SWEET & MAXWELL

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Archbold Review

Cases in Brief

Court Martial—composition of board of lay members
GUNN [2019] EWCA Crim 1470; 3 September 2019
G was not improperly tried when no member of the Court Martial board was of his own service, the RAF. The primary legislation, the Armed Forces Act 2006, ss.154 to 157 (which dealt with the composition of the Court Martial), was permissive and did not prohibit a board drawn from any service. The Queen's Regulations were a species of delegated or subordinate legislation. Paragraph (4) (which also dealt with the composition of the Court Martial) of the Queens Regulations for the RAF, 5th edition, 1999 (made under the Air Force Constitution Act 1917 s.2(1)), when properly analysed, embodied the *usual practice* that lay members of a defendant's own service would comprise the board, but did not contain a mandatory rule to that effect. The Act and the Regulations were not therefore incompatible. The Defence Council may, however, wish to act on the possibility that there is a conflict between the second and third sentences of para.(4) and the legislation, relating to co-defendants of a different service.

Defence statement—provision to the jury—timing of provision—where defendant may not give evidence—approach to application to provide where defendant does not give evidence
DUARTE [2019] EWCA Crim 1466; 16 August 2019
D did not give or call evidence at the trial at which he was convicted of manslaughter and violent disorder. His defence statement indicated that one of the issues was "incorrect identification". At trial, the positive case put by counsel in cross-examination was presence at, but non-participation in a violent episode. The judge acceded to the prosecution counsel's application to allow (an agreed extract) from his defence statement to be given to the jury as part of the prosecution case, and gave an adverse inferences direction to the jury in relation to it.
(1) The Criminal Procedure and Investigations Act 1996 s.11(2) (allowing comment on and adverse inferences from a defence statement provided on the basis that the defence at trial was different) would commonly apply where a defendant had given evidence and put forward a defence which differed from that in the defence statement. However, the prosecution was in principle entitled to comment/invite the jury to draw an adverse inference, even though the defendant has not given evidence. It inevitably followed that the prosecution could apply to adduce the relevant contents of a defence statement, and/or could apply pursuant to s.6E(5)(b) of the 1996 Act to provide the jury with a copy of the defence statement (subject to editing), as part of their case. Where it was not clear during the prosecution case whether a defendant would in due course give evidence, it might be possible for agreement to be reached between the parties, and approved by the judge, to the effect that the prosecution would be entitled to delay the formal closing of their case until after the defendant had made a final decision, or to re-open their case at that stage for the sole purpose of adducing the relevant contents of the defence statement. But subject to an arrangement of that nature, it would in general be too late for the prosecution to delay making any application until after a defendant has stated through counsel that he or she would not be giving evidence (as D had submitted should be done).
(2) However, in this case, the judge erred in accepting that the criterion in s.6E(5)(b) of the 1996 Act was made out (that seeing a copy would help the jury understand the case/resolve an issue): the case was clear without it; and she did not clearly identify which issue it might assist in the resolution of, presence not being in issue at trial. Neither was it rel-

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evant to whether D had put forward a lying defence denying presence in the statement, where the statement responded to weak prosecution evidence of identification which D was entitled to challenge the sufficiency of, as he did, in an application to dismiss (and which was subsequently fortified). In context, "incorrect identification" could not be taken as positive denial of presence. Further, the judge's directions to the jury did not clearly leave the issue of whether there had been a change in defence to the jury.
(3) These problems illustrated the care that must be taken when the prosecution sought as part of their case to adduce some or all of the contents of the defence statement of a defendant who may or may not subsequently give evidence. A cautious approach should be adopted. Before an application was made relying on a contrast between what was said in the defence statement and what had been put in cross-examination of prosecution witnesses, the question of whether the jury could properly find that there had been such a change by the defendant required close attention. The identification of an issue would not necessarily involve a positive assertion of fact by the defendant, and fairness may require consideration of the extent to which the defendant relied on advice as to whether a particular legal issue should be identified, which in turn may raise issues of legal professional privilege. Further, it would be necessary to focus on precisely how the criteria in s.6E(5)(b) were said to be satisfied.
(4) The conviction was nonetheless safe.

*Procedure—*ex parte *notification hearings—whether allowable—approach—legal basis—invitation to revise Crim PR*

