarded as any encouragement to frequent recourse to a plea of insanity. The burden lay on a defendant to prove on a balance of probabilities that he or she fell within the M'Naghten Rules. The offences in the 1997 Act required a "course of conduct", and in practice, prosecutions were generally brought in respect of conduct repeated many times over a significant period. Someone who had engaged in such conduct would not readily be able to show that throughout that period they did not know the nature and quality of their act, or that they did not know what they were doing was wrong, in the necessary sense. If the defence were to be relied upon, it would require psychiatric evidence of great cogency addressing the specific questions contained in the M'Naghten Rules.

Failing to provide a specimen—reasonable excuse—voluntary intoxication—whether failure to procure alternative specimen relevant; nature of reasonable excuse

DPP v CAMP [2017] EWHC 3119 (Admin); December 15, 2017

(1) Where C was "simply too drunk to provide" a specimen for an Intoximeter breath test under the Road Traffic Act 1988 s.7(1), his voluntary intoxication did not amount to a reasonable excuse under s.7(6). While drunkenness may amount to a "medical reason" for the purposes of s.7(1) and (3) (alternative provision of blood or urine sample), "reasonable excuse" for the purposes of s.7(6) may not be available even if there were cogent "medical reasons" under s,7(3), a conclusion that aligned perfectly with *Young v DPP* [1992] R.T.R. 328 (on intoxication as a "medical reason"). That the officer did not go on to require a specimen of blood or urine was irrelevant. The power to do so was permissive not mandatory and it was the court's duty to try C for the offence charged alone.

(2) "[T]here is a real difference between a true explanation for a person's failure to provide a specimen of breath when required to do so and a 'reasonable excuse' for that failure. An explanation may constitute an excuse, and that excuse may be a reasonable one. But that is not necessarily so. The fact that voluntary intoxication may sometimes, perhaps often, explain a person's inability to provide a specimen does not mean that that person will therefore have a 'reasonable excuse' for not doing so."

Homicide—loss of control—Coroners and Justice Act 2009 ss.54 and 55—relevance of mental disorder to "circumstances of the defendant"

REJMANSKI; GASSMAN AND GASSMAN [2017] EWCA Crim 2061; December 12, 2017

Two conjoined appeals raised the issue of the extent to which a mental disorder could be relevant to an assessment of "the circumstances of the defendant", when considering the partial defence of loss of control (Coroners and Justice Act 2009 s.54(1)). The court considered *Mcgrory* [2013] EWCA Crim 2336 (renewed application for leave), *Wilcocks* [2016] EWCA Crim 2043, [2017] 1 Cr.App.R 23 and *Meanza* [2017] EWCA Crim 445. The court concluded in relation to the effect of ss.54 and 55 of the 2009 Act:

(1) It was not necessary to analyse the background to the sections. The provisions and Parliament's intent were sufficiently clear and no resort to additional material such as Hansard was necessary.

(2) The three components of loss of control (that (a) D's acts or omissions in killing resulted from D's loss of self-control; (b) the loss of self-control had a qualifying trigger, and (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of D, might have reacted in the same or a similar way to D) were distinct and required separate consideration. The potential relevance of a mental disorder to each of the components was fact specific. It depended on the nature of the defendant's disorder, the effect it had on the defendant and the facts of the case.

(3) The wording of s.54(1)(c) was clear: in assessing the third component, the defendant was to be judged against the standard of a person with a normal degree, and not an abnormal degree, of tolerance and self-restraint. If, and in so far as, a personality disorder reduced the defendant's general capacity for tolerance or self-restraint, that would not be a relevant consideration. Moreover, it would not be a relevant consideration even if the personality disorder was one of the "circumstances" of the defendant because it was relevant to the gravity of the trigger (see *Wilcocks*). Expert evidence about the impact of the disorder would be irrelevant and inadmissible on the issue of whether it would have reduced the capacity for tolerance and self-restraint of the hypothetical "person of D's sex and age, with a normal degree of tolerance and self-restraint".

(4) If a mental disorder had a relevance to the defendant's conduct other than a bearing on his general capacity for tolerance or self-restraint, it was not excluded by subs.(3), and the jury would be entitled to take it into account as one of the defendant's circumstances under s.54(1)(c). However, it was necessary to identify with some care how the mental disorder was said to be relevant as one of the defendant's circumstances. It must not be relied upon to undermine the principle that the conduct of the defendant was to be judged against "normal" standards, rather than the abnormal standard of an individual defendant. It was not the case, therefore, that, if a disorder were relevant to, and admitted in relation to the gravity of the trigger, the jury would also be entitled to take it into account in so far as it bore on the defendant's general capacity for tolerance and self-restraint. The disorder would be a relevant circumstance of the defendant, but would not be relevant to the question of the degree of tolerance and self-restraint which would be exercised by the hypothetical person referred to in s.54(1)(c). The most obvious example of the possible relevance of a mental disorder was to gravity of the qualifying trigger. The court did not exclude the possibility of other circumstances where a disorder might be relevant to the third component, but none had been put before it, suggesting the question was of academic interest only.

