R v (1) Hawkins, (2) Dixon and (3) MPM North West Ltd: aspects of gross negligence manslaughter

By Christopher Adams

Our Counsel Prashant Popat QC, Oliver Campbell QC and Christopher Adams instructed by Kennedys Solicitors acted for the three defendants in a prosecution for gross negligence manslaughter ("GNM") arising from the death of an employee of D3, who fell from Eastbourne pier on 19 August 2014 during work to repair the pier. D1, a director of D3 who acted as project director, was charged with GNM and breach of the duty under s.7 of the Health & Safety at Work etc Act 1974 ("HSWA"). D2, who was employed by D3 as the site manager, was charged with GNM and breach of the duty under s.37 HSWA. D3 was charged with breaches of duties under ss.2 and 3 HSWA.

The case gave rise to several points of general interest. In particular, the defendants argued successfully that (1) the prosecution should provide further and better particulars of its case in relation to the GNM charges; (2) the prosecution expert witness should not be permitted to give her opinion before the jury as to whether any breaches of the duties of care owed by D1 and D2 to the deceased were 'gross', and (3) D1 and D2 had no case to answer in relation to the GNM charges.

Gross Negligence Manslaughter

1. The six elements that the prosecution must prove before a defendant can be convicted of GNM were set out by the Court of Appeal in *Broughton* [2020] EWCA Crim 1093:[1]

(i) The defendant owed an existing duty of care to the victim.
(ii) The defendant negligently breached that duty of care.
(iii) At the time of the breach there was a serious and obvious risk of death. Serious, in this context, qualifies the nature of the risk of death as something much more than minimal or remote. Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation.
(iv) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death.
(v) The breach of the duty caused or made a significant (i e more than minimal) contribution to the death of the victim.
(vi) In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

Inadequate particularisation

2. At the PTPH and PTR the defence argued that the particulars provided by the prosecution were inadequate and obtained orders requiring further particularisation. However the prosecution's responses were, it was contended by the defence, inadequate and at the opening of the trial, on the Defendants' application, the Judge directed the prosecution to provide better particulars of the indictment on the GNM charges reflecting the necessary ingredients of GNM, in particular the breaches of duty alleged against each defendant.

[1] At §5.

3. It is important when facing a GNM charge to ensure the prosecution case is as clear as it can be and that, insofar as it can be, the indictment is particularised so that the defence and the jury know the case being advanced. The defence contended that in this respect the approach to GNM should not be too dissimilar to the approach to be adopted in a civil case of negligence where particulars of breach are to be expected and which properly circumscribe the case against a defendant.

Expert opinion on the ultimate issue

4. One of the ingredients which the prosecution had to prove was that the alleged negligence was "gross", a question of fact for the jury to determine.[2] The prosecution expert expressed the view in her report that, although the question of grossness was a matter for the court to decide, in her opinion the failings she identified did amount to gross negligence. She had not been provided with any definition of 'gross negligence' in her instructions.

5. The Judge identified from the line of cases such as *Stockwell*,[3] *Pora*[4] and *Sellu*[5] the principles that (1) although an expert can give evidence on 'the ultimate issue', the admissibility of such evidence is subject to the requirement that it should be of assistance to the finder of fact, and (2) evidence which has or may have the effect of supplanting the role of the jury as decision maker cannot necessarily be countered by the usual direction to the jury that they, not the experts, are the arbiters. He concluded that the expert's answers about whether the alleged failings amounted to gross negligence provided no expert or other assistance to the jury because they were in each case simply set out in the form of an assertion; she did not give any real indication as to the test which she applied in considering that final question, and she did not state or even imply that her opinions on 'grossness' were based on any test from the case law. Nor was the Judge satisfied that the potential mischief of allowing the expert evidence on 'grossness' would necessarily be nullified by directions to the jury. The Judge ruled that the expert could not give evidence as to 'grossness'.

[2] *R v Misra* [2005] 1 Cr App R 21 per Judge LJ at §62.
[3] (1993) 97 Cr. App. R. 260.
[4] [2015] UKPC 9.
[5] [2016] EWCA Crim 1716.

No case to answer

6. D1 and D2 made applications of no case to answer in respect of the GNM charge. The applications were focussed on 4 elements of the GNM test as set in *Broughton*, noted above.

7. As to both Defendants, the Judge concluded that the identification of the evidence of the breaches alleged against D1 had to be by reference to the matters alleged by the prosecution expert. It was that evidence which the jury would principally have to consider to assess whether the particulars alleged by the prosecution could be proved to the requisite standard.

8. In advancing these applications, the defence began by focussing on the requirements of serious and obvious risk and foreseeability of that risk. These elements of GNM are sometimes given less importance than they deserve, and there is a mistaken belief that as death has occurred the risk of death must have been serious and obvious. This mistaken approach focusses on risk of death when the incident occurs; in this case the prosecution asserted that the risk of death was serious and obvious when a person falls 30m off a pier. As the defence argued, and as the Judge agreed, this approach addressed the wrong questions. The questions, following the line of cases including *Rose,*[6] *Winterton*[7] and *Kuddus*,[8] were whether there was a serious and obvious risk at the time of death and arising from the breach, and further whether that risk at that time arising from that breach was foreseeable to a reasonable person in the Defendant's position. For example, in a case of a workplace death where the allegations of breach, when sufficiently particularised, may focus on alleged inadequacies of risk assessment, it may be important to examine when the risk assessment was conducted because, as in this case, it may be that at that date if control measures are proposed and the defendant has no reason to believe that the identified control measures will not be implemented, there is no basis for concluding that there was a serious and obvious risk of death at that time and arising from the breach. Events subsequent to the risk assessment will not impact on such a determination unless the defendant had actual or constructive knowledge of them, such to render the defendant guilty of a separate breach in failing to act on the new knowledge.

[6] [2017] EWCA Crim 1168
[7] [2019] 2 Cr. App. R. 12
[8] [2019] 1 W.L.R. 5199

9. On the evidence in this case and having regard to the particular scope of the particular defendants' duties, the Judge concluded that a reasonably directed jury could not conclude these questions in favour of a conviction. The Judge also agreed with the defence that the evidence provided no basis for a reasonable jury to conclude that the defendants' assumed breaches caused or contributed to the deceased's death. Further and in any event, there was no basis for a reasonable jury to conclude that the breaches collectively were gross.

Key points and conclusions

10. Defendants facing GNM charges in the context of accidents at work should be alert to the prosecution's duty properly to set out its case and to prove each and every element of the offence. Broad allegations of an unsafe system of work may not be sufficient for a GNM prosecution to succeed at trial. In particular, the requirement for a serious and obvious risk of death arising from the alleged breach to be reasonably foreseeable at the time of the breach means that it will not be sufficient for the prosecution to establish a serious risk of death if the relevant risk eventuates (i.e. in the present case if a worker were to fall from the pier). What must be established is that there was, at the time of and arising from the breach, a serious and obvious (i.e. present, clear and unambiguous) risk of a fatal incident.

Christopher Adams
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