Gross Negligence Manslaughter, Restaurant Owners and the Duty of Care

R v Zaman [2017] EWCA Crim 1783, Court of Appeal

Keywords – gross negligence manslaughter, food allergy, duty of care, breach of duty, causation

Mohammed Zaman (Z) was a 'highly experienced restaurateur'. He ran the Indian Garden restaurant in Easingwold, North Yorkshire, along with four other restaurants in the county. In January 2014, Paul Wilson (W) had visited the restaurant and ordered a chicken tikka masala takeaway. W, who had been diagnosed as suffering from a severe peanut allergy since he was a seven-year-old, had told staff that his meal must not contain nuts and had been assured by a waiter that his meal would not contain any. However, this was not, in fact, the case and, after returning home and eating his takeaway, W suffered a severe, and fatal, anaphylactic shock.

Z was charged with gross negligence manslaughter (along with six counts of contravening food safety regulations) and appeared before HHJ Bourne-Arton QC and a jury at Teesside Crown Court in May 2016.

The Crown case was that at the start of 2013, Z's business had debts of £200,000 (increasing to nearly £300,000 by the year's end). In June 2013, in an attempt to save money, Z had switched from using almond powder to mixed-nut powder as an ingredient in various dishes. Mixed-nut powder, comprising wholly or mainly peanuts, was around 50% cheaper than almond powder. A sales representative from the ingredients suppliers (Fakir Chilwan) said that he had met with Z and told him that this change in the ingredients would have to be indicated on the menus; Z had assured Chilwan that this had already been done.

However, a week before W's death, an officer from North Yorkshire Trading Standards Department had tested a chicken korma meal at another of Z's restaurants, the Jaipur Spice in Easingwold, and found that it contained 5-10% peanuts, despite having been given an assurance that the meal was peanut-free. This followed an incident three weeks' earlier whereby a different customer, 17-year-old Ruby Scott, had suffered a violent allergic reaction which required hospital treatment, after eating a takeaway chicken korma meal containing peanuts that she had bought from the Jaipur Spice. Like W, she had sought and

been given (inaccurate) reassurances that her meal did not contain peanuts. The officer visited the restaurant's kitchen and found, amongst other things, a tub marked 'coconut' which was contaminated with peanut, at a level sufficient to trigger a reaction in a person with peanut allergy. On a subsequent visit by trading standards officers, an 'unmarked tub containing sugar [with] significant peanut contaminant, sufficient to cause a severe allergic reaction in an individual with an allergy to peanuts' was discovered. One officer 'saw the chef using the same spoon to take ingredients from different containers, which could and would have resulted in mutual contamination'.

During the trial, the defence denied in particular that Z had breached his duty of care to W. Z claimed that he 'had acted as a reasonable person would do in his position, in that the staff had sufficient training and knowledge to deal with the customer's order' (at [27]). Z conceded that in his restaurants there were 'no relevant written procedures or policies (and, in particular, in respect of allergens), no written recipes, no labelling of containers, and no system for recording the fact that each member of staff understood the procedure and policy in relation to allergens'. However, he claimed that he had discharged his duty of care because such procedures existed and that appropriate training had been provided and instructions given, albeit verbally (at [28]). He blamed his staff 'who had repeatedly failed to comply with their training and his clear and strict instructions' (at [31]). For the Crown, the case was that Z had breached his duty having taken 'no steps to ensure the safety of [his] customers, in that his staff were not trained, instructed or supervised; or, if any training or instructions were given, no steps were taken to ensure compliance by staff' (at [30]).

Z was convicted of all seven counts. He appealed both his conviction and sentence (six year's imprisonment) for gross negligence manslaughter. It was contended that the trial judge had misdirected the jury on breach of duty in particular, by directing them to consider whether Z had 'failed to take those steps which you think he should reasonably have done' or had 'failed to take those steps that you would consider reasonable for him to take to prevent [W] being exposed to the risk of eating a meal containing peanut'. Instead, it was contended that the trial judge should have explained to the jury that there were actually three separate potential breaches of duty (failure to take reasonable steps to alert customers to the risk of peanuts in meals; failure to properly train or instruct staff in food allergens; failure to provide a system to prevent cross-contamination of food products). Z submitted that the judge should have directed the jury as to 'how, in respect of any proven breach of duty, they needed to go on to consider whether that particular breach of duty satisfied the other elements of the crime such as causation and risk' (at [38]; emphasis in original).

Alternatively, it was contended that the conviction was unsafe because the trial judge had failed to direct the jury to consider the possibility that the sole cause of W's death was the negligence of the restaurant chef.

