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Court of Appeal

***Regina v Evans (Gemma)**

[2009] EWCA Crim 650

2009 Feb 24;
April 2Lord Judge CJ, Moore-Bick LJ, Calvert-Smith,
Christopher Clarke, Holroyde JJ

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Crime — Homicide — Manslaughter — Appellant supplying drugs to deceased — Deceased developing clear signs of overdose — Appellant not seeking medical help — Whether supply giving rise to duty of care — Whether failure to take reasonable steps to save deceased's life constituting gross negligence manslaughter — Whether existence of duty of care to be determined by judge or jury

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The 24-year-old appellant gave C, her 16-year-old half-sister, some heroin. C self-injected the heroin and then developed and complained of symptoms which the appellant recognised as being consistent with a heroin overdose. The appellant and her mother believed that they were responsible for the care of C but they decided not to seek medical assistance because they feared that they, and possibly C, would get into trouble. Instead they put C to bed, hoping that she would recover spontaneously. They remained at the house, checking on C at intervals and then sleeping in the same room as her. The following morning the appellant was woken by her mother who told her that C was dead. The cause of death was heroin poisoning. The appellant was charged with manslaughter. The main dispute of fact at trial was whether the appellant had been concerned in the supply of the heroin to C. At the end of the prosecution case, the appellant submitted that there was no case to answer as the prosecution had failed to adduce evidence capable of establishing that she had owed C a duty of care. The judge ruled that the appellant was capable of owing a duty of care to C and that the jury should consider whether she did in fact owe such a duty on the basis that she had supplied her with the heroin. In summing up, the judge emphasised that the prosecution case was based solely on the appellant's omission to summon medical help, that before they could convict of manslaughter by omission there had to be a pre-existing duty to act, that it was for the jury to decide whether the appellant owed C a duty of care and that, in the circumstances, the only matter which was capable of giving rise to such a duty was if the appellant had supplied C with the heroin. The appellant was convicted.

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On appeal against conviction—

Held, dismissing the appeal, that for the purposes of gross negligence manslaughter, if a person created or contributed to the creation of a state of affairs which he knew, or ought reasonably to have known, had become life threatening, a consequent duty would normally arise on him to act by taking reasonable steps to save the other's life; that, therefore, if the appellant had been involved in supplying the heroin to C, that fact, taken with the other undisputed facts, gave rise to a duty on the appellant to act; that, therefore, in the circumstances, the judge's directions about the ingredients of gross negligence manslaughter had been correct; that, in principle, the existence or otherwise of a duty of care, or a duty to act, was a stark question of law for the judge and the question whether the facts established the existence of the duty was for the jury; that if the existence of the duty was not in dispute the judge could properly direct the jury that a duty of care existed, but if the issue was in dispute and the judge had found that it would be open to the jury to find that there was a duty of care, or a duty to act, the jury should be directed that if specified facts were established a duty would arise but if other specified facts were present the duty would be negated; and that, accordingly, the jury should not have been left to decide whether the appellant had owed C a duty of care but that, in the

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circumstances, that direction had not rendered the appellant's conviction unsafe since on the facts actually found by the jury on the supply issue and on the undisputed facts the appellant had been under a plain and obvious duty to take reasonable steps to assist or provide assistance for C (post, paras 31, 35, 39, 45, 48-49).

R v Adomako [1995] 1 AC 171, HL(E) and *R v Wacker* [2003] QB 1207, CA considered.

R v Willoughby [2005] 1 WLR 1880, CA explained.

Per curiam. The judge's direction that a duty to act did not arise from a voluntary assumption of risk by the appellant may have been appropriate in this case, but it would not be of universal application where, for example, a voluntary assumption of risk by the defendant had led the victim, or others, to become dependent on him to act (post, para 36).

The following cases are referred to in the judgment of the court:

Airedale NHS Trust v Bland [1993] AC 789; [1993] 2 WLR 316; [1993] 1 All ER 821, HL(E)

Mitchell v Glasgow City Council [2009] UKHL 11; [2009] 2 WLR 481; [2009] 3 All ER 205, HL(Sc)

R v Adomako [1995] 1 AC 171; [1994] 3 WLR 288; [1994] 3 All ER 79; 99 Cr App R 362, HL(E)

R v Dalby [1982] 1 WLR 425; [1982] 1 All ER 916; 74 Cr App R 348, CA

R v Kennedy (No 2) [2007] UKHL 38; [2008] AC 269; [2007] 3 WLR 612; [2007] 4 All ER 1083; [2008] 1 Cr App R 256, HL(E)