(5) The exclusionary effect of s.54(3) was consistent with, and reinforced by, the availability and scope of the partial defence of diminished responsibility, Homicide Act 1957 s.2, as amended by s.52 of the 2009 Act. The amended s.2 applied where a mental disorder substantially impaired the ability of the defendant to exercise self-control. The two defences might be presented together as alternatives. The law did not therefore ignore a mental disorder that rendered a defendant unable to exercise the degree of self-control of a "normal" person.

SENTENCING CASE

Sexual Harm Prevention Orders; restrictions on internet access and use

PARSONS AND MORGAN [2017] EWCA Crim 2163 (20 December 2017)

Before addressing the particular issues raised by the appeals the court gave the following general remarks on imposing prohibitions on internet use through Sexual Harm Prevention Orders ("SHPOs"), as provided for by ss.103A and following of the *Sexual Offences Act 2003* ("the Act"). (i) No order should be made by way of SHPO unless necessary to protect the public from sexual harm. If an order is necessary, the prohibitions imposed must be effective; if not, the statutory purpose will not be achieved. (ii) Any SHPO prohibitions imposed must be clear and realistic. They must be readily capable of simple compliance and enforcement. (iii) None of the SHPO terms must be oppressive and, overall, the terms must be proportionate. (iv) Any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances.

Dealing in turn with the particular issues raised by the appeals: (1) *Blanket bans on internet access and use.* A blanket ban would not be appropriate in anything other than the most exceptional cases. In all other cases, a blanket ban would be unrealistic, oppressive and disproportionate – cutting off the offender from too much of everyday, legitimate living. (2) *The question of age*. Section of 103B(1) of the Act defines a child as a person under 18 for the purpose of the SHPO regime. There was no objection in principle to a prohibition geared to those under 18, but the facts of an individual case might point towards confining prohibitions to images of children under 16. (3) *Risk management monitoring software* (defined at [15]). The court's preferred approach to such software was to make the offender notify the police of his acquisition of a device capable of accessing the internet the trigger for action. The device should be able to display the history of internet use and the offender should be prohibited from deleting such history. The device should be made available on request for inspection and the offender should be required to allow the installation of risk management software if the person inspecting the device so chooses. The offender should be prohibited from interfering with the functioning of any such software. (4) *"Cloud storage"* (defined at [20]). The vice against which

a prohibition on cloud storage should be targeted is the deliberate installation of a remote storage facility, specifically installed by an offender without notice to the police and which would not be apparent from the device used or intrinsic to its operation. (5) *Encryption software* (defined at [26]). A suitable prohibition must be targeted at the installation of encryption software on any device other than that which is intrinsic to its operation. (6) The observations in *McLellan and Bingley* [2017] EWCA Crim 1464 as to the demarcation between appeals to the Court of Appeal and applications to vary or discharge Sexual Offences Prevention Orders apply equally to SHPOs.

The orders imposed in the appeals provide further guidance on how the matters covered would be incorporated into a particular SHPO. These may be found at paragraphs [58] and [78] of the judgment.

Features

Apportionment of Defence Costs

By Janice Brennan, Lamb Building

Defendants with no financial means benefit from full legal funding when prosecuted in the Crown Court. Wealthy defendants can afford to pay privately for their representation. Those in between the extremes are required to pay a monthly contribution until the case finally concludes. That can amount to a very large sum indeed. No problem arises when the defendant is acquitted on all counts because the contributions are refunded. But what about the defendant who is convicted on some, but not all of the counts?

Many practitioners will not be aware of Reg.26 of the Criminal Legal Aid (Contribution Orders) Regulations 2013. I was not, until it was brought to my attention by an eagle-eyed solicitor.[1] As we discovered it is a little-used but extremely important regulation which permits the judge to order that the defendant pay a proportion only of the cost of his or her representation on the basis that it would be "manifestly unreasonable" for the defendant to pay the whole amount.

The regulation applies only to proceedings in the Crown Court and only where the defendant is charged with more than one offence, and convicted of one or more, but not all such offences. Provided that an application is made in writing within 21 days of the date of the sentence, then the court has jurisdiction to consider apportionment. That time limit appears to be strict.