ALI [2019] EWCA Crim 1527; 6 September 2019

During A's trial for terrorism-related offences, the prosecution twice saw the judge *ex parte* for notification hearings – the notification of the judge of otherwise non-disclosable sensitive information to prevent the inadvertent mismanagement of the trial, not involving any issue of public interest immunity. The hearings took place in accordance with a procedure set out in the CPS disclosure manual. On appeal, A argued that there was no proper basis in law for the prosecution seeing the judge *ex parte* for case management purposes outside a PII application and that the CPS Manual did not make good the absence of any proper legal basis. The court rejected the ground of appeal.
(1) Contrary to A's submissions, Lord Bingham's judgment in *R v H and C* [2004] UKHL 3, [2004] 2 AC 134 was not intended to impose a blanket prohibition on *ex parte* hearings outside the ambit of PII, albeit nothing in *R v H* itself afforded a foundation for such hearings. Nonetheless, the court did have power to hold *ex parte* notification hearings. That power lay in the court's inherent jurisdiction to control its own proceedings. The circumstances must indeed be exceptional to warrant a departure from open justice going so far as to justify a hearing *ex parte*, but the decision in *Attorney-General v Leveller Magazine* [1979] AC 440 furnished the principle upon which a departure from open justice may be justified, namely where the ends of justice themselves required such a departure. The case did not confine such departures to *in camera* hearings *inter partes*; nonetheless, *Leveller* stood as a reminder of the gravity of any departure from public, open justice in the presence of the defendant.
(2) Accordingly, *ex parte* notification hearings may be justified where the following conditions were met: (a) the need must be exceptional; such a hearing could never be routine or simply held by way of a course of least resistance; (b) there must be no practicable *inter partes* alternative, so that even an *in camera* hearing cannot practicably be held; (c) the *ex parte* notification hearing must be *necessary* in the interests of justice to avoid the risk of inadvertent mismanagement of the trial occasioning unfairness to the defendant; (d) the material shown to the judge and the discussion at the notification hearing must be kept to a minimum and confined to what was *necessary* to achieve the purpose of the notification hearing. It was only by such restraint on the part of counsel, subject to tight case management by the judge, that the acute dangers inherent in any private exchange of material between prosecutor and judge could be avoided or minimised.
(3) The court was nonetheless deeply concerned that the practice of notification hearings has arisen solely based on the CPS Manual, a document of no legal authority. If such hearings were to continue, it was essential that the practice be placed on a sounder and more appropriate footing. The court therefore drew the instant judgment to the attention of the Head of Criminal Justice and the Criminal Procedure Rule Committee. Having regard to the parameters outlined above, the Committee was invited to consider and, if necessary, refine the procedure to govern notification hearings, including the circumstances in which such hearings could take place and the limits to be placed upon them.

Road traffic offences—causing death by careless driving whilst over the prescribed limit for a drug—Road Traffic Act 1988 s.7(3)(c)—whether evidence obtained not in compliance with not admissible as a matter of law

TWIGG [2019] EWCA Crim 1553; 13 September 2019

A sample of blood taken from T was not in compliance with the Road Traffic Act 1988 s.7(3)(c), because the health care professional taking the sample did not advise the police that T's condition might be due to some drug. At his trial for causing death by careless driving whilst over the prescribed limit for a drug, T's submission that the evidence should be excluded under the Police and Criminal Evidence Act s.78 was rejected by the judge. On appeal, it was argued that, before the question of a s.78 application arose, the evidence was inadmissible as a matter of law.
(1) While the law as stated in *Sang* [1980] AC 402 was modified by the enactment of s.78, the general principle remained that there was no automatic rule requiring the exclusion of evidence because of the manner in which it was obtained: *Sang; Kuruma v The Queen* [1955] AC 197.
(2) *Howard v Hallett* [1984] RTR 353, in which the admissibility of samples of breath was said to be dependent on the satisfaction of the requirements of the Road Traffic Act 1972 s.10(2), the similarly worded predecessor to the Road Traffic Offenders Act 1988 s.15(2), was considered and commented on by the House of Lords in *Fox* [1986] AC 281. The Court analysed the speeches in *Fox* and concluded that it was not authoritatively decided by the House of Lords that the section did have the effect which was considered by the Divisional Court in *Howard v Hallett*. In *Fox* the point of law was ultimately left open without being finally determined. More importantly, the House of Lords dismissed the appeal despite the admissibility argument being squarely before

it, the principal submission for the appellant being that the evidence should have been excluded because of the illegal manner in which it had been obtained.
(3) T relied on *Murray v DPP* [1993] RTR 209, a case on the Road Traffic Act 1988 s.7(7) (requirement on a constable to warn a person that a failure to provide a specimen may render them liable to prosecution), in which the Divisional Court relied on the reasoning in *Howard* in allowing the appeal. The Court of Appeal was not bound by a decision of the Divisional Court. Further, *Murray* was distinguishable because s.7(7) amounted to a statutory exception to the normal principle against self-incrimination. *Murray* was not authority for the proposition that *any* breach of *any* of the procedures associated with the obtaining of specimens under the Road Traffic Act s.7 meant that a specimen was automatically rendered inadmissible. *Cole v DPP* [1988] RTR 224, also relied on by T, involved s.8(3)(c). The Court in *Cole* found there had not been a clear indication by the doctor to the constable that a drug was the possible cause of the defendant's condition (in the context of him giving a view on consent). That case turned on its own facts and was distinguishable, on the basis that in that case there were two possible causes, only one of which was drugs.
(4) The Court approved the analysis offered by Burnett J, obiter, in *Boddhaniya v Crown Prosecution Service* [2013] EWHC 1743 (Admin); 178 JP 1 at [17]. Section 7 did not in terms provide that a failure to comply meant the evidence was inadmissible, and that was why, in contrast to the Road Traffic Offenders Act 1988 s.15(4), the matter was approached in terms of s.78. In the overwhelming majority of cases, it may be that a failure to comply with the Road Traffic Act 1988 s.7(3) would have the result that all evidence of the specimen would be excluded under s.78. But it was not necessarily so.
(5) The blood sample was not automatically inadmissible as a matter of law. The judge had not been wrong to decline to exclude it under s.78.

