***Whether ‘obvious and serious’ risk of death in cases of gross negligence manslaughter to be determined both objectively and prospectively***

***R v Rose* [2017] EWCA Crim 1168, Court of Appeal**

***Gross negligence manslaughter; ‘obvious and serious’ risk of death***

In February 2012, Honey Rose (R), a registered optometrist based at a branch of Boots Opticians in Ipswich, conducted a routine eye test and examination on Vincent Barker (B), aged seven. Pursuant to s.26(1) of the Opticians Act 1989, R had a statutory duty of care as an optometrist to examine the internal eye structure as part of a routine eye examination, to detect signs of abnormality or disease including life threatening problems evident from the optic nerve. However, she did not examine B’s eyes using an opthalmascope. Another member of Boots’ staff had taken retinal images of B’s eyes earlier that day. These showed swelling of the optic discs at the end the optic nerve (bilateral papilloedema), an indication that an obstruction in B’s brain was causing a build-up of cerebrospinal fluid in the ventricles of the brain (hydrocephalus), a treatable but potentially fatal condition. However, R did not inspect these images either. As a result of the failure to either use the opthalmascope or inspect the retinal images, R recorded no issues of concern with B’s eyes.

In July 2012, five months after the examination, B was taken ill while at school. He was sent home in the afternoon but, when his condition deteriorated over the evening, paramedics were called. He was taken to hospital but by this time he was in cardiac arrest. Attempts at resuscitation were unsuccessful and he was pronounced dead at 9.27pm. Three experts looked into the cause of B’s death. They agreed that the cause of B’s death was acute hydrocephalus, and that the obstruction in his brain had been a longstanding chronic problem. They also agreed that B’s case was unusual because he had not presented with many associated symptoms of hydrocephalus, such as headaches and vomiting. B’s condition was said to have been treatable (by draining the build-up of fluid and creating a bypass or inserting a shunt to prevent a repetition) up to the point of acute deterioration and death, i.e. in July 2012.

R was arrested. She claimed that she had not examined B’s eyes with the opthalmascope because B had had ‘poor fixation’ and slight photophobia, a version of events which was contradicted by B’s mother, who was present at the examination. R also told the police that she had examined the retinal images but not the ones taken of B on the morning of the sight test; she said that these must have been images taken of B’s eyes 12 months earlier. (At the trial, she said that the images must have been of a different patient altogether.) R was charged with gross negligence manslaughter and appeared before HHJ Stuart-Smith and a jury at Ipswich Crown Court in July 2016.

At trial, the experts agreed that a competent optometrist with knowledge of the swelling of the optic nerve would have known the significance of the swelling and would immediately have referred B’s case on to others. At one point during the trial, Stuart-Smith J rejected a submission of no case to answer, determining that R had failed to conduct a full internal examination of B’s eyes, there was no good reason for that failure, and hence R had breached her duty of care. Stuart-Smith J directed the jury to consider whether the risk of B’s death caused by R’s breach of duty would have been obvious to a reasonably competent optometrist with the knowledge that R would have had ‘if she had not acted in breach of her duty to investigate the true position’ and, if so, whether her conduct was so bad as to amount to a criminal omission.

R was convicted and appealed. She contended that the submission of no case to answer was wrongly rejected and that the judge had erred in his directions to the jury as to the elements of gross negligence manslaughter.

**HELD, allowing the appeal and quashing the conviction**, in assessing the reasonable foreseeability of risk of death in cases of gross negligence manslaughter, the court was not entitled to take into account information which would only have been available to a defendant following the breach of duty in question (at [94]). Although R had committed a ‘serious breach of duty’ this did not constitute the crime of manslaughter (at [95]).

In cases of gross negligence manslaughter, there were 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 (at [77]).

The appeal in the present case involved issue (3). On that point, the Court of Appeal ruled that the test was both ‘objective and prospective’ (at [78]). According to Sir Brian Leveson P, giving the unanimous judgment of the court, the objective aspect of the test ‘requires the notional objective exercise of putting a reasonably prudent professional in the shoes of the person whose conduct is under scrutiny and asking whether, at the moment of breach of the duty on which the prosecution rely, that person ought reasonably (i.e. objectively) to have foreseen an obvious and serious risk of death’ (at [84]).

In terms of the prospective aspect, Sir Brian Leveson P stated:

None of the authorities suggests that, in assessing either the foreseeability of risk or the grossness of the conduct in question, the court is entitled to take into account information which would, could or should have been available to the defendant following the breach of duty in question (at [78]).