The judge has a complete discretion whether to refuse the application or order a proportion. There is no guidance as to the exercise of that discretion in the regulation, other than that the ground for the application is "manifest unreasonableness", and there do not appear to be any authorities yet on the subject. It is, in reality, a common sense question of fairness. Just because a defendant has been acquitted of two out of five counts on the indictment does not mean that he or she should be ordered to pay three fifths of the costs. In this case the judge at Snaresbrook Crown Court ordered the defendant, who was convicted of two out of three counts, to pay just one third of the costs. In so ruling the judge looked at the overall picture. This defendant was one of two defendants in the case. Of the more than 700 pages of evidence and 20 or so witnesses, fewer than 100 pages and just two witnesses related to him. The misconduct of the co-defendant prolonged the case substantially. The order to pay one third of the costs of his representation reduced the defendant's bill from over £18,000 to a little more than £6,000, a not insignificant result.

The regulation is silent as to any appeal, but presumably if the judge took into account irrelevant considerations or ignored manifestly relevant ones, then an appeal might conceivably lie to the Divisional Court. Section 50(3) of the Criminal Appeal Act 1968 would appear to preclude an appeal to the Court of Appeal.

The judge who dealt with the case described here has two more applications for apportionment from different trials due to be determined in the near future. It would seem that Reg.26 is becoming better known and understood.

1 Ben Holden, of Shearman Bowen & Co.

In the blink of an eye

By Joyce Plotnikoff and Clare Park[1]

In February 2017, Mr X, a witness with Motor Neurone Disease (MND), was cross-examined using eye movement to "type" his responses. This was the first court use of "eyegaze" assistive technology[2], designed for those without speech or controlled physical movements. The user selects the desired letter from an on-screen alphabet; a camera tracking the user's eye movement detects the chosen letter which then appears in a box on the screen. Words and sentences can be spelled out; some users reach 30 or 40 words per minute. System costs are reducing and can be funded by NHS England; use is becoming more common for those with MND.[3]

1 Joyce Plotnikoff (Lexicon Limited) and Clare Park (Registered Intermediary).
2 The generic industry term; there are several suppliers.
3 Communication from Hector Minto, Microsoft, 17 May 2015.

Mr X was assisted at trial by an intermediary,[4] an independent communication specialist on the Ministry of Justice register. She had advised the court that he communicated reliably using eyegaze. She read out his answers[5] and ensured that other measures were in place to facilitate his evidence. Mr X died on the day that the jury returned guilty verdicts, before learning of the outcome.[6]

Background

In June 2015, Mr X, then in his 40s, was diagnosed with MND. In August, he told the police about alleged sexual offences by a vicar when Mr X was a choirboy. That November, officers took a written statement. He could not speak but wrote his answers which were transcribed. This interview was conducted without intermediary assistance.

Because of MND's prognosis, Mr X knew that he might die before the case reached trial. Officers considered recording his cross-examination before trial (s.28, Youth Justice and Criminal Evidence Act 1999, currently available at three pilot courts).[7] A filmed "Achieving Best Evidence" (ABE) interview as evidence-in-chief is a prerequisite for this special measure. In September 2016, the police requested that an intermediary assess Mr X's communication. By that time, he had severe motor dysfunction, could no longer write and was reliant on eyegaze technology to communicate. The intermediary found that: "He was the best user of 'eyegaze' that I've seen. Using his eyes as his mouth gave him his true voice". Nevertheless, her assessment revealed that his accuracy deteriorated as time went on, because of the effort required. Breaks of increasing length were needed for his fatigued eye muscles to recover.

In November 2016, the police filmed an interview[7] at Mr X's hospice, in which he spelled out answers using eyegaze. The intermediary read them out and checked whether the words on screen were what he meant. This interview took two and a half hours. MND causes uncontrolled production of saliva. The intermediary requested six breaks – more frequently as the interview continued – for Mr X's carer to wipe or suction his mouth. Those with MND may be emotionally labile, with extreme episodes of laughing or crying: Mr X cried frequently during the interview. (These episodes were edited out for the jury.)

At present, pre-trial cross-examination is only available for witnesses in a live-link room at court. By the time of a plea and trial preparation hearing at Snaresbrook Crown Court in October 2016, Mr X was too ill to travel to a pilot court (even though one was not far away); in consequence, he had to be questioned at trial over a remote live link from the hospice. The intermediary attended the hearing. She emphasised that, given Mr X's rapid deterioration, the need to take his evidence was urgent. Extreme fatigue could render him unable to use eyegaze and he was likely to develop severe respiratory problems. The trial was scheduled for May 2017. In January, it was brought forward to February 2017 and listed at Bournemouth Crown Court, to accommodate the defendant who had advanced Parkinson's disease.

Ground rules hearing

The ground rules hearing to plan Mr X's cross-examination was held the day before he gave evidence at trial. The intermediary attended. At the plea and trial preparation hearing, she had offered to review defence counsel's questions: these were sent to her at 7 am on the morning of the ground rules hearing. Her report had recommended that questions be short and address single concepts, allowing for "Y"/"N" responses where possible, to reduce the effort involved for Mr X. Simplification was unnecessary as he had no apparent cognitive deficit. The trial judge and intermediary reviewed defence counsel's questions, some of which were multi-part and needed to be split up. It was agreed that the intermediary would read out Mr X's answers. However, prosecution and defence took different approaches to other aspects of managing the evidence.