Road traffic offences—driving a motor vehicle while using a hand-held mobile telephone or interactive communication device—use while driving of a smartphone to film—whether amounts to offence—nature of communication

DPP v BARRETO [2019] EWHC 2044 (Admin); 31 July 2019

Where B used his mobile telephone to film an accident whilst driving, he did not commit the offence of driving a motor vehicle while using a hand-held mobile telephone or interactive communication device contrary to the Road Traffic Act 1988 s.41D, and the Road Traffic (Construction and Use) Regulations 1986 reg.110.
(1) It would have been much better if the drafting of the legislation had been less cumbersome than it was, but its effects were clear. The statute criminalised breach of a regulation "as to driving … while using a hand-held mobile telephone or other hand-held interactive communication device". Regulation 110(1) prohibited, while driving, the use of a mobile telephone or a hand-held device "of a kind specified in paragraph (4)". That paragraph defined the device as one which "performs an interactive communication function by transmitting and receiving data". It was plain from the context that "perform" meant "is being used/is used to perform". As a matter of construction, it was the use of a device for the performance of an interactive communication function which brought it within the prohibition. The use while driving of hand-held devices which have no communication function, such as a camera or a satnav, did not breach the regulations. The same applied to the use of, for instance, a tablet computer to take a photograph. Such a use was not using the tablet to perform an interactive communication function. The meaning of the word "using" in s.41D and reg.110 was restricted in respect of hand-held devices to using the interactive communication function of the device. Given that the mobile phone and interactive communication device were equated in s.41D there was no reason why use of a mobile phone should be given a wider ambit than use of an interactive communication device. On the contrary, use of a mobile phone or an interactive communication device should be treated consistently. This conclusion was reinforced by para.(6), which stated that a device is to be "treated as hand-held if it is, or must be, held at some point during the course of making or receiving a call or performing any other interactive communication function." This was a deeming provision, making "hand-held" not a matter of design, but of the purpose for which a telephone or other device was being used. Thus the legislation did not prohibit all use of a mobile phone held while driving. It prohibited driving while using a mobile phone or other device for calls and other interactive communication and holding it at some stage during that process.
(2) Whilst it was not necessary for the purposes of this case to decide the point, there was an argument that sending and receiving messages included the drafting or recording of the messages and the reading of them and not just the nanosecond of the transmitting or receipt of data. Without the data, there was nothing to communicate. In the non-digital world, interactive communication was not restricted to the posting of the letter, its sorting and its delivery. Without the writing and reading of the letter, there was no communication. In the digital sphere each aspect of the drafting, sending and reading/viewing/replying was an intrinsic part of using a device which performs interactive communication as defined.
[*Comment: In addition to making the offence harder to prosecute, this case opens up further technical uncertainty. The observation (presumably not based on full argument, given the facts) in (2) above suggests that B's filming of the accident would have fallen within the prohibition if he had been using an app such as periscope to stream the film to a social media site. What if B had intended at a later point to email the film to someone – might that also count as along the "drafting, sending and reading/viewing/replying" continuum? In neither of these possible cases would the "interactive communication" element impact on the safety or otherwise of what the driver was doing. On the other hand, the reference to a hand-held satnav not having a communication function may indicate that for there to be communication, it must be with a human, as a satnav is clearly receiving data in an automated form. But if that were the case, the prohibition would not cover a driver "communicating" with an automated system, such as shopping on Amazon or placing a bet with an internet bookie, clearly thoroughly dangerous activities. It is true that the Thirlwell J adverts to offences of careless and dangerous driving as covering actually unsafe driving, but nonetheless, the clear policy justification for the prohibition in the first place is that use of the devices prejudices road safety. (RP)*]

SENTENCING CASE

Criminal Damage; Committal for Sentence; Powers of the Court of Appeal

BANGAR [2019] EWCA Crim 1533, 28 August 2019

In June 2019 the Court of Appeal had allowed the appellant's appeal against sentence and purported to quash his conviction for causing criminal damage (value less than £5,000). The appellant had pleaded guilty to this offence in the magistrates' court and had been committed for sentence to the Crown Court, pursuant to s.6 of the Powers of Criminal Courts (Sentencing) Act 2000. The appellant had previously pleaded guilty in the Crown Court to four counts on an indictment which charged a number of other offences and been sentenced to 28 months' imprisonment. This included a concurrent term of three weeks' imprisonment for the committal offence of criminal damage. In the June appeal, the Court of Appeal had reduced the overall sentence from 28 to 21 months' imprisonment. In the June proceedings, the Court considered the power of the magistrates' court to commit for the summary offence of criminal damage under s.6 of the 2000 Act in circumstances where none of the operative provisions of s.6(4) of the Act applied (it was not an offence triable either summarily or on indictment; it did not relate to a conviction by a person who had been conditionally discharged or was subject to a suspended sentence, and it was not a committal under the Vagrancy Act 1824). The Court had concluded that the committal for sentence was defective and so quashed the conviction for criminal damage.

