



# Drawing the line: Experts, directions and the “ultimate issue”

By Michael Harwood

## Introduction

1. How should a judge direct a jury where an expert witness has given their opinion on the “ultimate issue” to be decided in the case? The answer, the Court of Appeal has confirmed, is: carefully. In *R v Sellu* [2016] EWCA Crim 1716, the Court of Appeal overturned the conviction of the Appellant, a consultant surgeon, for gross negligence manslaughter on the grounds that the trial judge had failed to adequately direct the jury as to the meaning of gross negligence, in circumstances where expert witnesses had expressly given their view as to whether the conduct of the Appellant amounted to the same.

## Background

2. On 5 February 2010, James Hughes (then aged 66) underwent knee replacement surgery at a private hospital. On 11 February, and prior to his discharge from hospital, Mr Hughes began to complain of abdominal pain. Mr Hughes was eventually referred to the Appellant, Mr Sellu, who was a consultant specialising in colorectal medicine. By the afternoon of 14 February, Mr Hughes had died of multiple organ failure resulting from septic shock, which in turn had occurred as a consequence of a perforation of the bowel. Following an internal inquiry and an inquest, a police investigation commenced which led to the prosecution of the Appellant. The 24 hour period following Mr Hughes’ referral to the Appellant and the decisions taken (and not taken) by the Appellant during that period formed the basis of the case against him at trial. The particular failings alleged by the Crown were:

- 1) A failure to take immediate steps, including the administering of antibiotics, following the production of Mr Hughes’ X-ray result on 11 February;



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- 2) A failure to visit Mr Hughes early on the morning of 12 February after being contacted by a nurse with concerns regarding his condition;
- 3) A failure to operate urgently or at least within eight hours of being informed of Mr Hughes' CT scan results on 12 February.

### **Trial at the Central Criminal Court**

3. The trial came before Nicol J and a jury at the Central Criminal Court in late 2013. Both sides called expert medical evidence. During their evidence, each of the Crown's two witnesses were on several occasions asked, and gave their opinion on, whether the Appellant's acts or omissions amounted to gross negligence.
4. In summing up, Nicol J gave directions defining the offence of gross negligence manslaughter, which included the following:

*“But your task is not just to decide whether Mr Sellu fell below the standard of a reasonably competent consultant colorectal surgeon, but whether he did so in a way that was gross or severe. Start with what Mr Sellu knew or ought reasonably have known about the risk to Mr Hughes' life if the proper standards were not observed. Then ask yourselves, did Mr Sellu's behavior or failure to act fall so far below those standards that his conduct and omissions deserves to be characterised as gross? When we want to weigh a physical object we can use scales marked in ounces or grams. There is nothing similar which I can give you to measure or weigh whether any negligence was 'gross'. As in many other contexts we leave it to juries to apply their own common and good sense to decide whether Mr Sellu acted in a way that was grossly negligent. If you conclude he was then it will mean that his behavior was potentially criminal.”*

5. During deliberation, the jury sent a note to the judge with the question: “are we to be deliberating legalities or are [we] to be judging as human beings, lay people?” Nicol J reminded the jury that they were to apply the law to the facts – there was a



difference between using sympathy and other emotions and applying common sense to find facts in deciding whether the elements of the offence were established.

6. The Appellant was convicted by a majority verdict (10:2) of gross negligence manslaughter and sentenced to 2.5 years' imprisonment. He appealed his conviction.

### The Court of Appeal

7. Sir Brian Leveson gave judgment for the Court. Four grounds of appeal were pursued. The first related the admission of fresh evidence, the second and third concerned the judge's directions as to causation. All three were rejected.
8. The fourth ground was that the trial judge erred in failing to give a fuller direction to the jury as to the meaning of gross negligence, in circumstances where the expert witnesses had asserted at various stages that the Appellant's conduct had been grossly negligent. The Court began by acknowledging that the law *"has developed to the point where an expert has been permitted to give his opinion on what has been called the "ultimate issue" but, in such a case, the judge is required to make it clear to the jury that they are not bound by the expert's opinion"* [131], citing the decisions in *R v Stockwell* (1993) 97 Cr App R 260 and *R v Brennan* [2014] EWCA Crim 2387. In relation to the latter case, the Court observed that the expert provided a view as to whether the defendant was suffering from a "substantial impairment" i.e. the "ultimate issue" in the case. This, the Court held, might be a medical question and therefore within the remit of the expert, but that was not the same as the position here: *"whether any such negligence was "gross" (which is not a medical term) involved an evaluation for the jury. Medical opinion may be better placed to inform on that point but it was not and could not be determinative"* [134].
9. The Court cited *Pora v The Queen* [2015] UKPC 9; [2016] 1 Cr App R 3 as affirming the importance of the jury as ultimate decision maker. In this case, Nicol J's direction on expert evidence did clarify that it was the jury, not the experts, who were the ultimate decision maker. However, the judge's summary of the evidence contained