Defence counsel initially suggested that Mr X (who by this time was emaciated) should not be shown on the courtroom live link screen and that the intermediary ask counsel's questions off camera. The judge ruled that both the witness and intermediary be visible to the jury: "It's important for Mr X to be treated like an ordinary witness." However, taking account of the visual impact of Mr X's condition on the jurors, the judge gave what he described as an "industrial strength" warning at the start of the trial and again at the end: "It would be entirely understandable to be very sympathetic, but put all emotion aside – emotion and justice do not make happy bedfellows."

The prosecutor proposed that two days be allocated to cross-examination. Aware that Mr X's need for breaks would increase the longer he gave evidence, the judge ordered that his evidence last no more than one and a half hours, with breaks. The judge was concerned that drawing it out would have been enormously stressful for Mr X, making extension of questioning into a second day counter-productive.

Following the ground rules hearing, the video of the ABE interview was played. The following day the intermediary travelled to the hospice to be with Mr X.

Mr X's evidence

Operation of the technology at the hospice did not go smoothly. Bright or flickering light can diminish the accuracy of eyegaze so curtains had to be closed. Accuracy can also be affected by the distance or angles between the computer and the person's head. The intermediary had requested that someone familiar with Mr X's equipment be available; on the day, a new health care assistant attended who had never set it up before. In one tense moment, the intermediary tripped over a cable and disconnected the remote link to the court.

When everything was ready, the intermediary read the oath to Mr X in segments; he typed "Y" after each part. Despite all the difficulties, with appropriate modifications in place Mr X's evidence was tested in cross-examination. The intermediary was given some latitude to interpret spelling errors as his eyes became tired, but words were always clear in the context. (Eyegaze provides for greater use of programmed abbreviations, but Mr X preferred spelling out exactly what he wanted to say.)

Questions were put in a non-confrontational way; only one

4 Intermediaries are a special measure (s.29, Youth Justice and Criminal Evidence Act 1999). Young witnesses under 18 are eligible, as are adult witnesses with mental, learning or physical disabilities. Courts must determine whether special measures would improve the quality of evidence (s.16).

5 Stephen Hawking's American "voice" dates from 1980s' technology, but a synthetic voice can now be personalised to speak what is typed on screen. For forensic purposes, having an intermediary read responses from the screen may be preferable, e.g. the system reads out typed dates as individual numbers. Voicing responses is also problematic where users omit spaces between words, as sometimes happened here.

6 http://www.bbc.co.uk/news/uk-england-dorset-39230850.

7 Ministry of Justice (2011) *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures.*

minor judicial intervention was necessary. However, pacing questions was difficult. The intermediary intervened when counsel asked new questions while Mr X was still "typing". During a break, he kept spelling something he wanted to tell the court and the intermediary was permitted to read this out when the court reconvened.

Mr X's questioning began at 11.45 am and was finished by 1.30 pm, with a few short breaks to suction his mouth. The intermediary felt that the judge had got the timing "absolutely right": it helped Mr X to know that limits had been set. He did not cry during cross-examination. The intermediary noted: "He didn't break down until he was finished. It seemed to take overwhelming determination to get him through it."

Conclusion

After the verdicts, a CPS spokesperson said that: "The CPS will always do everything we can to ensure victims and witnesses can give their best evidence, including using the latest technology".[8] However, despite the known prognosis for those with MND, it appears that this case was not expedited until Mr X was already seriously incapacitated; he did not survive to hear the verdict.

There are lessons here. This case took 18 months from reporting to trial: witnesses with similar diagnoses must be fast-tracked. Had Mr X made an early ABE recording, his cross-examination could have been video-recorded. The trial court received this case with three weeks' notice and the judge and advocates did not meet Mr X before the trial. Such meetings enable those involved to become familiar with the technology and the witness's communication. It would also assist jurors to see a short commercial demonstration of the software.

Being enabled to participate in the justice process was of immeasurable value to Mr X. When questioning was finished, Mr X spelled out thanks to the intermediary for "enabling me to tell my truth". She recalls that his victim personal statement said: "Being able to talk about what happened to me helped me get rid of demons I'd lived with in my head all my life".