The prosecution then submitted that this was not the correct way to address the matter, and that the consequences of the defective committal were that the offence was not lawfully before the Crown Court and there was therefore no power to sentence for it, and consequently the Court of Appeal had no power to order the quashing of the underlying conviction because the Court of Appeal's jurisdiction derives s.1 of the Criminal Appeals Act 1968, which limits the powers of the court to "*an offence on indictment*". As the criminal damage offence had come before the Crown Court on a committal for sentence, it was never an "*an offence on indictment*" within the meaning of s.1 of the 1968 Act; accordingly, the Court of Appeal had no power to quash the conviction. Accepting these arguments, the Court then adopted the following solution:

(1) the previous ultra vires decision quashing the conviction on the summary charge was withdrawn and altered to correct the nullity due to lack of jurisdiction;

(2) the Court was reconstituted as a Divisional Court of the Queen's Bench Division and upon hearing a claim for Judicial Review of the decision of the Magistrates' Court to commit for sentence, quashed the unlawful committal to the Crown Court for sentence of the criminal damage offence, since the Crown Court also lacked jurisdiction;

(3) the presiding member of the Court constituted himself as a district judge under s.66(1) of the Courts Act 2003;

(4) an absolute discharge was imposed under s.12 of the 2000 Act in respect of the criminal damage offence. (This was due to the highly unusual circumstances of the case and the sentences imposed in respect of the other offences on the indictment.)

Case in Depth – *Brown* [2019] EWCA Crim 114

By J.R. Spencer

In *Ford* [1] some gunmen shot V's windows out and drove off in a car. When the police arrived a woman emerged from the crowd, gave them a slip of paper with her note of the registration number of the car, and disappeared. The car was traced, and the occupants' mobile phones revealed that they were in the area at the time, and that they had previously been in contact with Ford, who had been sending threatening messages to V, using his street name "Killa". On the basis of this evidence Ford was prosecuted for conspiracy offences related to the shooting, and unsurprisingly, convicted.

The woman's note about the registration number was of course a piece of hearsay, but the trial judge admitted it by virtue of s.114(1)(d) of the CJA 2003, which gives the court a discretion to admit hearsay not otherwise inadmissible if it would be in the interests of justice to do so. The Court of Appeal later quashed Ford's conviction, holding that this evidence had been admitted wrongly. They so held, relying on dicta from Lord Judge in *Mayers*[2] and in *Horncastle*[3] to the effect that anonymous hearsay is never admissible in English law.

As there was no serious reason to doubt the veracity of this piece of evidence the result was counter-intuitive, to put it mildly. Furthermore, the Court's reasoning, with all due respect, was distinctly flawed. In brief[4], it takes Lord Judge's dicta out of context, it goes against the wording of the hearsay provisions of the CJA 2003 and the known intentions of the Law Commission when it drafted them, and by rendering even highly cogent evidence inadmissible it furthers the acquittal of the guilty and the conviction of the innocent.

In the recent case *Brown*[5] a different constitution of the Court avoided applying that decision on a set of facts which on the face of them seem virtually identical.

In a busy street a man was stabbed by an assailant who drove off in a car, the registration number of which was noted from inside a bus by a passenger with her mobile phone. She then read it out to another passenger (who did not herself see it) as the other passenger was making a 999 call on her own phone to the police. The woman who had noted the number then disappeared and despite the best efforts of the police could neither be identified nor traced. As in *Ford*, the registration number led the police to the defendant. At his trial

1 [2010 EWCA Crim 2250.
2 [2008] EWCA Crim 2989, [2009] 1 W.L.R 1915.
3 [2009] UKSC 14, [2010] 2 AC 373.
4 These points were developed in my note on the decision in [2011] *Cambridge Law Journal* 494; and see too my *Hearsay Evidence in Criminal Proceedings*, (2nd ed 2014).
5 [2019] EWCA Crim 114.

the judge admitted this evidence as hearsay, relying (like the trial judge in *Ford*) on s.114(1)(d) of the CJA 2003, and also on the *res gestae* exception to the hearsay rule, which s.118 of the Act expressly preserves. As in *Ford* he was convicted, and relying on that case he appealed against conviction. Dismissing Brown's appeal, the Court pointed out that the "missing woman" in the *Ford* case had told the police when handing them her note that she did not wish to get involved: but there was no suggestion of this with the missing woman here. The dicta about the general inadmissibility of anonymous hearsay on which the earlier Court relied in *Ford* should be read in the context of information from a source whose unavailability to give evidence in person is due to his or her unwillingness to do so, which was not so in the case in hand. In consequence:

> [33] It is only the 2003 Act, therefore, which governs this case. Under the 2003 Act there is no general rule that a statement made out of court cannot be admitted as hearsay evidence unless the maker of the statement is identified.

