



GROSS NEGLIGENCE MANSLAUGHTER

A STEP CLOSER TO PROSECUTIONS OF SUPPLIERS OF DRUGS FOR MANSLAUGHTER

RICHARD BARRACLOUGH QC & GORDON MENZIES

SIX PUMP COURT

1. On 9th March 2020 after a five week trial prosecuted by RICHARD BARRACLOUGH QC leading GORDON MENZIES for HARROW COUNCIL as prosecuting food authority, R was convicted by the jury at the Central Criminal Court of the manslaughter of ELOISE PARRY.
2. EP was a 21 year old who suffered a number of mental disorders, bulimia nervosa, unstable personality disorder, depression and features of dependence syndrome. He had supplied her with DNP over the internet. She had consumed a number of capsules of DNP and suffered a most distressing death as it destroyed her internal organs causing them to fail. There is no effective treatment for what she suffered.
3. 2,4 Dinitrophenol ('DNP') is a chemical. It was originally used in the manufacturing of explosives and then dyes, wood preservatives, photographic developers, and insecticides. It is a synthetic benzene. It is a highly toxic substance when ingested, inhaled or absorbed through the skin and is not designed for human consumption. Despite its toxicity, it has also been used as a '*fat burning*' and weight reducing product. This is because the chemical blocks the way energy is stored in the body. It consumes or burns off fat and carbohydrates. That in turn, causes energy to be converted into heat. The result is that the person's body temperature and metabolic rate, all dangerously increase. The uncontrolled release of heat can result in high fever, and in some cases, multi-organ failure and death. Toxic effects arising from the use of DNP include: initial agitation, flushing, hyperthermia (that is an increased temperature when the body's self regulation fails) , sweating, abdominal pain, nausea, vomiting and diarrhoea progressing to worsening hyperthermia or high fever, rapid breathing and heart rate, dehydration, thirst, muscle rigidity and then muscle breakdown (rhabdomyolysis), acidosis and other chemical disturbances of the blood (for example high potassium or blood glucose). Kidney failure, liver failure, heart failure, circulatory shock, coma, convulsions and cardiac arrest can then occur in more severe cases.
4. DNP is technically classified as a food supplement. R was prosecuted for an offence under the Food Hygiene (England) Regulations for placing an unsafe food on the market intended or reasonably expected for human consumption and two counts of manslaughter, unlawful act and gross negligence manslaughter. He was convicted on all counts. He appealed the

manslaughter convictions. The appeal was allowed. The Court of Appeal held that placing the product on the market was not sufficiently proximate to EP's death to provide a basis of an unlawful act manslaughter charge. A retrial was directed in respect of the gross negligence manslaughter count.

5. WHIPPLE J and a jury tried the case at the Central Criminal Court. The directions to the jury included the following

"There are 6 elements to this allegation of gross negligence manslaughter:

- (1) Did the DNP which EP took on 12 April 2015 come from the Defendant? ...*
- (2) Did the Defendant owe EP a duty of care which arose in connection with his business of selling DNP? ...*
- (3) If so, has he negligently breached such a duty in the circumstances?...*
- (4) Was it reasonably foreseeable that the breach of duty gave rise to a serious and obvious risk of death?...*
- (5) If so, are those circumstances truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence requiring criminal sanction?...*
- (6) If so, was such a breach of duty a substantial and operative cause of her death (although not necessarily the sole cause of her death)?...*

*(As for) **Causation of Death***

Fully free, voluntary and informed

...If this was a fully free, voluntary and informed decision, or may have been, that means that as a matter of law, her death was caused by her free choice, because in those circumstances, the Defendant only set the scene for her to make that decision, but he did not cause her death.

.....What does a fully free, voluntary and informed decision mean? Lawyers sometimes refer to a person's ability to make a fully free, voluntary and informed decision as "autonomy". Whether a decision is fully free, voluntary and informed will be a matter of degree. It will be for you to judge whether all the relevant factors in this case, including her eating disorder and her mental health generally, were such that you can be sure that her decision to take the DNP was not fully free, voluntary and informed, as the Prosecution alleges.