8 The Guardian, 13 February 2017. "Stephen Hawking-style tech helped convict ex-vicar of child abuse".

The evolution of gross negligence manslaughter

By Karl Laird[1]

Introduction

Like all common law offences, gross negligence manslaughter is the product of incremental judicial development. The House of Lords in *Adomako* restated the essential ingredients of the offence. The elements of the offence did not crystallise, however, but continued to be refined by the Court of Appeal in the years following the judgment in *Adomako*.[2] Eventually, judicial development of the offence plateaued and it underwent a period of relative stability with few developments since *Evans* in 2009.[3] However, gross negligence manslaughter has recently been the subject of significant development by the Court of Appeal. The practical impact of these recent developments has been to reaffirm and, in some cases, to raise the threshold that must be crossed before all the elements of the offence can be established. The purpose of this brief article is to analyse the judgments that have led to this state of affairs. As will become clear, the Court of Appeal's recent development of the offence has occurred solely with reference to healthcare professionals. How these developments would apply in a case where the defendant is not a healthcare professional has not been considered. It will be argued that it is undesirable that an offence that may potentially be committed by anyone who breaches the duty of care they owe to another now seems to be being developed solely with reference to one category of professional: healthcare professionals. Indeed, the categories in which a duty of care might arise are very broad. Given the fact that gross negligence manslaughter appears to be in a state of flux, the article will conclude by submitting that an authoritative judgment of the Supreme Court clarifying the elements of the offence is necessary.

The elements of the offence

In what Professor Sir John Smith described as a "welcome decision"[4] the House of Lords in *Adomako* restated the elements of gross negligence manslaughter:

(1) A duty of care owed by the defendant to the victim.

(2) A breach of the duty of care applying the ordinary principles of negligence.

(3) The death of the victim was caused by the negligent breach of the duty of care.

(4) The defendant's conduct departed from the proper standards of care to such an extent, involving as it must have done a risk of death to the victim, that it should be judged by the jury as criminal.

Following *Adomako,* the elements of gross negligence manslaughter were subject to further elucidation by the Court of Appeal.[5] The court's consideration of the offence focused

1 Law Tutor, St Hilda's College, Oxford. I would like to thank Oliver Quick and John Spencer for their comments on a previous draft.

2 [1995] 1 AC 171.

3 [2009] EWCA Crim 650.

4 [1994] Crim LR 757.

5 For general discussion, see D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (2015), pp 636–644.

primarily upon two elements.[6] First, the assessment of whether the defendant's conduct fell so far below the requisite standard that it ought to be considered grossly negligent and, secondly, the extent to which the breach of the duty of care must have involved the risk of death. In relation to this first issue, the Court of Appeal in *Misra*[7] confirmed that it is for the jury to assess the extent to which the defendant's behaviour was grossly negligent and consequently criminal. In relation to this second issue, the Court of Appeal in *Singh*,[8] in a refinement of what was said in *Adomako*, approved the trial judge's direction that "the circumstances must be such that a reasonably prudent person would have foreseen a *serious and obvious* risk not merely of serious injury, but of death". The court envisaged this as being a separate element of the offence that had to be satisfied before there could be criminal liability.

Recent developments

Gross negligence manslaughter is a rarely charged offence. In an analysis conducted by the Sentencing Council, 160 offenders were sentenced in 2016 for manslaughter with only a small proportion convicted of gross negligence manslaughter.[9] Despite this fact, since the beginning of 2016 the Court of Appeal has delivered a number of judgments in which it has taken the opportunity to re-evaluate the elements of the offence. This large volume of appeals against conviction could indicate that the offence is being charged more often. Furthermore, the willingness to grant leave in these cases could suggest that there is a view amongst some members of the judiciary that further refinement of the offence is necessary.

In *Sellu*[10] the Court of Appeal considered how the jury ought to be directed when they are assessing whether the defendant's breach of duty was grossly negligent. The trial judge directed the jury that their task was not just "to decide whether [the defendant] fell below the standard of a reasonably competent consultant colorectal surgeon, but whether he did so in a way that was gross or severe". The Court of Appeal, in a judgment delivered by Sir Brian Leveson P, held that this direction was inadequate. Whilst his lordship accepted that no particular formulation is mandatory, he emphasised that the trial judge must assist the jury to understand how to approach their task of identifying the line that separates serious or even very serious errors, from conduct which was "truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal". The court quashed the defendant's conviction on the basis that he did not have the benefit of a sufficiently detailed instruction to the jury in relation to the concept of gross negligence. In the subsequent case of *Bawa-Garba*,[11] the conviction of the defendant – a paediatric registrar – was upheld. Sir Brian Leveson P observed that the judge accurately brought to the jury's attention the fact that the prosecution had to make them sure that the defendant's conduct was "truly, exceptionally bad" before they could find her guilty of gross negligence manslaughter.

