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Causing death by failing to seek medical help

***R v Broughton* [2020] EWCA Crim 1093, Court of Appeal**

Keywords: Gross negligence manslaughter; Obvious and serious risk of death; Causation

On Sunday 10th September 2017, Ceon Broughton (B) and Louella Fletcher-Michie (F) were attending the Bestival music festival at Lulworth Castle in Dorset. There, B supplied F with 2C-P, a Class A drug known to have psychedelic properties. B 'bumped up' the drug either by giving F an increased dosage or by mixing it with ecstasy or ketamine. B and F left the festival grounds for nearby woodland at around 4.30pm. There, F suffered a 'bad' reaction to the drug and began hallucinating. Over the next several hours, B took 'live' photographs and recorded videos of F. In a video recorded around 6pm, F could be seen slapping herself and shouting. At around 6.45pm, B rang F's mother, who told him to take F to the festival's medical tent, which was approximately 400 metres away. B did not do so, but told F's mother that he would look after her. At 7pm, F's brother texted B, asking him to take F to the medical tent. Again, B did not do so but instead took some more photographs of F. At around 7.15pm, B's friend Ezra Campbell (C), who was at the festival, rang B. B told C to 'get the medics' to the forest. This was followed by several text messages between B and F's father and brother.

At around 8.15pm, by which time the sun had set, B made another video of F. She was now lying on her back, making 'animal like' noises. One of the Crown's experts, Professor Deakin, described her as 'seriously unwell and in need of urgent medical care' at this time. This was followed by more text messages between B and F's mother, and between B and C. At 8.30pm, B tried to send a Google map pin to C to indicate his location in the woods, but C replied to say that he did not have Google maps on his phone. At 8.45pm, B made another video of F, who was 'groaning and moaning'. This was followed by further texts at around 8.50pm between B and C wherein B asked C to send medics and tried but failed to explain where he and F were. This was followed a by a series of texts to B from F's mother, father, sister and from C. The latter had apparently contacted medics but had inadvertently sent them to the 'Ambient Forest', part of the festival site, and not to the woods. At 9.10pm, B took some 'live' photographs of F. This showed that she was 'making unintelligible noises' and had scratches on her forehead and nose.

At 10.30pm, B texted C to say that 'She just kooled down' and 'So Ima carry her'. Ten minutes later, he took some more 'live' photographs of F. This showed her hands covered in scratches, that she was still 'making unintelligible sounds', and that her condition appeared to be deteriorating. This was followed by a series of texts between B and C and between B and F's father and brother, indicating that he (B) was going to carry her, that she would sleep it off, that he would make sure she got medical help and that he did not want to leave her. B did not in fact carry F but at 11.25pm he took more 'live' photographs of her. This showed her lying down covered by a coat. Professor Deakin considered that F was most likely dead at this time.

Shortly after that, B went back to the festival site and found two guards. He told them that F was in the woods and they went to look for her. Initially they were unsuccessful but her body was eventually found at 1am.

B was charged with manslaughter and appeared before Goose J and a jury at Winchester Crown Court in February 2019. At trial, the pathologist told the jury that a post mortem had failed to identify a cause of death but that the use of stimulant drugs had been a 'significant contributory factor'. The effects of the drugs combined with F's 'prolonged agitated behaviour' would be expected to cause increased heart rate, body temperature and blood pressure. Over a prolonged period that would lead to fatigue and difficulty breathing at a time when F's physical exertion would have demanded more oxygen. All of these factors had 'pre-disposed her to cardio-respiratory arrest'.

Of the Crown's experts, only Professor Deakin dealt with causation. He produced two reports, in the second of which he indicated that F's chances of survival had medical help been procured before 9.10pm (the time when B had filmed her, and she was conscious, and 'making unintelligible noises') at '90%' but added that 'it is not possible to be certain beyond reasonable doubt as to whether medical intervention could have reversed [F's] demise'.