.....It is important that you look at each element separately although there is likely to be some overlap between "fully free" and "voluntary".

.....You will appreciate that a state of mind may fluctuate and just because some decisions EP made at some times in her life may not seem to be fully free, voluntary and informed, it could still be the case that when she made the decision to take DNP on 12 April 2015, that decision was fully free, voluntary and informed. It is that decision you must think about.

*.....When considering whether it was '**fully free**' you will want to consider in particular the effect of any mental health condition. In ordinary language, you might talk about someone being vulnerable because of their mental health issues. This might include, as the Prosecution say, that the person's ability to protect themselves from significant harm was impaired. The Prosecution say that EP was vulnerable because of her mental health problems and her psychological addiction to DNP, because those problems stifled her ability to make a fully free decision. The Defence say that she was able to protect herself; they say that an adult woman*

suffering from an emotionally unstable personality disorder and an eating disorder can, and in this case did, make a fully free, voluntary and informed decision to take the DNP.

*.....When considering whether the decision was '**fully voluntary**' you will want to consider whether she was acting under any compulsion, whether caused by her mental health problems or any psychological addiction she may have had to DNP. Here too, you will consider whether she was vulnerable, which in this context would mean that her ability to resist feeling compelled to take the DNP was impaired. The Prosecution say that there is clear evidence that she was acting under an element of compulsion because of her psychological dependence on DNP combined with her mental health problems. The Defence say she was not acting under compulsion, nor was she vulnerable to feeling compelled; she wanted to take the DNP and so she did.*

*.....When considering whether she was '**fully informed**' you will want to consider whether she knew the risks that she was taking. The Prosecution say that she was not fully informed as the references she makes to 'safe' doses are nonsense and not supported by science. The Defence say that she had conducted substantial research so knew full well what risks she was taking.*

.....The expert psychiatrists agreed that her decision to take the DNP on 12 April 2015 was not fully free, voluntary and informed, because of her mental health problems, so that her ability to resist a sense of compulsion to take the DNP was impaired.....

*....**The Mental Capacity Act** is a piece of legislation which has a specific purpose: it is used to identify the situations where treating professionals can intervene and take decisions on behalf of a person who meets specific criteria. When someone lacks capacity, that is a conclusion in law, reached under the statute. The law recognises that people with capacity are entitled to make bad decisions, and just because someone makes an unwise decision does not mean that they lack capacity, in a legal sense. One of the tests for capacity, in law, is whether, by reason of a mental impairment or disturbance in the functioning of the mind or brain, someone is able to use and weigh the relevant information in the decision-making process and determine what weight to give that information relative to the other information required to make the decision.*

*.... **Capacity** is one of the factors you may want to take into account in considering whether EP made a decision that was fully free, voluntary and informed. It might be your starting point: did EP suffer from a mental illness such as to affect her capacity? You might take the view, if you are sure that EP lacked capacity, in the sense that she was unable to weigh and use the information she had about DNP by reason of her mental condition, that she was not in a position to make a fully free, voluntary and informed decision to take the DNP...."*

6. The impact of this case and the Court of Appeal judgment which will now be made available, on drug supply cases is significant. It is unusual to prosecute for manslaughter after an individual supplies a drug to their customer because the consumption of the drug is taken by the consumer and that decision to consume the drug is fully free voluntary and informed.
7. In accordance with orthodox principle the intervention by the action of someone who makes a decision to assume a risk which is fully free, voluntary and informed relieves whoever has created such an opportunity of responsibility. It constitutes a break in the chain of causation.
8. However in this case Harrow was able to prosecute R because EP was so psychologically vulnerable that the forensic psychiatrists agreed that her decision to consume the DNP was not fully free or voluntary.

