

## Establishing the threshold for gross negligence in medical cases (R v Sellu)

30/11/2016

**Corporate Crime analysis: Are doctors sufficiently protected from inappropriate criminal sanctions? Adrian Darbishire QC, barrister at QEB Hollis Whiteman Chambers, advises that as a result of the decision in R v Sellu, trial judges will have to give the jury clear, robust guidance as to the nature of the negligence that must be proved to establish manslaughter.**

### Original news

*R v Sellu* [2016] EWCA Crim 1716, [2016] All ER (D) 114 (Nov)

*The Court of Appeal, Criminal Division, allowed the defendant consultant colorectal surgeon's appeal against conviction for manslaughter by gross negligence of the deceased patient. The defendant had not had the benefit of sufficiently detailed directions to the jury in relation to the concept of gross negligence contained within the offence of gross negligence manslaughter. That failure had been underlined by the way in which the expert witnesses had asserted gross negligence in their evidence and had been aggravated by the absence of a route to verdict which would have focussed the jury's minds on the various stages to be considered. Accordingly, the conviction was unsafe and would be quashed.*

### What was the factual background to David Sellu's appeal?

On 5 February 2010, James Hughes entered a private hospital in order to undergo knee replacement surgery. By 10 February he had developed post-operative bowel complications that required further surgery. He was referred to Mr David Sellu, a consultant specialising in colorectal medicine and surgery. However, Mr Sellu did not operate on Mr Hughes until 15 February 2010. Mr Hughes never regained consciousness from his bowel surgery and died on 16 February 2010.

Mr Hughes's death led to an internal hospital inquiry and then an inquest before a coroner. Mr Sellu's evidence at the inquest caused the coroner to suspend the hearing and refer the matter to the police in October 2010. He was subsequently charged and tried at the Central Criminal Court. At trial the prosecution had three main criticisms of Mr Sellu:

- o that he failed to take appropriate action in response to Mr Hughes's abdominal pain
- o that he failed to visit Mr Hughes at a time when he knew (or should have known) that the patient may have needed urgent surgery
- o that he failed to operate sufficiently quickly after being informed of Mr Hughes's CT scan results

On 5 November 2013, David Sellu was convicted by a jury (ten to two) of the manslaughter of Mr Hughes resulting from gross negligence. Mr Sellu received a two and a half-year immediate custodial sentence.

### What were the key issues in the case?

The central issues for the jury were whether Mr Sellu had behaved in a way in which no reasonable consultant colorectal surgeon in his position would have done and, if sure of that, whether his negligence caused Mr Hughes's death and was 'gross'.

The appeal against conviction raised a number of issues including:

- o fresh evidence, some of which had and some of which had not been available at the time of the trial, and
- o whether the jury had been properly directed on causation on the facts

Further, the court examined whether the jury should have been directed that they had to all agree on the particular negligence committed by Mr Sellu, in accordance with *R v Brown* (1984) 79 Cr App R 115. The court rejected all of these grounds.

The ground upon which the appeal succeeded concerned the way that the jury had been directed on the gross negligence element. The directions were deficient in two respects:

- o how the judge had directed the jury on the weight to give the experts' conclusions and

- o how he had directed the jury on the 'grossness' element of gross negligence manslaughter

### **What legal arguments were put forward that his conviction for gross negligence manslaughter was 'unsafe'?**

Four grounds of appeal were advanced.

The first ground was on the basis of fresh evidence. This concerned the statistical probability of Mr Hughes's survival at different stages prior to surgery, and other factors that were not explored at trial but that may have affected his prospects of survival. These grounds were rejected.

The second and third grounds of appeal focused on how the judge dealt with causation. The appellant argued on the second ground that the judge erred by not directing the jury that Mr Hughes might have reached Mr Sellu in such a state that he would have died irrespective of any negligence on Sellu's part. The appellant further argued on the third ground that the judge erred in not giving the jury a *Brown* direction.

The fourth ground of appeal related to the jury directions and was the only ground of appeal that was successful. There were two aspects to this ground. The first was that Nicol J had not sufficiently emphasised to the jury that they were the 'ultimate decision maker' when it came to the 'ultimate issue' of gross negligence. This created the risk of the jury simply accepting the (strong) assertions given by expert witnesses on this point. The second was that the judge had not sufficiently assisted the jury in understanding the line between very serious mistakes (which did not constitute gross negligence) and conduct that was 'truly exceptionally bad' and thus amounted to gross negligence manslaughter.

### **Despite Mr Sellu's conviction being quashed on appeal, is there a concern that the threshold for the conviction of surgeons for manslaughter is being lowered in England and Wales?**

The concern is not restricted to surgeons, or even physicians, but applies to all medical professionals. For many, Sellu's conviction marked a new low point in the approach to such cases. Here was an exceptional surgeon with an unblemished record. On the evidence, the patient would probably have died even if there had been no negligence on the surgeon's part. The experts were invited in terms by prosecution counsel to express a view not merely on whether Sellu had been negligent, but whether he had been grossly negligent. And finally, the jury were given no adequate guidance on how they were to approach that question of grossness—they were simply not told what the qualifier 'gross' means in this context (these are only some of the concerns about the case).