R v Khan (Rungzabe) [1998] Crim LR 830, CA

R v Miller [1983] 2 AC 161; [1983] 2 WLR 539; [1983] 1 All ER 978; 77 Cr App R 17, HL(E)

R v Sinclair (1998) 148 NLJ 1353, CA

R v Wacker [2002] EWCA Crim 1944; [2003] QB 1207; [2003] 2 WLR 374; [2003] 4 All ER 295; [2003] 1 Cr App R 329, CA

R v Willoughby [2004] EWCA Crim 3365; [2005] 1 WLR 1880; [2005] 1 Cr App R 495; [2005] Crim LR 389, CA

Smith v Littlewoods Organisation Ltd [1987] AC 241; [1987] 2 WLR 480; [1987] 1 All ER 710, HL(Sc)

The following additional case was cited in argument:

R v Dias [2001] EWCA Crim 2986; [2002] 2 Cr App R 96, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

Brumarescu v Romania (2001) 33 EHRR 862, GC

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112; [1985] 3 WLR 830; [1985] 3 All ER 402, HL(E)

Kokkinakis v Greece (1993) 17 EHRR 397

Local Authority X v MM [2007] EWHC 2003 (Fam); [2009] 1 FLR 443

MacAngus v HM Advocate [2009] HCJAC 8; 2009 SLT 137

R v Graham [2006] EWCA Crim 599; [2006] 2 Cr App R (S) 573, CA

R v Misra [2004] EWCA Crim 2375; [2005] 1 Cr App R 328, CA

R v Rimmington [2005] UKHL 63; [2006] 1 AC 459; [2005] 3 WLR 982; [2005] 2 All ER 257; [2006] 1 Cr App R 257, HL(E)

R v Rogers [2003] EWCA Crim 945; [2003] 1 WLR 1374; [2003] 2 Cr App R 160, CA

R v Ruffell [2003] EWCA Crim 122; [2003] 2 Cr App R (S) 53, CA

SW v United Kingdom (1995) 21 EHRR 363

Sunday Times v United Kingdom (1979) 2 EHRR 245

X Ltd and Y v United Kingdom (1982) 28 DR 77

A APPEAL against conviction

On 18 April 2008 in the Crown Court at Swansea before Lloyd Jones J and a jury the appellant, Gemma Evans, was convicted of manslaughter. The appellant appealed against conviction by permission of the single judge on the grounds that (1) the judge had wrongly rejected her submission of no case to answer and held that the Crown was entitled to argue that she was capable of owing a duty of care to the deceased and that, if the jury found that she had supplied the drugs to the deceased, they could then go on to consider whether she did in fact owe her a duty of care; (2) the judge had wrongly left it to the jury to decide a question of law, namely whether to extend the categories of persons by whom and to whom a duty of care was owed; (3) the practice whereby juries in gross negligence manslaughter trials were asked to determine whether a duty of care was proved was incompatible with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms; and (4) the practice in gross negligence manslaughter trials which permitted the jury to enlarge the class of persons from whom and to whom a duty of care might be owed was incompatible with article 7 of the Convention and therefore offended against section 6(1) of the Human Rights Act 1998.

D The facts are stated in the judgment of the court.

Ian Murphy QC and *Dyfed Llion Thomas* (assigned by the Registrar of Criminal Appeals) for the appellant.

Paul Thomas QC and *John Hipkin* (instructed by *Crown Prosecution Service, Dyfed*) for the Crown.

E The court took time for consideration.

2 April 2009. LORD JUDGE CJ handed down the following judgment of the court.

1 This is an appeal against conviction by Gemma Evans, who together with her mother, Andrea Townsend, was convicted of manslaughter by gross negligence in the Crown Court at Swansea before Lloyd Jones J and a jury. The conviction arose from the death of Carly Townsend, on 3 May 2007. She was not quite 17 years old. Andrea Townsend was her mother, and the appellant was her older half-sister.

2 Carly Townsend was born in June 1990. The appellant was born in October 1982. Both had a history of heroin addiction. So did their mother. In January 2007, Carly was sentenced to a six-month detention and training order. During this period she underwent detoxification. She refused substitute medication. She was seeking to overcome her addiction. She had no access to heroin for three months.

3 She was released on licence on 23 April 2007. It was a condition of her licence that she should observe a curfew and live at her mother's home at Llanelli, where her mother was living with her youngest child, a teenage son.