9. This is not just consistent with established authority, namely the Supreme Court in *R v Kennedy (No2)*, but policy generally as liability for gross negligence manslaughter is based on the existence of a duty of care owed to those who may be harmed by the conduct of another in certain circumstances e.g. in the course of pursuing some commercial activity whether intrinsically legal or not
10. The duty of care is not restricted to professional relationships (see **EVANS** and the cases referred to **ADOMAKO; MILLER; WILLOUGHBY; WACKER**). The categories of duty in which liability might arise are those involving doctor and patient, transport carrier and passenger (**LITCHFIELD 1998 CRIM LR 508; BARKER 2003 2 CR APP S 110**; employer and employee **R V DPP EXP JONES 2000 IRLR 373**; parent and child, landlord and tenant **HARRISON 2011 EWCA CRIM 3139** but the “categories are limitless and involve duties arising in the course of hazardous activity (e.g. on the road, smuggling illegal immigrants, smuggling, cocaine taking heroin, storing fireworks)...It is impossible to catalogue all circumstances in which a duty will arise; rather the approach is to apply the “ordinary principles of negligence” to determine whether the defendant owed a duty to the victim” (SMITH & HOGAN page 638).
11. It was also open to the jury to convict on the basis that EP was not fully informed of the true effect of DNP in certain doses. Each of the three limbs of the test are to be considered separately. Thus even if the decision is fully free and fully voluntary, if it is not fully informed the chain of causation remains unbroken.
12. This is especially important in situations where an individual is unaware of the nature and effects of substances supplied. A decision which is not fully informed is no more a ‘true’ decision than one which is not fully free or voluntary. It is the quality of being informed in the sense of a true acceptance of a risk created by another which relieves the principal actor from responsibility. Without it the responsibility remains with those who created the risk in the first place. This may have potentially wide implications. For example, where a supplier supplies a drug at a festival and the consumer does not know its effects perhaps because it is adulterated and then dies, manslaughter will be available to the charging authority. None of this changes what is settled law but rather simply provides an illustration of how far the ordinary principles of gross negligence manslaughter may be used to pursue the supplier of dangerous substances whether or not they are in themselves illegal. Because this is not unlawful act manslaughter such a prosecution will not depend on whether the prosecuting authority is able to establish a base offence such as that under the Food Hygiene Regulations.

RICHARD BARRACLOUGH QC
GORDON MENZIES

THE FULL DIRECTION

“There are 6 elements to this allegation of gross negligence manslaughter:

- (1) *Did the DNP which EP took on 12 April 2015 come from the Defendant?*

- (2) *Did the Defendant owe EP a duty of care which arose in connection with his business of selling DNP? ...*
- (3) *If so, has he negligently breached such a duty in the circumstances?...*
- (4) *Was it reasonably foreseeable that the breach of duty gave rise to a serious and obvious risk of death?...*
- (5) *If so, are those circumstances truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence requiring criminal sanction?...*
- (6) *If so, was such a breach of duty a substantial and operative cause of her death (although not necessarily the sole cause of her death)?...*

(As for) Causation of Death

Fully free, voluntary and informed

*....In relation to the question of causation, the Prosecution must make you sure that EP did not make a **fully free, voluntary and informed decision** to risk death by taking the 8 tablets of DNP on the morning of 12 April 2015: this is the "decision" you must think about. If this was a fully free, voluntary and informed decision, or may have been, that means that as a matter of law, her death was caused by her free choice, because in those circumstances, the Defendant only set the scene for her to make that decision, but he did not cause her death.*

.....What does a fully free, voluntary and informed decision mean? Lawyers sometimes refer to a person's ability to make a fully free, voluntary and informed decision as "autonomy". Whether a decision is fully free, voluntary and informed will be a matter of degree. It will be for you to judge whether all the relevant factors in this case, including her eating disorder and her mental health generally, were such that you can be sure that her decision to take the DNP was not fully free, voluntary and informed, as the Prosecution alleges.