For those who believe that the Court of Appeal got it badly wrong in *Ford*, *Brown* is a welcome step in the right direction. But it would be much better, surely, if a later court could now bring itself to say that *Ford* was an aberration, and should not be followed.

Features

The problematic standard of good character evidence of non-defendants: *Mader* [2018] EWCA Crim 2454

By Ashlee Beazley[1]

Mader is not a complicated case and yet it raises some complicated questions. In brief, the case centres around a disagreement between new acquaintances which culminated in the appellant, Mr Mader, stabbing the victim, Mr Waterhouse, in the face, neck and hands. At trial, Mader admitted to doing so but claimed his actions were the result of self-defence as Mr Waterhouse and his partner (collectively, "the witnesses") had been attempting to rob him. The witnesses asserted that Mader's attack had been unprovoked. Following Mader's testimony, the Crown applied to admit evidence in rebuttal – namely the witnesses' lack of convictions, testifying to their good characters – on the ground that the defence's case had involved the assertion that Waterhouse was a violent aggressor, and his partner dishonest. The trial judge allowed the evidence, as:

> Imputations have now been made, in effect, in respect of both, not only the main complainant but also against the key witness, [the victim's partner], alleging that she was violent as well, in direct contradiction of her own evidence.

The case, the judge held, was unusually a very proper case where good character evidence went to the heart of the issues, i.e. to the circumstances in which Mader had come to use the knife against Waterhouse, and to the parties' respective versions of the events that preceded this. In support of her decision, the trial judge referred to *Junior Lodge*[2] and *IWAT*[3], and to the well-accepted proposition that while evidence may not be led in chief to bolster the credibility of a witness:

> Cases may arise where evidence of the victim's dispositional character may well be relevant to an issue in the case.[4]

Following his subsequent conviction of wounding with intent (for which he received a sentence of nine years' imprisonment), Mader appealed. He submitted that his conviction had been rendered unsafe by the admission of the witnesses' good character evidence, which had been of significant prejudice to his defence. He further contended that this was a case where a legitimate but robust defence had been advanced but that it was not one which justified bolstering the credibility of the prosecution witnesses by adducing evidence of their good character.

Prohibition against "oath-helping"

The Court of Appeal began its assessment of Mader's appeal with a restatement of the well-established principle prohibiting oath-helping, namely that evidence intending to show that a prosecution witness is of good character, in the sense that "he or she is generally a truthful person who should be believed", is not admissible.[5] A witness may, however, be compelled to answer questions which go to his or her credibility, just as the defendant may allege misconduct on the part of the witness.[6] If the character of the witness is not itself in issue, the party calling the witness may not call evidence as to the good character of the witness for the purpose of rebutting such allegations; defendants retain their right to robustly pursue a legitimate defence.[7] While evidence may be admitted to show a witness is unreliable,[8] there are no grounds which allow evidence intended to boost, bolster or enhance the evidence of a witness; this includes, as held in *Robinson*,[9] evidence by an expert witness which speaks to the reliability of the complainant or victim's evidence.[10]

1 PhD student, KU Leuven. I am grateful to Professors Michele Panzavolta, Andrew Sanders and John Spencer for their insights and comments on an earlier draft.
2 [2013] EWCA Crim 987.
3 [2001] EWCA 1898. (Also known as "*Amado-Taylor*".)
4 Above at [21].
5 *Mader*, at [32], citing *Amado-Taylor*, at [19]; and *Lodge*, at [18].
6 *Archbold Criminal Pleading, Evidence and Practice* (2019 ed.), at § 8-276.
7 *Hamilton*, *Times Law Reports*, 25 July 1998.
8 Criminal Justice Act 2003, s.101. For more explanation on the bad character of non-defendants, see J. Spencer, *Evidence of Bad Character* (Hart, 2016), Ch.3.
9 (1994), 98 Cr.App.R. 370.
10 In *Robinson*, the appellant had been charged with sexual offences against a 15-year-old girl with mental disabilities. An educational psychologist was called by the prosecution to affirm that the complainant was a competent witness; she was later asked whether the complainant was suggestible or prone to fantasise. On appeal, the Court held that unless it had been suggested that the complainant, as a witness of fact, was unreliable, it had not been open to the prosecution to call the psychologist to give reasons why the complainant was reliable.