4 According to the evidence of her mother, Carly used heroin on 24 April, the day after her release. She came home late. As she was in breach of her curfew she called the monitoring authority, and provided an excuse. However she told her mother that she had been smoking heroin, obtained from a well known local heroin dealer, Andrew Taylor. There was no evidence that Carly used heroin again until 2 May 2007. Towards the end of

the month the appellant came to live with her mother because her boyfriend, with whom she had been living at his parent's home, had been sentenced to imprisonment.

5 At about lunchtime on 2 May 2007 the appellant arranged to buy heroin from Andrew Taylor. He offered two bags for £15, but he had no change for the £20 that she handed him, so he gave her three packages. She handed some or all of the heroin to Carly. Carly's social worker called at about 3.30 p.m. She thought that Carly looked pale and tired but there were no signs then that she was under the influence of drugs. Shortly after her departure, while both the appellant and her mother were in the house, Carly self-injected with heroin.

6 Carly developed and complained of symptoms consistent with an overdose of heroin. These included a loss of colour, which might have been a sign of cyanosis, as well as a high temperature. The symptoms Carly described were similar to those the appellant herself remembered suffering when she overdosed on heroin and was eventually saved by paramedics who had injected her with Naloxone. The appellant described in a later interview with the police that she had seen that Carly's lips had turned blue, that she was "in a mess", and was incapable of responding to attempts to speak to her. The appellant and her mother decided not to seek medical assistance because they feared that they themselves and possibly Carly would get into trouble. Instead of seeking help for her they put her to bed, hoping that she would recover spontaneously. They stayed with Carly for a couple of hours. The appellant put water on her face to cool her, and hoped that Carly would sleep the drugs off. According to her account to the police, in due course Carly appeared to be recovering her normal colour and settled into a "gouch", which is a state of virtual unconsciousness which recreational users of heroin apparently believe to be normal. The appellant and her mother decided to sleep in the same room as Carly. When they went to bed, Carly's colour had returned and she looked much better. She was snoring, apparently fast asleep, but not then capable of looking after herself. In interview the appellant accepted that Carly expected her mother and the appellant to look after her needs during that night.

7 On the following morning her mother woke the appellant, and told her that Carly was dead. They were shocked. At 8.33, her mother made a 999 call to the emergency services, stating that her daughter was dead. Paramedics attended within a few minutes. They identified post mortem staining and rigor mortis. These indicated that Carly had been dead for some time. The cause of death was poisoning by heroin.

8 The police came to the home. The appellant and her mother were searched. A syringe was found in the gown which belonged to her mother but, like the appellant, her mother denied any knowledge of the syringe. The appellant told the police that Andrew Taylor had supplied the heroin Carly had used. She also said that her mother had told her that she had a bag of heroin in her purse. The purse was searched but the heroin was not found. A later telephone call from the appellant's mother said that she had found the heroin in the corner of the purse. The purse was collected and examined. Forensic analysis confirmed that the bag contained 0.04 grams of heroin of 64% purity.

A 9 At the end of the prosecution case, in a careful and detailed ruling, the judge rejected a submission on behalf of the appellant that the case should be withdrawn from the jury on the basis that the Crown had failed to adduce evidence capable of establishing that the appellant owed Carly a duty of care. He also rejected a submission on behalf of her mother that causation was insufficiently established.

B 10 The appellant's mother gave evidence at trial. This appellant did not give or call evidence on her own behalf.

C 11 The main dispute of fact between the Crown and the appellant was whether she had been concerned in the supply of the heroin from Andrew Taylor with which Carly had injected herself. We shall describe this as the supply issue. On the verdict of the jury this issue was resolved adversely to the appellant. The jury was sure that she had been concerned in the provision of the heroin.

D 12 It was not in dispute before the jury: (a) that the appellant, together with her mother, had remained at the premises from the time when Carly injected herself, throughout the evening and night, until they woke and the appellant's mother found that Carly was dead; (b) that the appellant had witnessed obvious signs of the effect of the drug taken by her half-sister, and that she appreciated that her condition was very serious and indicative of an overdose; and (c) that the appellant and her mother believed that they were responsible for the care of Carly after she had taken heroin.

13 The present appeal criticises both the judge's ruling at the close of the Crown's case, and the directions of law given to the jury in the summing up. As the arguments are interconnected, it is convenient to deal with them together.

