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Gross Negligence Manslaughter, Restaurant Owners and the Foreseeability Question

R v Kuddus [2019] EWCA Crim 837, Court of Appeal

Keywords: gross negligence manslaughter, food allergy, duty of care, foresight of an obvious and serious risk of death

Mohammed Kuddus (K) was the owner of a takeaway business, the Royal Spice Indian restaurant in Oswaldtwistle, Lancashire. He also worked there as the chef. Alongside his co-accused, the restaurant manager Harun Rashid (R), K was charged with the gross negligence manslaughter of a 15-year-old girl, Megan Lee (L), who died on New Year's Day 2017 due to an allergic reaction after she ate a takeaway meal containing nuts from the restaurant two days' earlier. K and R and appeared before HHJ Yip and a jury at Manchester Crown Court in October 2018.

On 30th December 2016, L and her friend had ordered food from the restaurant via the Just Eat website. As they were doing so, a prompt appeared inviting customers to 'Leave a note for the restaurant'. When that was clicked, a further prompt appeared asking (inter alia) 'Got an allergy?' Here, L's friend typed 'nuts, prawns'. L had been diagnosed with asthma as a child, and with allergies to nuts when she was 8, but her allergies were believed to be mild.

The order (including the comment 'nuts, prawns') was received by Royal Spice and was seen by R, but not by K, who was working in the kitchen. The food was prepared and delivered to L and her friend. Despite the comment about L having a nut allergy, the food contained peanut protein. L suffered an allergic reaction, which was mild, at least initially. Shortly afterwards, however, she stopped breathing and her heart stopped. She was taken to hospital in an ambulance but had suffered irreversible brain damage. Two days' later, life support was withdrawn and she was pronounced dead, with the cause of death a fatal asthma attack precipitated by an allergic reaction to nuts.

K and R were both convicted of gross negligence manslaughter (in addition to breaches of the Health and Safety at Work, etc., Act 1974 and the Food Safety and Hygiene (England) Regulations 2013). K appealed against his manslaughter conviction. At trial, he admitted preparing at least part of L's meal but denied any knowledge of the 'nuts, prawns' comment. There were two grounds of appeal:

1. The trial judge, Yip J, should have directed the jury that the Crown was obliged to prove there was in fact a serious and obvious risk of death to L at the time of K's breach of duty – the existence of this risk being in addition to the requirement to prove that a reasonable prudent person in K's shoes would have foreseen that the breach posed such a risk to nut allergy sufferers generally.
2. The trial judge had imputed K with knowledge (about L's nut allergy) that he did not, in fact, have. Yip J did so on the basis that he (K) was the owner of the restaurant and this information had been communicated to the restaurant manager (R).

Held, allowing the appeal, the conviction for manslaughter was unsafe and was quashed (at [81] and [86]). The first ground of appeal was rejected but the second was accepted. As to the first ground, Sir Brian Leveson P said that

'To focus on the particular circumstances of this specific victim is to misunderstand what has to be established to prove gross negligence manslaughter. There is no requirement that there must be proved to be a serious and obvious risk of death for the specific victim who dies. If it is in issue, the question to be answered is whether the defendants' breach gave rise (as an objective fact) to a serious and obvious risk of death to the class of people to whom the defendant owed a duty… The relevant question in this case would be whether [K's] breach gave rise to (a) a risk of death that was (b) serious and (c) obvious for nut allergy sufferers of the class to whom the relevant duty was owed and of which [L] was a member.' (at [69] and [71])

Applying those principles to the present case, he said that K's submission:

> 'over-personalised the question of fact that should be left to the jury... There was no separate and independent requirement that the Crown prove that the particular victim, in this case [L], was at serious and obvious risk of death.' (at [72])

However, on the second ground, Leveson P explained that restaurateurs like K owed a 'duty of ensuring that appropriate systems were in place to avoid the risk that a customer with a declared allergy was not served food which contained the allergen' (at [79]). He then moved on to consider the separate question, namely, was there an obvious and serious risk of death at the time such duty was breached? Leveson P continued:

‘The foreseeable risk for the purposes of gross negligence manslaughter is that, armed with notice that a particular customer falls into the category which the system was designed to deal with, a reasonable person in the position of [K] would, at the time of breach of duty, have foreseen an obvious and serious risk of death... It was not suggested that [K] was armed with notice that [L] fell into the category of those in respect of whom a reasonable person in the position of [K] could have foreseen an obvious and serious risk of death by serving the food that he did. He knew nothing of the allergy which [L] had declared. In those circumstances, the conviction for gross negligence manslaughter cannot stand.’ (at [80] – [81]; emphasis added)

Commentary

As recent case law has demonstrated, the charge of gross negligence manslaughter requires five elements to be proven by the Crown: (1) a duty of care; (2) a breach of that duty; (3) reasonable foreseeability that the breach gave rise to an obvious and serious risk of death; (4) that death was caused by the breach; (5) gross negligence.

The present case confirms that restaurant owners like K owe a duty of care to their customers, a proposition first established in *Zaman* [2017] EWCA Crim 1783. The scope of that duty was explained in the present case (above). Leveson P also said that:

> ‘That is the same as the duty placed [on optometrists] in *Rose* of conducting an appropriate examination to accord with the requirements of the legislation. In both cases, the risk, however, was the risk that a customer or patient respectively might present with the underlying condition which the system should have been designed to prevent, rather than the obvious and serious risk of death’ (at [79]).

In the present case, Leveson P closely followed his own judgment in *Rose* [2017] EWCA Crim 1168, [2018] QB 328, in which an optometrist’s conviction of gross negligence manslaughter was quashed because the trial judge had directed the jury to assess whether there was an obvious and serious risk of death, based on knowledge which she would have had, had she carried out an internal eye examination, rather than on the basis of the knowledge which she in fact had. Leveson P confirmed that the assessment of the foreseeability question is both objective i.e. determined according to a reasonable prudent person in the shoes of the defendant and prospective, i.e. it is predicated on the defendant’s

actual knowledge at the time of the breach, and not on knowledge that he or she could, or should, have had (at [80]).

The present case does develop the law in one way, however. The key question in *Rose* was whether the reasonable prudent optometrist in the shoes of Honey Rose could be imputed with the knowledge that she would have had, had she not breached the duty on her – the Court of Appeal answering the question 'no'. In the present case, the second ground of appeal was whether the reasonable prudent restaurateur in the shoes of Muhammed Kuddus could be imputed with the knowledge that someone else (i.e. the restaurant manager, Harun Rashid) actually had – the Court of Appeal answering that question 'no'.

Finally, the present case can be compared and contrasted with the decision in *Zaman*. In that case, the Court of Appeal upheld the gross negligence manslaughter conviction of a restaurateur, Mohammed Zaman, following the death of a customer with a nut allergy. In *Zaman*, however, Hickinbottom LJ pointed out that the appellant had 'accepted that he knew that customers with a peanut allergy were at risk of fatal consequences if they ingested peanut' and had 'conceded that there was a serious and obvious risk of death' (*Zaman* at [66]), thereby obviating any need for the Crown to prove that issue. Mohammed Zaman is therefore comparable to Harun Rashid in the present case: only the actual knowledge on the part of an accused (as opposed to knowledge which the accused could, or should, possess) can be taken into account in assessing the foreseeability of death question for the purposes of gross negligence manslaughter.