At the close of the Crown case, the defence had made a submission of no case to answer, arguing that any breach of duty by B could only safely be said to be a cause of death *before* 9.10pm, but that the jury could not be sure that there was an obvious risk of death until *after* 9.10pm. The Crown responded that B's negligence over a period of several hours produced an explanation for F's death, and that causation was a matter for the jury.

The trial judge rejected the defence submission. In summing up, Goose J told the jury that B's breach of duty (if there was one) need not be the only cause of death but must have made a 'substantial contribution' to F's death. He left it to the jury to decide when B was in breach and whether they were sure that his failure to obtain medical help at that time was a 'substantial cause' of her death. At the close of the summing up, the defence invited the judge to clarify the position on causation, pointing out that Professor Deakin's evidence was to the effect that at 9.10pm there was a 10% chance that, even with medical help, F would have died anyway, which (the defence argued) meant that it could not be proven to the criminal standard that any breach by B after that time caused her death. The judge declined to do so.

B was convicted but appealed, contending that it could not be proven to the criminal standard that his failure to procure medical assistance for F had caused F's death. Essentially the appeal pursued the same argument as at the close of the trial, to the effect that only one of the Crown's experts gave evidence on causation, and at best that only established that medical assistance prior to 9.10pm would 'probably' have saved her life.

HELD, ALLOWING THE APPEAL, the task of the jury was to ask whether the evidence established to the criminal standard that, with medical intervention as soon as possible after F's condition presented a serious and obvious risk of death, 'she would have lived'. The answer was 'no'. Professor Deakin's description of a 90% chance of survival at 9.10pm, were medical help available, left a 'realistic possibility' that F would not have lived (at [101]). The

submission of no case to answer should have been accepted. '[T]taken at its highest, the evidence adduced by the prosecution was incapable of proving causation to the criminal standard of proof' (at [104]).

Commentary

Element inflation?

As recently as 2017, the Court of Appeal in *R v Rose* [2017] EWCA Crim 1168; [2018] QB 328 (at [41], per Sir Brian Leveson P) and *R v Zaman* [2017] EWCA Crim 1783 (at [24], per Hickinbottom LJ) held that there were five elements to gross negligence manslaughter, *viz* (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) gross negligence; (5) a causal connection between the breach and death. In the present case, Lord Burnett CJ stated that there are, apparently, SIX elements (at [5]). This expansion of the list was achieved by splitting the third element into two, so that: a serious and obvious risk of death at the time of the breach is now element 3 and reasonable foreseeability that the breach gave rise to an obvious and serious risk of death is now element 4. This seems pointless: there always had to be an obvious and serious risk of death in order for said risk to be reasonably foreseeable.

Causation in cases where D fails to summon help

The task for the jury in the present case was to determine five (not six) issues:

1. **Did B owe F a duty of care?** This seems beyond argument. Following *R v Evans* [2009] EWCA Crim 650; [2009] 1 WLR 1999, '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' (at [31], per Lord Judge CJ). At some point during the 5 or 6 hours that B and F were together in the woods prior to her death, F's condition *must* have become 'life threatening', i.e. presenting an obvious and serious risk of death. If B did not personally appreciate that F's condition was 'life threatening' then he *should* have done i.e., he 'ought reasonably' to have known it. It was for the jury to determine exactly *when* F's condition became 'life threatening'.

2. **Did B breach that duty?** This is a jury question, but the fact that B failed to take any steps to seek medical help for F after 8.50pm, despite the medical tent being around 400m away, strongly suggests that he did. In the present case, Lord Burnett CJ stated that for the jury, having determined the point in time when F's condition became life threatening, 'there would have been no difficulty in concluding that [B] should immediately have tried (or continued to try) to get help' (at [92]).

3. **Was it reasonably foreseeable that the breach gave rise to an obvious and serious risk of death?** It is submitted that this element is otiose in cases like *Evans* and the present case i.e. those based on the defendant creating a dangerous situation and then failing to summon help. Given that the *duty* can only come into existence when the 'state of affairs… has become life threatening', it is axiomatic that any *breach* of that duty must involve an obvious and serious risk of death.