E 14 Mr Ian Murphy QC on behalf of the appellant contended that the judge was wrong to find that the appellant was capable of owing a duty of care to the deceased, and that the jury could consider whether she did in fact owe a duty of care to the deceased on the basis that the appellant had supplied the heroin to her. He was also wrong to conclude that "the proposition that the supplier of drugs may owe a duty of care to the customer in such circumstances is . . . consistent with authority".
F The authorities did not support this proposition.

G 15 In relation to the directions of law, Mr Murphy submitted that the judge was wrong to leave the jury to decide whether to extend the category of persons by whom and to whom a duty of care is owed for the purposes of manslaughter by neglect, and whether or not to enlarge these categories. The question whether specific facts would serve to establish a duty of care was for the decision of the judge, who should then leave it to the jury to decide whether the facts necessary to establish the duty of care had been proved. This contention was supported by reference to *R v Dalby* [1982] 1 WLR 425; *R v Willoughby* [2005] 1 WLR 1880; *R v Wacker* [2003] QB 1207; *R v Kennedy (No 2)* [2008] AC 269, as well as *R v Khan (Rungzabe)* [1998] CrimLR 830 and *R v Sinclair* (1998) 148 NLJ 1353.
H It was further contended that the practice by which juries were invited to decide whether a duty of care is proved or to enlarge the class of persons from whom and to whom a duty of care may be owed in cases of alleged gross negligence manslaughter is incompatible with articles 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Discussion

16 In the context of manslaughter the appellant's criminal liability, if any, depended on manslaughter by gross negligence. Her involvement in the supply to her sister of the fatal dose of heroin could not found a conviction for manslaughter on the basis of her unlawful and criminal act: *R v Kennedy (No 2)* [2008] AC 269, an authority expressly stated to have no application to gross negligence manslaughter.

17 The problem of fixing liability, whether in tort or in crime, on the basis of omission has generated much, indeed prolonged, debate. The Good Samaritan would have been disconcerted to discover that, at common law, absent a pre-existing responsibility for the child, a fit strong adult could watch him drown in shallow water although he was within easy reach and safety. In civil law the virtual inevitability of inroads into this principle was anticipated by Lord Goff of Chieveley in *Smith v Littlewoods Organisation Ltd* [1987] AC 241. The exemption applies only to what was described as "mere" or "pure" omission. In a variety of circumstances what may appear to be an omission to act may be converted into "a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard . . . from harm or injury": *Mitchell v Glasgow City Council* [2009] 2 WLR 481, para 40.

18 The principle was recently summarised by Lord Scott of Foscote in *Mitchell v Glasgow City Council* [2009] 2 WLR 481, para 40, where he said:

"Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that have led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise."

After reviewing a number of further additional features, Lord Scott concluded, at para 40:

"In each case where particular circumstances are relied on as constituting the requisite additional feature alleged to be sufficient to cast upon the defendant the duty to take steps that, if taken, would or might have avoided or lessened the injury to the victim, the question for the court will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission."

19 In relation to the criminal law, in the current edition of *Smith & Hogan on Criminal Law*, 12th ed (2008), p 64, Professor Ormerod repeats the text from much earlier editions that "The courts have long accepted without debate that murder and manslaughter are capable of commission by omission", certainly where the defendant who caused the death was under a duty to act. This principle was highlighted by Lord Mustill in *Airedale NHS Trust v Bland* [1993] AC 789. He described, at p 893, the

"important general exception at common law, namely that a person may be criminally liable for the consequences of an omission if he stands in such a relation to the victim that he is under a duty to act. Where the result is death the offence will usually be manslaughter, but if the necessary intent is proved it will be murder."

A 20 The question in this appeal is not whether the appellant may be guilty of manslaughter for having been concerned in the supply of the heroin which caused the deceased's death. It is whether, notwithstanding that their relationship lacked the features of familial duty or responsibility which marked her mother's relationship with the deceased, she was under a duty to take reasonable steps for the safety of the deceased once she appreciated that the heroin she procured for her was having a potentially fatal impact on her health.

B 21 When omission or failure to act are in issue two aspects of manslaughter are engaged. Both are governed by decisions of the House of Lords. The first is manslaughter arising from the defendant's gross negligence: *R v Adomako* [1995] 1 AC 171. The second arises when the defendant has created a dangerous situation and when, notwithstanding his appreciation of the consequent risks, he fails to take any reasonable preventative steps: *R v Miller* [1983] 2 AC 161. Gross negligence manslaughter and unlawful act manslaughter are not necessarily mutually exclusive: *R v Willoughby* [2005] 1 WLR 1880. The same applies to the aspects of manslaughter presently under consideration. Indeed care needs to be taken to avoid the risk of allowing the convenience of addressing the different circumstances in which manslaughter may arise to be converted into a compartmentalised, mutually isolated series of offences each inconveniently described by the same word, "manslaughter".