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repeated references to both qualitative assessments and bare assertions made by the experts as to the standard of the Appellant's acts and omissions, but without any guidance as to how to differentiate between them. This created a risk that the jury would simply accept that the Appellant was grossly negligent on the occasions where he was stated to have been so, and had not been adequately guarded against by the judge. While this did not of itself provide a sufficient basis for allowing the appeal, it did set the background against which the direction as to gross negligence fell to be considered.

10. The Court considered that the modern law of gross negligence manslaughter was stated by Lord Mackay in *R v Adomako* [1995] 1 AC 171 and by Judge LJ in *R v Misra* [2005] 1 Cr App R 21. The effect of these authorities is that whilst a jury direction as to gross negligence manslaughter ought to be comprehensible and straightforward, it was not sufficient for the jury to be asked solely whether the conduct of the accused was grossly negligent. The summing up of the trial judge in *R v Misra* was considered by the Judge LJ to be "*fair and balanced*".
11. Two further example jury directions were referred to. The Court contrasted these directions with that given by Nicol J, in which the jury were invited to use their common sense to determine whether the Appellant's conduct deserved to be characterised as gross. Whilst it was correct that there was no mandatory form of words, it was mandatory that the jury were assisted sufficiently in finding the line between "*very serious mistakes or lapses, from conduct which, to use the phrase from the above direction, was "truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal*" [152].
12. The Court's view that Nicol J's direction was inadequate was reinforced by the fact that when the jury requested assistance from the judge during their deliberations, the judge repeated his earlier directions, again failing to identify the line between conduct which did and did not amount to an offence. He also failed to repeat that what was gross negligence was for the jury and not the experts. The inadequacy of



the direction, compounded by the assertions of the experts, rendered the Appellant's conviction unsafe. Appeal allowed.

### Conclusion

13. The decision affirms the importance of guarding against the now common practice of experts being asked to give a view on the "ultimate issue", though it is noted the judgment does not criticise the practice of eliciting such evidence. It also draws a distinction between the cases in which the "ultimate issue" is one which falls within the expertise of the witness, such as in *R v Brennan*, and those which do not. In the latter cases particular care must be taken when summing up the expert evidence. In any event, a jury must always be reminded of their position as ultimate decision maker.
  
14. It is important to note that the trial judge's failure to guard against the experts' evidence as to gross negligence provided the context for the decision on the appeal and was not determinative. It may well have been that the inadequate direction on gross negligence would have itself been sufficient to render the conviction unsafe. The Court's key distinction between Nicol J's direction and the examples at [151] which it considered helpful is the failure of Nicol J to "draw the line", in other words, to help the jury distinguish between the very serious mistakes and errors which are not criminally negligent, and those which are. It was not necessary for this to be a lengthy explanation, as shown by the first of the examples relied on, but it had to express the standard in terms other than merely "gross", as Nicol J had done. This was particularly dangerous where the experts had expressed their view in the same terms. Though the Court of Appeal declined to itself provide a form of words it is noted that both the examples relied on and the trial judge's direction in *R v Misra* adopt the phrase "truly exceptionally bad" to characterise grossly negligent conduct.
  
15. In all, the decision breaks little new ground, indeed it is deliberately restrictive in scope. It does however clearly affirm two existing propositions:



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- 1) Determining the “ultimate question” can only be for the jury, and the judge must remind them of this duty;
- 2) A judge must direct a jury in clear terms to the types of conduct that will *and will not* amount to being grossly negligent, so that they may “find the line”.

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