The requirement that the breach of duty must pose a risk of death was specifically considered by the Court of Appeal in two further cases. In *Rudling*[12] the Crown appealed against a finding that the defendant, a GP, had no case to answer following the death of a child in her care. The victim's mother telephoned the defendant's GP practice describing his symptoms, but the defendant failed to conduct a home visit. The next day, the victim died of Addison's disease, a very rare condition in children. The judge agreed with the submission made on behalf of the defendant that there was insufficient evidence of an obvious and serious risk of death at the time of the telephone call (which was the breach of duty alleged against the defendant). Such a risk would only have become obvious had the defendant visited the victim. The Crown appealed against the judge's ruling, which was upheld by the Court of Appeal. Sir Brian Leveson P stated that at the time of the breach of duty, there must be a serious and obvious risk of death. It was held that a recognisable risk of something serious is not the same as a recognisable risk of death. The court made the following observations about this element of the offence:

> What does not follow is that if a reasonably competent GP requires an urgent assessment of a worrying and undiagnosed condition, it is necessarily reasonably foreseeable that there is a risk of death. Still less does it demonstrate a serious risk of death, which is not to be equated with an "inability to eliminate a possibility". There may be numerous remote possibilities of very rare conditions which cannot be eliminated but which do not present a serious risk of death. Further, and perhaps most importantly, a mere possibility that an assessment might reveal something life-threatening is not the same as an obvious risk of death. An obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation.[13]

His lordship stated that these distinctions were not merely a matter of semantics, but rather "represent real differences in the practical assessments which fall to be made by doctors".[14] The requirement for the risk of death to be obvious and serious at the time of the breach of duty was considered more extensively by the Court of Appeal in *Rose*.[15] The defendant was an optometrist who failed to examine the back of the victim's eyes during the course of a routine sight test. Had she examined the back of his eyes, as she was required to do by statute, she would have noticed the symptoms of acute hydrocephalus, which would have been treatable by surgical intervention. The defendant's failure properly to conduct the sight test meant that the victim's condition went undiagnosed and he died some five months later. The trial judge ruled that an optometrist who is so negligent that she does not even attempt an internal investigation cannot rely on that breach to escape liability for gross negligence manslaughter. The judge held that the test is objective and, as such, relies on what is reasonably foreseeable by reference to the reasonably prudent optometrist who would have complied with their statutory duty to examine the internal eye.[16] The defendant was convicted

6 There were further developments, for example in *Evans* [2009] EWCA Crim 650 the Court of Appeal confirmed that it is a question of law whether the defendant owed the victim a duty of care.
7 [2004] EWCA Crim 2375; [2005] 1 Cr.App.R. 21.
8 [1999] Crim LR 582.
9 https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-statistical-bulletin.pdf. The figures relating to gross negligence manslaughter take account of years other than 2016, but the proportion of convictions for the offence is consistently small.
10 [2016] EWCA Crim 1716.
11 [2016] EWCA Crim 1841.
12 [2016] EWCA Crim 741.
13 *Rudling* [2016] EWCA Crim 741, [40].
14 Ibid, [41].
15 [2017] EWCA Crim 1168.
16 As required by s.26(1) of the Opticians Act 1989 and reg.3 (1) of the Sight Test (Examination and Prescription) (No2) Regulations 1989.

of gross negligence manslaughter and appealed. The Court of Appeal, in a judgment delivered by Sir Brian Leveson P, quashed the defendant's conviction. His lordship stated that the objective nature of the test of reasonable foreseeability does not turn it from a prospective test into a retrospective one. He added that, "the question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, not but for the breach".[17] The failure to examine the back of the victim's eyes meant that there was the possibility that signs of a potentially life-threatening condition or abnormality might be missed, but it was held that this was insufficient to form the basis of a conviction for gross negligence manslaughter since there must be a "serious and obvious risk of death" at the time of the breach of duty. The court concluded that in cases of gross negligence manslaughter, it is not appropriate to take into account what the defendant would have known but for his or her breach of duty. Were the court to conclude otherwise, Sir Brian Leveson P stated that dire consequences would follow for healthcare professionals:

> the implications for medical and other professions would be serious because people would be guilty of gross negligence manslaughter by reason of negligent omissions to carry out routine eye, blood and other tests which in fact would have revealed fatal conditions notwithstanding that the circumstances were such that it was not reasonably foreseeable that failure to carry out such tests would carry an obvious and serious risk of death.[18]