D 22 Miller's duty to act arose after he fell asleep in a squat while holding a lighted cigarette. He woke up and found that his mattress was smouldering. He left the room in which he had been asleep and went back to sleep in an adjoining room. He wholly ignored the smouldering mattress. The house caught fire. He was convicted of arson. In the House of Lords argument ranged over whether his omission to act engaged what was described as the "duty theory" espoused by Professor J C Smith or whether his reckless omission to rectify the consequences of his earlier unintended act attracted the "continuing act theory" supported by Professor Glanville Williams. It was submitted that there was no liability in criminal law for an omission unless there was a legal duty to act imposed by common law or by statute, and that no statutory provision imposed a duty neglect of which involved criminal liability, and no common law duty to extinguish an accidental fire or fire innocently started had previously been "declared".

E 23 The decision of the House of Lords was expressed in the single opinion of Lord Diplock. Both theories, he said, led to an identical result. The "continuing act" basis for liability was not disavowed, but the duty theory was adopted only on the basis that it was easier to explain to a jury, provided the word "responsibility" rather than "duty" was used. In fact, the issue has continued to be addressed in the context of "duty" rather than responsibility, and we shall continue to do so. More important, however, Lord Diplock observed, at p 176, that he could see

H "no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence . . . I cannot see any

good reason why, so far as liability under criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk that property of another will be damaged; provided that, at the moment of awareness, it lies within his power to take steps, either himself or by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk.”

24 The mens rea necessary for arson was, and thereafter the analysis focussed on, recklessness. But the reasoning in the decision does not exclude liability where a different mens rea is required. And if, for example, the result of the fire in *R v Miller* had included the death of a fellow squatter, it appears to us that Miller would properly have been convicted of manslaughter by gross negligence as well as arson: *R v Willoughby* [2005] 1 WLR 1880.

25 Adomako was an anaesthetist and the deceased was his patient. He plainly owed him a duty of care. Lord Mackay of Clashfern LC in the only speech, expressed the opinion that [1995] 1 AC 171, 187: “the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died.” He answered the certified question, at p 188: “In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case . . .”

26 Our attention was drawn to a number of subsequent authorities. In *R v Khan (Rungzabe)* [1998] Crim LR 830 a young woman was supplied by the appellants with heroin. This was probably the first occasion on which she had used heroin. She took ten times the recommended therapeutic dosage and twice the amount likely to be taken even by an experienced user of heroin. She became “obviously very ill”. She needed medical attention. The appellants, who were drug dealers, left her where she was and did nothing to assist. On the next day they returned and found that she was dead. If she had received medical attention she would probably have survived.

27 The jury was directed that they could consider a manslaughter verdict on the basis of omission. This could arise only if the appellants had set in train “a chain of events” which gave rise to a risk of harm to the deceased. The relevant act was the supply of heroin to her. The second necessary ingredient was knowledge or awareness of the obvious risk that, having taken the heroin, the deceased would or might be harmed, and that they deliberately took no steps to rectify it. The effect of the direction was “to extend the duty to summon medical assistance to a drug dealer who supplies heroin to a person who subsequently dies”. This court held that that might be correct (sed quaere today, in the light of *R v Kennedy (No 2)* [2008] AC 269), but the issue needed to be closely addressed with the jury. The summing up in relation to manslaughter by omission was flawed. The convictions were quashed. The issue which arises in the present appeal was not directly addressed, although impliedly at any rate it appears that the court would not have rejected criminal liability on this basis.

A 28 *R v Sinclair, Johnson and Smith* (1998) 148 NLJ 1353 raised similar issues. For these purposes the detailed facts need no narrative. Johnson's conviction for manslaughter was quashed on the basis that his conduct had not demonstrated a "voluntary assumption of a legal duty of care". What he had done was rather "a desultory attempt to be of assistance". The facts were not capable of giving rise to a legal duty of care in his case. Sinclair, however, was in a different position. He was a close friend of the deceased. They lived together, almost like brothers. Sinclair paid for and supplied the deceased with the first dose of methadone and helped him to obtain the second dose. He knew that the deceased was not an addict. He remained with the deceased throughout the period of his unconsciousness. For a long time he was the only person who was with him. On this basis there was material on which the jury, properly directed, could have found that Sinclair owed the deceased a legal duty of care. That accords with the present case.