Held, dismissing the appeal, that 'none of the grounds of appeal against conviction [were] made good' (at [72]). In particular, Z's contention regarding breach was 'based upon a false premise as to the nature of the breach of duty alleged' (at [41]). Hickinbottom LJ, giving the unanimous judgment of the Court of Appeal, said:

Of course, there was not a single, unique way in which [Z] could have complied with his duty of care… The prosecution case was based upon a single alleged breach of duty, i.e. that he had failed to take reasonable steps to avoid injury to customers who had a declared allergy. It was never the prosecution case that individual acts or omissions of [Z] upon which it relied, each constituted a discrete breach of duty… Whilst the burden of proof always lay upon the prosecution, that did not mean that it became the prosecution case that each discrete matter raised in the defence was capable of amounting to a breach of duty… The jury were required to consider, on the evidence as a whole, what steps, if any, [Z] had taken to avoid the risk of harm to [W]; and then to consider whether those steps were reasonable in all the circumstances. In our judgment, the judge correctly directed the jury in those respects (at [42], [46], [47] and [48]).

The Court of Appeal also rejected the argument based on causation. Hickinbottom LJ said that the chef 'may well have also been negligent in preparing the meal' (at [55]) but, even if that were the case, he could not be said to bear sole responsibility for W's death. Rather, 'it was beyond sensible argument' that, if the jury found the breach on Z's part proved, that 'that breach made a more than minimal contribution to the death' of W (at [56]).

Z's sentence was not 'manifestly excessive or, indeed, excessive at all' (at [81]). Z's behaviour 'was not a transitory act of negligence, but negligent behaviour that persisted over months… The culpability here was very high' (at [79]).

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 (at [24]).

Duty of Care

On the first element, Z accepted that he owed his customers a duty of care; specifically, he owed a duty 'to provide food that was not harmful to customers who made clear that they have a food allergy' (at [25]). Hickinbottom LJ, giving the unanimous judgment of the Court of Appeal, confirmed that this was correct (at [41]).

Zaman is the first case in England where a restaurateur has been convicted of gross negligence manslaughter and clearly sets a precedent about the duty which such a person owes to their customers. Z's concession that he owed W a duty of care relieved the Crown from the need to prove that such a duty existed. Would the outcome have been different had Z not conceded this point? It is submitted that the answer is 'no'. Had the appellant contested the existence of a duty, either at trial or on appeal, it seems highly likely that one would have been imposed on him. But by whom? In *Willoughby* [2004] EWCA Crim 3365, [2005] 1 WLR 1880, Rose LJ said that the existence of a duty of care in any given case is 'normally for the jury's determination' (at [23]). However, that somewhat over-simplifies the situation. In *Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999, Lord Judge CJ stated that 'In any cases where the issue is in dispute', it was initially the judge's task to decide whether (as a matter of law) it was 'open to the jury to find that there was a duty of care' (at [45]). Thereafter it was a question for the jury whether such a duty was established (as a matter of fact). As Catherine Elliot has explained:

> When Adomako was first decided the meaning of a duty of care in this context caused some confusion. It is now relatively clear that it has its ordinary civil meaning as developed in the law of negligence. Thus a person owes a duty of care to another where it is reasonably foreseeable that their acts or omissions will cause harm to another. The Court of Appeal has recently clarified in *Evans* that the meaning of a duty of care is an issue of law determined by the judge, with the jury deciding whether the facts of the case fall within that legal definition (Liability for Manslaughter by Omission: Don't Let the Baby Drown! (2010) 74 J Crim L 163, at p.166).

It is submitted that a restaurant owner clearly owes a duty of care to his customers (or at least, those known to have food allergies). An analogy can be drawn here with the case of *Yaqoob* [2005] EWCA Crim 2169, in which the appellant, a partner in a taxi firm, was held to have breached his duty of care to a passenger in one of the firm's taxis who was killed when a tyre burst, causing the taxi to crash. The Court of Appeal in that case rejected, *inter alia*, an argument that the appellant did not owe a duty of care to the deceased. Thomas LJ said

that ‘it was, in our view, entirely open to the jury to find that there was a duty to inspect and maintain beyond that required for a MOT test, council inspections and other duties imposed by regulation’ (*Yaqoob* at [34]; emphasis added). It could therefore be said that *Yaqoob* establishes and *Zaman* confirms the proposition that the proprietor of a business which provides a service (whether a taxi journey, or a restaurant meal) to the public owes a duty of care to those members of the public who partake of that service.

What about other jurisdictions? It appears that *Zaman* sets a precedent for the other common law jurisdictions too. One Australian media outlet described *Zaman* as ‘a case which is thought to be a legal first and sets a precedent for food suppliers’. The New York Times noted that *Zaman* ‘marked the first time in Britain that someone has been convicted of manslaughter over the sale of food’. Finally, the Washington Post said that ‘Zaman’s conviction, believed to be the first of its kind in Britain, could set an example worldwide by showing restaurants can be held accountable for not heeding their customers’ allergy needs’.