Unless excluded by one of the normal exclusionary rules of evidence, good character evidence may nevertheless be admitted where it is "relevant to an issue" in the trial.[11] As the Court of Appeal noted in the present case, the category of issues to which evidence of a witness's disposition are relevant is not closed.[12] It includes where the question of consent in a trial involving sexual consent is an issue;[13] and if the accused's defence to a crime of violence is self-defence, the non-violent character of his complainant may be relevant.[14] If evidence of good character is admitted at trial, "on the basis that it is 'issue-relevant'", the judge should ensure that the effecting of admitting the evidence "is not to water down the protection provided by the primary obligation upon the prosecution to prove its case."[15] Above all, a judge retains the exclusionary powers to refuse to admit evidence that she or he feels will have an "unduly prejudicial and less than probative impact upon the jury."[16]

One of the problems with good character evidence, however, is discerning whether it is relevant, and not accidental oath-helping. This problem is frustrated by the absence of a consistent definition of "relevant." *Tinsley*[17] comes closest to providing one.

Here, the Court of Appeal stated that the general principle:

> ... is that for evidence to be admissible as relevant, it must be logically probative (or disprobative) of a fact in issue between the parties.[18]

It must be noted, however, that *Tinsley* was a case in which the character evidence in question concerned bad character evidence of a non-defendant (and so was ultimately subject to the test provided in s.100 of the Criminal Justice Act 2003[19]). The Court in *Mader* accepted the reasoning of the trial judge that the context in which Mader had picked up the knife was an issue to which the good character of the prosecution witnesses was relevant, however indirectly. And yet, if we apply the test utilised in *Tinsley* (which neither the Court nor the trial judge did), one questions whether the Court's conclusion holds true – was the lack of convictions of the witnesses sufficiently probative of the circumstances in which Mader came to hold the knife? This evidence was admitted in response to Mader accusing the witnesses of attempting to rob him, and was accepted as proof of the suggestion that, due to their lack of criminal convictions, they were unlikely to have done so, thus rendering their version of the events more probable than Mader's. The problem with such a deduction, however, is that it ignores the possibility that on the night in question, the witnesses had acted "out of character" and Mader had in fact been forced to defend himself. Furthermore, without the ability to conclusively rule out such a possibility,[20] especially where the character evidence forms a significant part of the overall evidence, the risk remains that it might be prejudicially perceived by a juror. While the Court properly complimented the trial judge on her instructions to the jury on the limitations of this evidence, the "probative" standard – and its degrees of remoteness – is a subtle one, and its nuances are complex. Character evidence, meanwhile, can be powerful, and quick to speak towards the credibility of a witness, however wrong such presumptions may be. This is particularly so where the evidence is admitted in rebuttal to the "overzealous" defence of a defendant. (In *Mader*, however, the Court frustratingly failed to explain how, or why, Mader's defence amounted to more than the usual "robust pursuit".[21])

Position after Mader: the need for a stricter standard

It is important to note that *Mader* was an unreserved judgment, and it would be unfair to unduly criticise the court. Nevertheless, given the relative uncommonness of good character evidence cases, the appearance of *Mader* did provide the Court with an opportunity to clarify the law. While it effectively summarised the effect of the current case law, it nevertheless missed the chance to assess its appropriateness. Regulation of character evidence exists to restrict what can be put to a witness in the course of cross-examination, especially with a view to challenging the witness's credibility.[22] This is to distinguish between evidence which bears directly on the credibility of a witness and that which bears only indirectly.[23] The former gives reason to doubt, or conversely, accept, the veracity of the witness's account; the latter speaks only to whether the witness appears to be a person "whose word can be trusted".[24]

The existence of s.100 of the Criminal Justice Act is testament to the significance bad character evidence is presumed to have on a witness's credibility. The absence of an equivalent provision for good character evidence is problematic. As *Mader* aptly demonstrates, the admission of good character evidence which speaks, however indirectly, to a witness's credibility can be no less damaging to a defendant than the admission of bad character evidence which speaks against his own veracity: both give reason to doubt the truth of the defendant's evidence, in exchange for an acceptance of the witness's alternative version of events. Without a statutory framework, the onus is on the courts to ensure good character evidence is properly admitted. The current concepts of "issue-relevant" and "sufficiently probative" are often insufficiently defined and, at times, improperly applied.

If the issues discussed are to be avoided, a standard analogous to that given in s.100 of the CJA should be introduced, where admissibility is contingent on whether the evidence is important explanatory evidence without which the case itself cannot be properly understood, or of *substantial* probative value in relation to a specific issue.[25]

As presently elucidated, the principles governing good character evidence of witnesses are unsatisfactory and imprecise. If its purpose and application is to be properly recognised, good character evidence must be held to a higher standard.

11 *Amado-Taylor*, at [21]; *Lodge* at [18]; *Mader*, at [32].
12 *Mader*, at [32].
13 See *Amado-Taylor*.
14 See *Lodge*.
15 *Mader*, at [32].
16 Above, at [33].
17 [2006] EWCA Crim 2006; [2007] 1 Cr.App.R. 43; [2007] Crim. L.R. 165.
18 *Tinsley*, at [13].
19 Section 100(1) allows evidence of the bad character of a non-defendant to be admitted where "(a) it is important explanatory evidence; and (b) it has substantial probative value in relation to a matter which (i) is a matter in issue in the proceedings, and (ii) is of substantial importance in the context of the case as a whole." Subsection (2) holds that evidence is important explanatory evidence "(a) if without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case; and (b) its value for understanding the case as a whole is substantial."
20 Through, for example, the admission of further evidence proving or disproving the fact to which the character evidence relates.
21 In particular, the Court provides no explanation as to what aspect of Mr Mader's defence went beyond the usual, robust defence, once again leaving this to the inference of the reader.
22 Spencer, p.50.
23 Above, p.54.
24 Above.
25 For the definition of "important explanatory evidence", see fn.19.