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D 29 In *R v Willoughby* [2005] 1 WLR 1880 the appellant was convicted of manslaughter on the basis of arson. He owned some premises which he decided to destroy by fire. He recruited a man called Drury to help him set fire to the premises. In an explosion the premises collapsed and Mr Drury died. The court accepted that a duty to look after the deceased did not arise merely because the appellant owned the premises which collapsed and in which he was killed. But that fact, taken together with the additional facts that the destruction of the premises was for his financial benefit, that he enlisted the deceased to take part, and that his role was to spread petrol inside the premises, were sufficient, "in conjunction" to be capable of giving rise to a duty of care: para 20.

E 30 In *R v Wacker* [2003] QB 1207 the appellant's convictions for manslaughter arose from the horrific deaths of 58 illegal immigrants hiding in a container loaded on to a trailer. The appellant was the lorry driver. It was suggested that he owed no duty of care to any of the deceased because they were parties to the same illegal purpose. The court, at para 38, had "no difficulty in concluding that . . . the [appellant] did voluntarily assume the duty of care [for those in the container]", and he was aware that "no one's actions other than his own could realistically prevent [them] from suffocating to death". The appeal was dismissed on the basis that, once the jury decided that the appellant knew about those travelling in the container, it was a very plain case of gross negligence manslaughter.

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H 31 These authorities are consistent with our analysis. None involved what could sensibly be described as manslaughter by mere omission and in each it was an essential requirement of any potential basis for conviction that the defendant should have failed to act when he was under a duty to do so. The duty necessary to found gross negligence manslaughter is plainly not confined to cases of a familial or professional relationship between the defendant and the deceased. In our judgment, consistently with *R v Adomako* [1995] 1 AC 171 and the link between civil and criminal liability for negligence, for the purposes of gross negligence manslaughter, when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise.

The directions to the jury

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(a) The ingredients of the offence

32 When directing the jury as to the constituents of manslaughter by gross negligence, the judge prepared a detailed note for the jury. He summarised the propositions in four questions:

“(1) Has the prosecution made you sure that that defendant . . . owed Carly Townsend a duty of care? (2) If so, has the prosecution made you sure that that defendant was in breach of that duty of care? (3) If so, has the prosecution made you sure that the defendant’s breach of that duty of care caused the death of Carly Townsend? (4) If so, has the prosecution made you sure that that defendant’s breach of that duty of care was such gross negligence as to amount to the crime of manslaughter?”

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33 In his summing up the judge emphasised that the prosecution case against the appellant was based “solely” on her omission “to summon medical help when Carly . . . was suffering from a heroin overdose”, and that the negligence alleged by the prosecution was not any positive act but omission, taking this form. He directed the jury that before they could convict on manslaughter by omission, “there must be a pre-existing duty to act”.

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34 The judge told the jury that he would direct them “as to the circumstances in which such a duty can arise as a matter of law” but it would be for the jury to decide whether, on the facts they found, either or each of the defendants owed such a duty towards the deceased. In the case of the appellant he directed the jury that as a matter of law the blood relationship between the appellant and her half-sister, who was a minor, did not “of itself” give rise to a duty of care. He then directed the jury that they had heard that the appellant

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“did perform some acts to assist Carly during the evening of 2 May, in particular she and her mother placed Carly in the recovery position and they took turns to look to see if she was alright. However, I direct you that as a matter of law there is nothing in that course of conduct which is capable of amounting to an acceptance or an assumption by Gemma Evans of responsibility for Carly so as to give rise to a duty of care. In the present case, the only matter which in law is capable of giving rise to a duty of care owed by Gemma Evans to Carly Townsend would be if Gemma Evans did, on this occasion, as the prosecution allege, act as an intermediary, giving the drugs to Carly herself having first obtained them from Andrew Taylor. If the prosecution have made you sure that Gemma Evans did on this occasion act as an intermediary, giving the drugs to Carly herself, having first obtained them from Andrew Taylor, that is a matter which in law is capable of giving rise to a duty of care. It is for you to decide whether the prosecution has made you sure that such a duty of care has arisen on the facts found by you . . . if the prosecution has not made you sure that Gemma Evans did, on this occasion, act as an intermediary, giving the drugs to Carly herself having first obtained them from Andrew Taylor, then she cannot have owed a duty of care to Carly Townsend and you must find Gemma Evans not guilty. It is for you to decide, having regard to all the circumstances of

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A this case as you find them to be, whether each defendant owed a duty of care towards Carly Townsend.”