.....It is important that you look at each element separately although there is likely to be some overlap between "fully free" and "voluntary".

.....You will appreciate that a state of mind may fluctuate and just because some decisions EP made at some times in her life may not seem to be fully free, voluntary and informed, it could still be the case that when she made the decision to take DNP on 12 April 2015, that decision was fully free, voluntary and informed. It is that decision you must think about.

.....When considering whether it was 'fully free' you will want to consider in particular the effect of any mental health condition. In ordinary language, you might talk about someone being vulnerable because of their mental health issues. This might include, as the Prosecution say, that the person's ability to protect themselves from significant harm was impaired. The Prosecution say that EP was vulnerable because of her mental health problems and her psychological addiction to DNP, because those problems stifled her ability to make a fully free decision. The Defence say that she was able to protect herself; they say that an adult woman suffering from an emotionally unstable personality disorder and an eating disorder can, and in this case did, make a fully free, voluntary and informed decision to take the DNP.

.....When considering whether the decision was 'fully voluntary' you will want to consider whether she was acting under any compulsion, whether caused by her mental health problems or any psychological addiction she may have had to DNP. Here too, you will consider whether she was vulnerable, which in this context would mean that her ability to resist feeling compelled to take the DNP was impaired. The Prosecution say that there is clear evidence that she was acting under an element of compulsion because of her psychological dependence on

DNP combined with her mental health problems. The Defence say she was not acting under compulsion, nor was she vulnerable to feeling compelled; she wanted to take the DNP and so she did.

.....When considering whether she was 'fully informed' you will want to consider whether she knew the risks that she was taking. The Prosecution say that she was not fully informed as the references she makes to 'safe' doses are nonsense and not supported by science. The Defence say that she had conducted substantial research so knew full well what risks she was taking.

.....The expert psychiatrists agreed that her decision to take the DNP on 12 April 2015 was not fully free, voluntary and informed, because of her mental health problems, so that her ability to resist a sense of compulsion to take the DNP was impaired.....

Expert evidence on capacity

.....You heard the experts give evidence about the Mental Capacity Act 2005. Dr R....for the Prosecution thought she lacked capacity under the Mental Capacity Act. Dr.... for the defence thought there was insufficient evidence to displace the presumption under the statute that she had capacity. I want to give you some guidance about how to approach that evidence.

....The Mental Capacity Act is a piece of legislation which has a specific purpose: it is used to identify the situations where treating professionals can intervene and take decisions on behalf of a person who meets specific criteria. When someone lacks capacity, that is a conclusion in law, reached under the statute. The law recognises that people with capacity are entitled to make bad decisions, and just because someone makes an unwise decision does not mean that they lack capacity, in a legal sense. One of the tests for capacity, in law, is whether, by reason of a mental impairment or disturbance in the functioning of the mind or brain, someone is able to use and weigh the relevant information in the decision-making process and determine what weight to give that information relative to the other information required to make the decision.

....What relevance then does the dispute about capacity have in this case? Capacity is one of the factors you may want to take into account in considering whether EP made a decision that was fully free, voluntary and informed. It might be your starting point: did EP suffer from a mental illness such as to affect her capacity? You might take the view, if you are sure that EP lacked capacity, in the sense that she was unable to weigh and use the information she had about DNP by reason of her mental condition, that she was not in a position to make a fully free, voluntary and informed decision to take the DNP. Therefore, if you accept the view of Dr R.... and you are sure he is right that she lacked capacity in law – remembering always that it is for you to attach such weight as you think appropriate to the expert evidence - you may think that it follows that her decision to take DNP was not fully free, voluntary and informed.

....If, on the other hand, you agree with Dr L.... and conclude that she had capacity, or if you just are not sure which view to accept and you are not sure whether she had capacity or not, you should simply leave the issue of capacity to one side, and consider the wider question of whether her decision was fully free, voluntary and informed, applying the guidance I have already given you on what those terms mean, regardless of the issue of capacity.....”

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