Zaman’s conviction may be the first for a restaurateur, but it is unlikely to be the last. Similar cases have arisen subsequently. In May 2016, Canadian police arrested a waiter at Le Tapageur restaurant in the city of Sherbrooke, Quebec, who had served a customer, Simon-Pierre Canuel, with salmon tartare (instead of the steak tartare which had been ordered), despite Canuel specifically informing the waiter of his severe allergy to seafood. After eating the food, Canuel went into anaphylactic shock and had to be taken to hospital by ambulance. There, he suffered cardiac arrest and had to be resuscitated before eventually recovering. Happily, Canuel survived, so there was no suggestion of prosecuting the waiter for manslaughter. Nevertheless, the Globe & Mail website commented (in August 2016): ‘it is the first time police in Canada have pushed for criminal charges from such an incident – and sets a possible precedent for restaurants’ duty of care when it comes to dealing with food allergies’. However, in September 2016, prosecutors decided not to proceed with charges of criminal negligence.

More recently, the proprietors of the Royal Spice Indian restaurant in Oswaldtwistle, Lancashire, have been charged with gross negligence manslaughter. The case follows the death of a 15-year-old girl, Megan Lee, 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. At the time of writing, Mohammed Abdul Kuddus and Harun Rashid are scheduled to be tried at Burnley Crown Court in October 2018.

Breach of duty

As noted above, on the second element, breach of duty, the Court rejected the appellant's argument that the trial judge should have identified as many as three specific breaches by Z and directed the jury to consider each one separately. Rather, the Court was satisfied with the Crown's argument that the question of breach should be dealt with 'in the round'. Such an approach makes sense when the Crown case involves a systemic failure to discharge an ongoing duty of care over a period of time (in this case, months) rather than an isolated incident.

There is precedent for such an approach. In *Crow* [2001] EWCA Crim 2968, [2002] 2 Cr. App. R. (S) 49, the Court of Appeal upheld the manslaughter conviction of Alistair Crow, the owner (along with his father, Edward) of New House Farm in Shropshire. The victim in that case, Lee Smith, was a 16-year-old student who was on a work placement at the farm from nearby Walford Agricultural College. He was clearing mud from the surface of the A49 which adjoined the Crows' farm using a brush attached to a JCB telescopic handler (a large agricultural vehicle). Smith parked the vehicle off the road surface, but with the raised telescopic arm protruding about 1½ metres into the road. A passing lorry on the A49 collided with the telescopic arm, causing the JCB to roll onto Smith, crushing him to death. At Birmingham Crown Court, the Crown argued that the Crows' failure to heed warnings from the Health & Safety Executive that Smith should not be permitted to drive the JCB until he had undergone a course of training (which he had not), amounted to a grossly negligent breach of their duty. The jury convicted both men and the appeal court rejected Alistair's appeal. Pitchford J said that 'The jury, by their verdict, found that a significant cause of Lee's death was the reckless disregard for his safety demonstrated by the appellant and his father over a period of months' (at [6]; emphasis added).

Risk of death

The appeal court rejected another argument based on the trial judge's failure to direct the jury that the Crown was required to prove that a 'reasonably prudent person' would have foreseen an obvious and serious risk of death as a result of Z's breach of duty. Hickinbottom LJ pointed out that Z had 'accepted that he knew that customers with a peanut allergy were at risk of fatal consequences if they ingested peanut'; he had 'conceded that there was a serious and obvious risk of death' (at [66]). Such a concession was 'inevitable… given that his entire defence was apparently predicated on the premise that there was a serious and obvious risk of death but he had taken all reasonable steps to guard against it' (at [66]). Because of this concession, there was no need for the trial judge to have directed the jury on the point.

Causation

The Court of Appeal took the relatively unusual step of dealing with factual and legal causation separately. (If only law students were quite so fastidious.) On the former, the court pointed out that 'factual causation was not in issue: it was common ground that Mr Wilson died as a result of the peanut contained in the meal he had bought from [Z's] restaurant and eaten at home' (at [49]). On the latter, the Court observed that it was also necessary for the Crown to prove that Z's breach of duty 'caused or made a significant contribution to the death' (at [49]). The reference to the appellant's breach being 'a', rather than 'the' cause of death, is crucial. As Lords Hughes & Toulson pointed out in *Hughes* [2013] UKSC 56, [2013] 1 WLR 2461:

> Where there are multiple legally effective causes, whether of a road traffic accident or of any other event, it suffices if the act or omission under consideration is a significant (or substantial) cause, in the sense that it is not de minimis or minimal. It need not be the only or the principal cause. It must, however, be a cause which is more than de minimis, more than minimal (at [22]).

From there, it was inevitable that the court in the present case would dismiss the appeal on causation grounds. Even if the chef had been negligent, it was 'beyond sensible argument' that Z's (gross) negligence had made a 'more than minimal' contribution to W's death (at [56]).

Gross negligence

The final element, gross negligence, was not contested on appeal. There would have been little point in doing so; as the House of Lords has pointed out, this is 'supremely' a jury question (*Adomako* [1995] 1 AC 171, per Lord Mackay LC at p.187). In any event, as Hickinbottom LJ said in dismissing Z's appeal against sentence, his negligence 'was not just gross; his behaviour, driven by money, was appalling' (at [81]).