35 In relation to the circumstances in which a duty of care might arise in this case, these observations must be seen in their context, which is that the only issue of fact which the jury had to decide was the supply issue. Unless the jury was sure of this fact, the remaining undisputed areas of the appellant’s involvement (summarised at para 12) would, on the judge’s directions, have been insufficient for the purposes of gross negligence manslaughter. Without her involvement in the supply of heroin, the jury was directed that there was no duty on the appellant to act even after she became aware of the serious adverse effect of the drug taking on Carly. If on the other hand she was so involved, that fact, taken with the other undisputed facts would, and on our analysis of the relevant principles did, give rise to a duty on the appellant to act. In law the judge’s directions about the ingredients of gross negligence manslaughter, as applied to this case, were correct.

36 We would merely record that the judge’s direction that a duty to act did not arise from a voluntary assumption of risk by the appellant may have been appropriate in this case, but it would not be of universal application where, for example, a voluntary assumption of risk by the defendant had led the victim, or others, to become dependent on him to act.

(b) The responsibilities of the judge and jury

37 The authorities in relation to this question have been compendiously collected in an illuminating analysis by Jonathan Herring and Elaine Palser entitled “The Duty of Care in Gross Negligence Manslaughter” [2007] Crim LR 24. We shall not recite them in this judgment. The thesis is that the current law is unclear. The authors suggest that there are three possible solutions to the question whether the judge or the jury is responsible in an individual case for deciding whether the defendant owed a duty of care to the deceased: p 25. They are:

F “View 1. It is for the judge to decide when in law a duty of care arises. But it is for the jury to decide what the facts are . . . View 2. The jury are to decide not only what the facts are, but also the meaning of duty of care and whether there is a duty of care on those facts. View 3. The definition of the duty of care is shared between a judge and a jury. The judge can decide whether in law there *could* be a duty of care, but if there could it is for the jury to decide whether or not there is . . .”

G 38 We agree that there is an inconsistency between the authorities, and the court as presently constituted must address and resolve them.

39 The starting point is to reflect on first principles. Subject to any statutory exceptions, in the criminal trial decisions of fact are the exclusive responsibility of the jury and questions of law are for the judge. In principle therefore the existence, or otherwise, of a duty of care or, we would add, a duty to act, is a stark question of law: the question whether the facts establish the existence of the duty is for the jury.

H 40 In *R v Adomako* [1995] 1 AC 171 the essential question related to gross negligence in the context of the professional care of an anaesthetist for his patient during the course of an operation. The duty was plain on

ordinary principles of law. It was argued on behalf of the appellant that the jury should have been directed that they had to be satisfied that the defendant owed a duty of care to the deceased. That submission is not directly addressed in the opinion of Lord Mackay of Clashfern LC who observed, at p 187:

“the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence . . .”

41 Following *R v Adomako*, the existence or otherwise of a duty of care, and its nature, was closely addressed in *R v Wacker* [2003] QB 1207, where it was argued that the application of the “ordinary principles of the law of negligence” in their full rigour extinguished the duty relationship which would otherwise have been owed by the driver of the lorry to those travelling within the container. The court was unimpressed with the submission that all the wider manifestations of tortious liability for negligence should apply to gross negligence manslaughter, but *R v Wacker* confirmed, if authority were needed for this purpose, the plain fact that in the context of the existence of a duty of care or duty to act there is, for the reasons given earlier in this judgment, a close correlation between the civil and criminal law, and that in relation to the question whether a duty of care or duty to act is owed by one individual to another, the question is a question of law.

42 In *R v Willoughby* [2005] 1 WLR 1880 the court directly addressed what was said to be a “conflict” between the authorities on the question whether the judge or jury should decide whether such a duty existed. It was held, after examining the words used by Lord Mackay LC in *R v Adomako* [1995] 1 AC 171, that this issue, as well as the issues of breach of duty and assessment of criminality, were matters for the jury.

43 We are troubled by this conclusion. It depends on the view that this was indeed the effect of Lord Mackay LC’s observations in *R v Adomako*. We are unable to agree that this interpretation is correct. It was suggested in *R v Willoughby* that Lord Mackay’s use of the words “the jury must go on” carried the clear implication that the existence or otherwise of a duty of care would usually be a matter for the jury. However it is plain that Lord Mackay was anxious to avoid over elaboration, and we find it difficult to agree that his use of colloquial language (“the jury must go on”) was intended to bear the weight laid upon it by *R v Willoughby*. Our view is reinforced by Lord Mackay’s later observation [1995] 1 AC 171, 189 that “The task of trial judges in setting out for the jury the issues of fact and the relevant law in cases of this class is a difficult and demanding one”.