4. **Was B's breach grossly negligent?** This is a jury question, but again the fact that B did not try to seek out medical help after 8.50pm strongly suggests that it was. As Lord Burnett CJ pointed out, B 'made attempts to get assistance', by asking his friend, C, to get medics and by sending him a Google maps pin. This was around 7.15pm, 8.30pm and again at 8.50pm. Lord Burnett suggests that 'It is not plausible to suppose that [B] was acting in a grossly negligent way whilst actively seeking help'. It is difficult to disagree with that; but, given that F was still alive for a considerable period of time afterwards (the 'live' photographs that B took at around 10.40pm showed that she was alive then), it was clearly open to the jury to conclude that his failure to seek help for F after 8.50pm was grossly negligent.

5. **Did the breach cause death?** In the present case, Lord Burnett CJ stated that:

   To establish the guilt of [B] the prosecution had to make the jury sure that at the time when [F's] condition was such that there was a serious and obvious risk of death [B] was grossly negligent in failing to obtain medical assistance and that such assistance *would have saved her life* (at [89]; emphasis added)

   And later:

   In the context of causation in this very sad case the task of the jury was to ask whether the evidence established to the criminal standard that, with medical intervention as soon as possible after [F's] condition presented a serious and obvious risk of death, *she would have lived* (at [100]; emphasis added).

Authority for these propositions ostensibly comes from *R v Morby* (1882) 8 QBD 571, a decision of the Court for Crown Cases Reserved (the forerunner of the Court of Criminal Appeal), in which Lord Coleridge CJ said that 'to convict of manslaughter it must be shewn that the neglect had the effect of shortening life' (at p 574). In the present case, Lord Burnett stated that the approach to causation in cases where a 'health professional failed to provide treatment that should have been provided or a person who owed the deceased a duty of care failed to secure medical treatment' was 'settled' in *Morby* and that it has not been 'abrogated' since. He cited the adoption of *Morby* in *R v Sellu* [2016] EWCA Crim 1716; [2017] 4 WLR 64, involving the prosecution of a doctor for the gross negligence manslaughter of a patient, wherein Sir Brian Leveson P said that 'causation would not be established if [the] gross negligence was after the time that [the jury] could be sure that [the patient] would have survived' (at [127]).

It is submitted that the Court of Appeal has fallen into error by requiring the jury to decide whether someone like Dr Sellu's patient or F in the present case 'would have lived' or that medical assistance 'would have saved… life'. Asking whether the defendant's neglect 'had the effect of *shortening* life' (per Coleridge LJ in *Morby*) is **not** the same thing as asking whether medical intervention would have had the effect of *prolonging* it (paraphrasing Lord Burnett in the present case). In the case whose facts most closely mirror those of the present case, *R v Evans*, there was no suggestion whatsoever that the Crown had to prove that Carly Townsend 'would have lived' or that medical intervention 'would have saved her

life'. Rather, the focus was properly on the question whether Gemma Evans' breach of duty caused her death (it did).

Moreover, how are the jury supposed to decide whether medical intervention 'would' (not might) have saved life? Requiring a jury to answer this question surely only invites defence counsel in future cases to try to introduce (reasonable) doubt into the jury's mind by speculating as to why medical treatment might have failed. Imagine if a retrial had been ordered in the present case: defence counsel would have had a field day pointing out how F was in dark woods, late at night; that she had taken a psychedelic drug whose effects are not particularly well-known; that the festival camp was in rural south Dorset several miles from the nearest hospital in Wareham; and so on.

The test for causation set out at [89] and [100] is wrong; it is inherently speculative and sets the causation bar too high. In the present case, Crown counsel contended that 'requiring proof of certainty of survival was unsupported by general principles of causation and would, if implemented, render many cases where death had ensued after gross negligence, medical or otherwise, impossible to prosecute because of the difficulty of proving that there was no possibility of the victim dying if treated' (at [11]). It is submitted that that is right.

Tony Storey