He emphasised this point as follows:

The inherently objective nature of the test of reasonable foreseeability does not turn it from a prospective into a retrospective test. 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. The question of reasonable foreseeability is evident from the words used, i.e. what is reasonably *fore*-seeable at the time of the breach (a prospective view). It is not what would, could or should have been known but for the breach of the identified duty of care, i.e. if the breach had not been committed (a retrospective view) (at [80]).

Were the situation otherwise, it would ‘fundamentally undermine the established legal test of foreseeability in gross negligence manslaughter which requires proof of a ‘serious and obvious risk of death’ *at the time of the breach*’ (at [94], emphasis added).

Sir Brian Leveson P explained that a test that incorporated retrospective as well as prospective knowledge would have ‘serious’ implications for medical and other professions, because such professionals would face liability for 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’ (at [94]).

Finally, the Court of Appeal applied the law to the ‘factual matrix’ in the present case. According to Sir Brian Leveson P:

At its highest, what a reasonably prudent optometrist would or should have known at the time of the instant breach was that, if he or she did not carry out a proper examination of the back of B's eyes, there remained the *possibility* that signs of potentially life-threatening disease or abnormality *might* be missed. That was not enough to found a case of gross negligence manslaughter since there had to be a ‘serious and obvious risk of death’ *at the time of the breach* (at [86], emphasis added).

**Commentary**

**An ‘obvious and serious’ risk of death**

*Rose* makes an important contribution to the law on gross negligence manslaughter, specifically on the test for an obvious and serious risk of death. The leading case on gross negligence manslaughter remains the decision in *Adomako* [1995] 1 AC 171 but in that case the House of Lords dealt with the risk of death issue as part of the grossly negligent breach issue, rather than separately. Lord Mackay stated that ‘The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal’ (*Adomako* at p. 187). There was no mention of the risk having to be either ‘obvious’ or ‘serious’.

However, in *Singh* [1999] Crim LR 582, the Court of Appeal approved the trial judge's direction in that case that ‘the circumstances must be such that a reasonably prudent person would have foreseen a *serious and obvious* risk not merely of injury, even serious injury, but of death’ (per Schiemann LJ, emphasis added). This passage was quoted in *Misra & Srivastava* [2004] EWCA Crim 2375; [2005] 1 Cr. App. R. 21, and later in that case Judge LJ (as he then was) noted that ‘The jury concluded that the conduct of each appellant … showed a high degree of indifference to an *obvious and serious* risk to the patient's life. Accordingly, along with the other ingredients of the offence, gross negligence too, was proved’ (*Misra & Srivastava* at [66], emphasis added).

In the meantime, the Court of Appeal had held that the test was objective. In *Attorney General’s Reference (No.2 of 1999)* [2000] QB 796, Rose LJ stated that although there may be cases of gross negligence manslaughter ‘where the defendant's state of mind is relevant to the jury's consideration when assessing the grossness and criminality of his conduct, evidence of his state of mind is *not* a prerequisite to a conviction for manslaughter by gross negligence. The Adomako test is *objective’* (*Attorney General’s Reference (No.2 of 1999)* at p.809, emphasis added).

More recently, in *S*[2015] EWCA Crim 558, Cranston J said that ‘the issue for the jury was not based on a subjective test but rather an *objective* one: whether a reasonable and prudent person of the applicant’s age and experience would have foreseen a *serious* risk of death’ (*S* at [20], emphasis added). In *S* the Court of Appeal did not specify that the risk had to be ‘obvious’ as well as ‘serious’ but, in the most recent authority on the point, *Rudling* [2016] EWCA Crim 741, the Court of Appeal unequivocally held that ‘At the time of the breach of duty, there must be a risk of death, not merely serious illness; the risk must be *serious*; and the risk must be *obvious’* (*Rudling* at [30], per Sir Brian Leveson P, emphasis added). This passage was quoted in the present case (*Rose* at [74]).

The appeal court had therefore established, over a series of judgments from *Singh* to *Rudling*, that in cases of gross negligence manslaughter a reasonably foreseeable (i.e., objective) risk of death which was both ‘obvious’ and ‘serious’ had to be proved (in addition to the other elements of the offence). What *Rose* adds to this jurisprudence is a requirement that, in determining the answer to this test, hindsight is irrelevant. The reasonably prudent person in the defendant’s situation does not have any knowledge which the defendant would have had, but for the breach.