44 In our view if Lord Mackay LC had been intending to depart from what we have described as first principles he would have said so and explained why. Moreover, although we agree that before a conviction can be returned the jury must indeed be sure that the defendant owed the necessary duty of care, this begs the question whether the conclusions of the jury should follow on the basis of their findings of fact or whether the jury is required or indeed entitled to make a decision of law. Notwithstanding the

A terms of the judgment, in his valuable commentary on *R v Willoughby* [2005] Crim LR 389, 392, Professor Ormerod suggests that “The present decision does not relegate the duty question to one of fact. It remains a question of law, and the jury are to be directed on what the law is—ie whether a duty exists—if they find certain facts to be established.” His reasoning is persuasive, and consistent with principle.

B 45 In some cases, such as those arising from a doctor/patient relationship where the existence of the duty is not in dispute, the judge may well direct the jury that a duty of care exists. Such a direction would be proper. But if, for example, the doctor were on holiday at the material time, and the deceased asked a casual question over a drink, it may very well be that the question whether a doctor/patient relationship existed, and accordingly whether a duty of care arose, would be in dispute. In any cases
C where the issue is in dispute, and therefore in more complex cases, and assuming that the judge has found that it would be open to the jury to find that there was a duty of care, or a duty to act, the jury should be directed that if facts a + b and/or c or d are established, then in law a duty will arise, but if facts x or y or z were present, the duty would be negated. In this sense, of course, the jury is deciding whether the duty situation has been established.
D In our judgment this is the way in which *R v Willoughby* should be understood and, understood in this way, no potential problems arising from article 6 and article 7 of the Convention are engaged.

46 This conclusion seems to us to accord with the principles which would obtain if, in the extremely unlikely event of an order for trial by jury, the issues arose in a civil action. The current edition of *Halsbury’s Laws of England*, 4th ed reissue, vol 33 (1997), “Negligence”, para 685 addresses the functions of judge and jury in stark terms:
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“In those rare cases where there is still a jury in an action of negligence the respective functions of judge and jury are as follows: the judge decides whether the defendant owed a duty to the plaintiff, directs the jury on the standard of care required, decides whether there is any evidence on which a jury may infer that that standard has not been attained, instructs the
F jury on causation and remoteness, and lays down the principles for assessing damages. The jury decides whether the conduct of the parties fell below the standard of care as laid down by the judge, decides issues of causation and assesses the damages.”

47 We also note for present purposes the provisions of the Corporate Manslaughter and Corporate Homicide Act 2007 which are concerned
G with gross breaches of a “relevant duty of care” owed to the deceased. Section 2(5) provides: “For the purposes of this Act, whether a particular organisation owes a duty of care to a particular individual is a question of law. The judge must make any findings of fact necessary to decide that question.” In the context of the criminal law, the proposition that the trial judge should decide disputed questions of fact and then apply them to the relevant questions of law is, to put it no higher, unusual. However for
H present purposes it would, we believe, be remarkable if appropriate statutory provisions would not have been made in relation to questions of law if it was in the faintest degree possible that Parliament believed that the jury might decide a question of law after findings of fact made by the judge. The silence of section 2(5) on this point must be deliberate. Its effect in this

statute is that the judge must make the necessary findings of fact and also decide the relevant question of law. This provision, and its very enactment, is, we suggest, entirely consistent with our understanding of first principles.

48 In our judgment the jury should not have been left to decide the question whether the appellant owed a duty of care to the deceased. The judge is not to be criticised for doing so. He was following *R v Willoughby* [2005] 1 WLR 1880 as it was commonly understood.

49 The important question however is whether his direction renders the conviction unsafe. It does not. On our analysis there was a plain case to answer. On the facts actually found by the jury on the supply issue, and the undisputed facts, in our judgment the appellant was under a plain and obvious duty to take reasonable steps to assist or provide assistance for Carly. The jury were sure, both in law and in fact on this point: so, as a matter of law, are we. The fact that the jury was sure as a matter of law may help to reinforce our conclusion, but in the ultimate analysis is irrelevant to it. The remaining ingredients of the offence were proved. Accordingly this appeal against conviction will be dismissed.

Appeal dismissed.

JBS