Issue 8 28 October 2019

In Praise of *Rose*

By Findlay Stark[1]

In *Rose*,[2] the Court of Appeal had to decide how a jury in a gross negligence manslaughter case should assess whether there was a "serious and obvious" risk of death attending the defendant's breach of duty.[3] The options were:

(i) to consider whether a "serious" risk of death would have been "obvious" on the basis of the information that the defendant actually had at the time of the relevant breach of duty; or

(ii) to consider whether a "serious" risk of death would have been "obvious" on the basis of the information that the defendant *would* have had, had she *not* breached her duty.

In both scenarios, "obviousness" would be assessed by reference to the standard of the reasonable person/competent specialist (depending on the context). The Court of Appeal preferred option (i), as it had done in the earlier case of *Rudling*.[4]

Laird has been particularly critical of the law as set out in *Rose*,[5] which he sees as being "perverse" in two distinct ways.[6] This note defends the approach adopted in *Rose*, and contends that, when properly understood and applied, it comprehends an important point about the culpability of (gross)[7] negligence. It then addresses the subsequent cases of *Winterton*[8] and *Kuddus*,[9] which suggest that stating and applying the law as laid down in *Rose* is proving difficult. The situation is, nevertheless, salvageable through paying closer attention to the important points noted in *Rose*.

The next section introduces the first sense of "perversity" of which Laird complains.

"Perverse" Results?

Concentrating on the internal eye examination that Rose omitted to perform, Laird first contends that the Court of Appeal's decision leads to a "perverse" conclusion in the following imagined case:[10]

> [T]he optometrist who carries out an examination of the internal eye, but fails to perceive the obvious symptoms of hydrocephalus may be guilty, but the optometrist who fails even to attempt an examination of the internal eye will not commit the offence. All things being equal, surely the latter is more culpable than the former?

This example is slightly ambiguous. "[F]ails to perceive the obvious symptoms" could mean performing the relevant examination but doing so in such a way that the physical signs of the potentially fatal condition are not detected. Call the optometrist in this position Thorn. Alternatively, one could envisage an optometrist – Shrub – who performs the examination that Rose omitted to carry out, and sees the signs of hydrocephalus, but fails to form the additional belief that there is a "serious" risk of death at hand, when a reasonably competent optometrist would have done so, given the information Shrub actually had.[11]

Laird's suggestion in the quote above is that Shrub is less culpable than Thorn, and Thorn is less culpable than Rose. This suggestion seems to track his appraisal of their negligence.

One difficulty in assessing such a claim is that negligence can be appraised in different ways, and can focus to varying extents on the defendant's behaviour and her beliefs.[12] At the more behavioural end of the spectrum, negligence can be conceived of in terms of a failure to reach a certain standard of behaviour (that of the reasonable person/competent specialist).[13] The focus in such accounts of negligence is on what the defendant did (or did not do), and less directly on her beliefs. Laird's account of negligence is more sophisticated, focussing specifically on behaviours linked to tests designed to uncover risks. If the defendant ought to have performed a particular test, she can be credited with the information that she would have gleaned had she complied with her investigatory duty.

This type of argument works well in cases like *Rose*, where there are clear rules about the steps one should take to investigate risk, which defendants could be expected to have internalised.[14] The difficulty is limiting this type of approach to negligence fairly and practically. One can avoid many difficult questions by focussing, as Laird does, only on "specialist" activities – "specialists" have (the argument would run) chosen to take on the duties of investigation relevant to risks of death, and accept the chance of potential manslaughter convictions if they omit to perform those investigations.

Not all questions are avoided by taking this route, however. How "specialist" must an activity be before the proposed imputation of information relevant to any risk assessment is legitimate? Should this approach apply, for example, to those who work on train platforms and in other "high risk" environments?[15] If so, what is a sufficiently "high" risk?

Another pertinent question is whether everyone must agree that any reasonable, competent specialist would have taken the investigatory step that the defendant is alleged

1 University Senior Lecturer in Law, University of Cambridge. I am grateful to Jo Miles, Jonathan Rogers and Alex Sarch for comments on an earlier draft, and to Karl Laird for earlier correspondence on this topic.

2 [2017] EWCA Crim 1168, [2018] Q.B. 328; summarised at [2017] 8 *Archbold Review* 1. (To remind us, this was the case of the optometrist who, when examining a child's eyes, omitted to perform a routine test which, if done, would have revealed symptoms of the condition which, when left untreated, killed him.)

3 A requirement that has been uncontroversial since *Misra* [2004] EWCA Crim 2375, [2005] 1 Cr.App.R. 21.

4 [2016] EWCA Crim 741.