The current state of the law

Given that gross negligence is the hallmark of the offence, the court's conclusion in *Sellu* that the jury must be given a direction that assists them to distinguish an error that is grossly negligent from other, less egregious errors, is unimpeachable. There is one further aspect of the judgment that is worthy of note. The direction to the jury given by the trial judge in *Sellu* was similar to the direction in both *Adomako* and *Misra*. The trial judge did not, however, emphasise to the jury how bad the defendant's breach of duty had to be before they could conclude that it was grossly negligent. It was this failure to convey to the jury the exceptional nature of gross negligence that led to Dr Sellu's conviction being quashed. Whilst the court's analysis in *Sellu* accords with principle, it is respectfully submitted that its analyses of the offence in *Rudling* and *Rose* are more problematic. In *Adomako* the House of Lords made clear that the defendant's conduct ought to be evaluated against the standard of a reasonably competent anaesthetist, colorectal surgeon, GP, optometrist etc. The Court of Appeal in *Rose,* in concluding that the judge should not have directed the jury to take into account what the defendant would have known but for her breach of duty, undermined the objective nature of this test. The defendant's state of knowledge is irrelevant to his or her criminal liability. As the Court of Appeal confirmed in *Attorney General's Reference (No. 2 of 1999)*,[19] evidence of the defendant's state of mind, "is not a prerequisite to a conviction for manslaughter by gross negligence".[20] In *Rose,* if a reasonably competent optometrist would have performed a proper examination of the victim's internal eye, have noticed the symptoms of hydrocephalus and referred him for urgent treatment, why should the defendant avoid liability on the basis that she fell so far below the standard required of her that she did not even attempt to conduct an examination of the internal eye? As a result of the court's analysis in *Rose*, the more egregious the defendant's breach of duty, the less likely it is that he or she will be guilty of gross negligence manslaughter. To put the point another way, the optometrist who carries out an examination of the internal eye, but fails to perceive the obvious symptoms of hydrocephalus may be guilty, but the optometrist who fails even to attempt an examination of the internal eye will not commit the offence. All things being equal, surely the latter is more culpable than the former?

The Court of Appeal's narrow focus

All of the recent cases that are disucssed here in which the Court of Appeal has considered the elements of gross negligence manslaughter have concerned healthcare professionals. The court's interpretation of gross negligence manslaughter applies with equal force to anyone whose breach of the duty of care they owe to another causes death. Recognition of this fact has been lacking in the Court of Appeal's recent analyses of the offence, however. On the contrary, in both *Rudling* and *Rose* the court explicitly expressed concerns about the adverse impact the Crown's preferred interpretation of the offence would have on doctors. There is no separate offence of "medical manslaughter", which makes it necessary to consider how the court's interpretation of the elements of gross negligent manslaughter would apply in a case not involving a healthcare professional. Consider a case involving a train conductor who gives the all clear to the driver to pull away from the station without first checking whether a passenger is leaning against the side of a carriage. As the train leaves the platform, the passenger loses his balance, falls between the platform and the train and is killed.[21] A reasonably competent conductor would have checked whether there was anyone on the platform before giving the driver the all clear to leave the station. Had he done so, he would have noticed the passenger leaning against the train and would not have given the driver the all clear. If the defendant complies with his duty, but fails to notice the passenger because he is distracted, it seems safe to assume that he would be guilty of gross negligence manslaughter, because there was a serious and obvious risk of death to the passenger. If the conductor does not bother to check whether there was anyone on the platform before giving the driver the all clear, applying the court's approach in *Rose,* his criminal liability is less clear. Without checking whether there was anyone on the platform, there was no way to know that a passenger was leaning perilously against the side of a carriage. Applying *Rose,* a court could conclude that the serious and obvious risk of death remained speculative, as such a risk would only have crystalised had the conductor checked the platform. As a result of the Court of Appeal's interpretation of the offence, there is a perverse incentive for those who owe a duty of care to another to do as little as possible to discharge it and in so doing avoid potential criminal liability. Whilst this may be unlikely to

17 *Rose* [2017] EWCA Crim 1168, [80].
18 Ibid, [94].
19 [2000] QB 796.
20 Ibid, p.809.
21 http://www.liverpoolecho.co.uk/news/liverpool-news/merseyrail-guard-christopher-mcgee-fails-4066878.

impact the high standard of care that doctors provide to their patients, it is not inconceivable that a landlord might decide not to provide his tenants with a carbon monoxide detector so that he remains ignorant should gas ever leak from the boiler.

It is respectfully submitted that the concerns expressed by the Court of Appeal in both *Rudling* and *Rose* about the impact the Crown's preferred interpretation of the offence would have on doctors are overstated. In both cases, the court expressed concern that doctors would be liable for gross negligence manslaughter for failing to carry out routine tests that may have revealed that the victim was suffering from an ultimately fatal medical condition. As confirmed by the House of Lords in *Adomako*, one of the elements of gross negligence manslaughter is that there is a breach of the duty of care the defendant owed to the victim applying the ordinary principles of negligence. Doctors obviously owe their patients a duty of care, but an error of diagnosis is not necessarily negligent. Whether a doctor's failure to diagnose a condition is negligent depends upon whether he or she acted as a reasonable doctor in all the circumstances. According to Jones, this will to a large extent depend upon "the difficulty of making the diagnosis given the symptoms presented, the diagnostic techniques available such as tests or instruments and the dangers associated with the alternative diagnoses".[22] Therefore, had the Court of Appeal accepted the proposition that the jury should be directed to take into consideration what the defendant would have known but for his or her breach of duty, that would not lead to doctors being guilty of gross negligence manslaughter "by reason of negligent omissions to carry out routine eye, blood and other tests which in fact would have revealed fatal conditions".[23] The court assumed that such omissions are negligent, but this will not necessarily be the case.