To some doctors, *Sellu* appeared to be a classic 'there but for the grace of God' case—a perception among many practitioners was that if the same approach were taken generally then an arbitrary and fluid standard would be applied to medical negligence, which could and would result in convictions for manslaughter that simply could not be justified. Further, that quite apart from the unfairness to the convicted doctor, the effect of such prosecutions would be entirely negative for the provision of medical care. Patient safety, many believed, would not in fact be improved by imprisoning more doctors for their mistakes.

As a result of the decision in *Sellu*, trial judges will have to give the jury clear, robust guidance as to the nature of the negligence that must be proved to establish manslaughter. While the Court of Appeal declined to provide an exact formulation of words for such a direction, in both the examples referred to by the court the phrase 'truly exceptionally bad' was used. The Crown Prosecution Service will therefore have to apply their reasonable prospects test with that phrase in mind, a consequence of which may well be that fewer such prosecutions are brought. In any event, it is to be hoped that never again will a trial judge fail to direct the jury in direct and emphatic terms just how bad the defendant's conduct must be in order to merit the description 'gross'. A second consequence is that, if there were any doubt, it is absolutely clear that the question of grossness is not one for an expert, and no expert should be asked to give an opinion on that (moral) question.

## **Are the criminal courts really the best place to hold the medical profession to account for unexpected deaths and serious untoward incidents (SUIs)? Are there sufficient safeguards to reassure doctors who fear they are prone to being convicted for manslaughter?**

The conviction of David Sellu did substantiate the concern that doctors are not sufficiently protected from inappropriate criminal sanctions. It is to be hoped that his (belated) acquittal and the grounds for it will now allay those fears, at least to some extent.

Most would accept that where an individual's conduct is 'atrocious...truly exceptionally bad' and causes death, he or she should be held to account. After all, there is now little dissent from the idea that where careless driving kills, criminal sanctions are merited. The concern perhaps arises from the fact that doctors, in particular some hospital doctors, work all the time with patients who are gravely ill. In such cases, mere mistakes can kill. However, it is unrealistic to expect higher standards of performance from such individuals merely because the consequences of error can be grave. We are all human, and all prone to error, irrespective of what may ensue. The key point is that prosecutions should not be brought unless there is cogent evidence that the conduct of the suspect doctor was 'atrocious' or 'truly exceptionally bad'. The mere fact of errors causing death does not begin to satisfy that test.

If that strict test is satisfied, then a criminal prosecution may be merited. If the conduct falls somewhat short of that, regulatory action or disciplinary action may be appropriate. But a criminal prosecution is not the right forum to investigate SUIs or untoward incidents.

It may be that the guidance provided in *Sellu* addresses some of the concerns of doctors faced with the threat of prosecution. The more emphatic directions to be given to juries regarding the high threshold for gross negligence manslaughter may help to ensure that only the right cases lead to prosecution and conviction.

### **What does all this mean for lawyers practising in this area?**

The effect of *Sellu* is not that it breaks new ground as to the law to be applied, indeed the Court of Appeal was at pains to limit itself in that respect and refused to endorse any precedents. But *Sellu* does help. Prior to this decision, the only clear authority on the meaning of grossness was *Adomako* [1995] 1 AC 171, which merely stated that the jury could find gross negligence provided that they were satisfied that the conduct was such as to be regarded as criminal and therefore deserving of punishment. That is a circular and unhelpful test. Consequently, a practice grew of trial counsel providing judges with examples from other first instance summings-up, as templates for the legal directions. One was then in the hands of the trial judge as to whether he or she was willing to follow those examples (and usually they did).

After *Sellu* the degree of uncertainty and arbitrariness has been very much reduced if not wholly removed. There is now clear guidance that the jury must be given effective and helpful directions on the meaning of gross negligence and these will almost certainly be based on one or more of the examples cited in the decision. Hopefully, this will provide greater consistency and certainty for both lawyers and the medical profession. Indeed, the decision is of equal relevance to any individual charged with gross negligence manslaughter, irrespective of the circumstances. For all such cases, the decision confirms that gross negligence in the context of manslaughter requires a very high degree of culpability indeed.

*Mark Ellison QC of QEB Hollis Whiteman represented David Sellu in this appeal.*

*Adrian Darbishire's principal area of defence practice relates to professionals charged in criminal and disciplinary proceedings arising in connection with their work, especially anti-competitive behaviour, fraud, corruption, market abuse, serious professional misconduct and negligence/health and safety breaches. He has considerable experience of defending doctors in criminal and General Medical Council matters, including gross negligence, offences concerning the conduct of clinical research, sexual offences, abuse of patients, misuse of alcohol/drugs and claims fraud.*

*Adrian would like to thank Chris Sykes and Nadesh Karu, pupil barristers in chambers, for their valuable input throughout the interview.*

*Interviewed by Kate Beaumont.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor*



CLICK HERE FOR  
A FREE TRIAL OF  
LEXIS®PSL

[About LexisNexis](#) | [Terms & Conditions](#) | [Privacy & Cookies Policy](#)  
Copyright © 2015 LexisNexis. All rights reserved.