Conclusion

The Court of Appeal's recent consideration of gross negligence manslaughter seems to have been influenced by concerns about the disproportionate impact certain interpretations of the offence would have on healthcare professionals. To avoid such an impact, the court has taken a counterintuitive approach to interpreting the elements of the offence, as it is one that seems to reward egregious degrees of negligence. It is undesirable that an offence that can potentially be committed by anyone now appears to be being developed solely by reference to its impact upon healthcare professionals. Given the nature of their profession, doctors and other healthcare professionals are at greater risk of committing gross negligence manslaughter than most other members of society.[24] If there is the view that the elements of the offence need to be reconsidered in light of this fact, then the impact of doing so needs to be considered in a holistic manner. As an alternative to gross negligence manslaughter, it would be possible for Parliament to enact an offence that applies only to medical professionals and which takes account of the perilous nature of treating the sick. There is precedent for creating an offence that can be committed only by those with a certain occupation. For example, the offence in s.20 of the Criminal Justice and Courts Act 2015 can only be committed by care workers.[25] Alternatively, as others have argued,[26] the threshold for committing the offence could be raised to subjective recklessness. On the assumption that legislative intervention is unlikely, it will be for the courts to determine the contours and boundaries of gross negligence manslaughter. Given that this is the case, it is respectfully submitted that an authoritative judgment of the Supreme Court would be preferable to the piecemeal approach currently being taken by the Court of Appeal. This would help bring clarity not only for prosecutors, but also for those duty holders who may commit the offence. The Court of Appeal in *Rose* declined to certify a point of law of general public importance. Hopefully the court will have the opportunity to reconsider its decision not to certify a point of law in the not too distant future.

22 M Jones, *Medical Negligence* (2017), para. 4-018.
23 *Rose* [2017] EWCA Crim 1168, [80].
24 For discussion, see O Quick "Medical manslaughter – Time for a rethink?" (2017) Medico-Legal Journal 1 and C Dyer, "Where should the buck stop? Doctors, medical errors and the justice system" (2016) BMJ 1.
25 For discussion, see K Laird, "Filling a lacuna: the care worker and care provider offences in the Criminal Justice and Courts Act 2015" (2016) 37 Stat L Rev 1.
26 O Quick, "Medicine, mistakes and manslaughter: a criminal combination?" (2010) CLJ 186.

"Bringing closure" …

The latest proposed cull of local courts is headed by the magistrates' court at Cambridge – its serious business transferred to Huntingdon and Peterborough. As Cambridge is a city of 125,000 and growing fast, and transport links to Huntingdon and Peterborough are awkward and expensive, if the interests of court users count for anything it is the court Huntingdon (with a population of 25,000) that should be closed. But the Cambridge court – brand new in 2008 – is on a prime city centre site and Huntingdon is not, so Cambridge has been chosen as the one to go. Its citizens are outraged; but their protests may be unavailing, because the transfer of business away from the court began some years ago – which is how the consultation document can now tell us, with a straight face, that the court is "significantly underused". The real driver, sadly, is not efficiency or modernisation but austerity, and the urgent need for the MOJ – badly squeezed – to meet its savings targets. And the resulting wholesale closure of local courts and transfer of their business to inconvenient locations, of which this latest proposal is a part, is having a profound effect on the way that summary justice is delivered. It means that JPs, who are local unpaid volunteers and free to walk away, are resigning in huge numbers, and the future of summary justice now looks set to be DJs: who, as employees, can be told where to go and what to do. But do we really want the bulk of our criminal justice (and thousands of custodial sentences) to be dispensed by lone professionals, sitting on their own, instead of collegiate benches of local citizens, guided by professional advisors? If a welcome change to some, to others it is deeply worrying. In a sane world a change of such huge significance would be decided only after a full and public examination of its merits and demerits – and not just allowed to happen as an unnoticed and unintended side effect. JRS

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The views expressed are those of the authors and not of the editors or publishers.
Editorial inquiries: House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 888019

Archbold Review is published in 2018 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell.
Registered in England & Wales. Company number 1679046. Registered office 5 Canada Square, Canary Wharf, London E14 5AQ.

For further information on our products and services, visit
www.sweetandmaxwell.co.uk
ISSN 0961–4249

Typeset by Matthew Marley
Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire, SO40 3WX

726839