5 Alongside his relevant *Criminal Law Review* commentaries, see K. Laird, "The Evolution of Gross Negligence Manslaughter" [2018] 1 *Archbold Review* 6; D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Criminal Law* (2018), 15th edn., pp.591-593.

6 Laird has other criticisms of *Rose*, but these two are the most developed.

7 It will be assumed here that "gross" negligence is simply *worse* than "simple" or "ordinary" negligence.

8 [2018] EWCA Crim 2435, [2019] 2 Cr.App.R. 12.

9 [2019] EWCA Crim 837.

10 Laird, "The Evolution of Gross Negligence Manslaughter", 8.

11 One might wonder whether Dr Adomako was more like Thorn or Shrub. It seems that he had noticed various things that would have indicated a "serious" risk of death to the reasonable, competent anaesthetist, but failed to draw the "obvious" inferences. He appears, at least in this respect, more like Shrub than Thorn.

12 There are very many accounts of negligence in the existing literature, and I cannot feasibly explore their nuances here. See, however, F. Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (2016), chs.7-8.

13 See, e.g., *Misra* at [57].

14 Horder's not-dissimilar account of negligence focuses on the types of reasons that arise from undertaking certain roles: J. Horder, "Gross Negligence and Criminal Culpability" (1997) 47 University of Toronto Law Journal 495. For criticism, see Stark, *Culpable Carelessness*, pp.186-192.

15 Laird, "The Evolution of Gross Negligence Manslaughter", 8.

to have omitted to perform. For instance, the experts disagreed about whether Dr Rudling should have visited her patient. Laird suggests that this means that, when asking whether there was a "serious and obvious" risk to his life at the relevant time, Dr Rudling should not be credited with the information that she would have gleaned had she seen him in person.[16] Such disputes about the correct course of action are, presumably, very common (not just in the medical realm),[17] which restricts the circumstances in which Laird's approach can be deployed, potentially dramatically.[18] Against these points, Laird can point to the clarity of the duty at issue in *Rose*, and its statutory basis.[19] But Parliament (and those it charges with responsibility for deciding which specific medical checks to mandate) cannot be assumed to have stipulated tests that can catch (mercifully) quite rare, but deadly, conditions consistently. For instance, there is no legislative requirement to check every A&E patient for signs of sepsis, and presumably opinions will differ about when it is appropriate to do so. Laird's imputation-based account of negligence would appear to be inapplicable in such circumstances. Are these cases of thankfully rare conditions, that can have fatal consequences if unchecked, different enough to justify a distinct approach to them in the law of manslaughter? I (and presumably most optometrists) would suggest not.[20] If the answer to this point is that A&E sepsis checks should be mandated, then the pernicious problem of being unable to legislate for everything arises (together with concerns about efficiency and the potential for such steps to prove counter-productive).

These practical points raise a serious question about whether Laird's imputation-based approach to negligence is workable, or would just cover exceptional cases such as internal eye examinations. If anything is going to make the law of involuntary manslaughter more sensible, it is not the recognition of such narrow rules.

The alternative approach – adopted in *Rose* – is to focus on what the defendant should have believed on the basis of her extant beliefs. The next section argues that this is a far preferable way forward.

Defending a (More) Belief-Centred Conception of Negligence

Laird chides *Rose* for moving (further) away from the House of Lords' focus in *Adomako* on "objective" conduct.[21] On my view, this is actually a virtue of the Court of Appeal's decision. It moves the law closer to analysing the defendant's actual beliefs (and lack thereof), which will tell us far more about her personal culpability regarding the risk of death than her bare failure to do as another person could have (should have, would have) done, and the information that she could have (should have, would have) had.[22] Even more nuanced accounts such as Laird's engage in hypothetical assessments to an extent that raises serious questions about the security of findings of *personal* culpability for a particular outcome.

The alternative, more belief-based approach that I have put forward in earlier work[23] seeks to solve this problem by making negligence more akin to the more familiar (and less controversial)[24] culpability concepts with which the criminal law operates, particularly in the context of risk-taking. If recklessness is about defendants who believe that they are exposing others to certain risks (risks that it is unjustified for them to impose on others),[25] negligence is (in large part) about the unreasonable *absence* of such a belief.

Laird's approach may well be taken to be concerned with the unreasonable absence of beliefs about risk (based on the failure to carry out adequate investigations), but my account is far narrower. The thought underlying my belief-centred account is that criminal negligence ought to require, at base, that the defendant had a certain set of "background beliefs" necessary for the formation of the further belief that a relevant risk existed. In more colloquial terms, central to criminal negligence, on my view, is the possession of 2 and 2, and the failure to make 4. In manslaughter, 4 is a "serious and obvious" risk of death.

Rose presumably had the background belief that the examination that she omitted to perform might have shown the signs of the ultimately fatal condition. She had other background beliefs. One of these is that it is very unlikely that someone presenting without other symptoms is at risk of death. It was accepted that, at the time of the breach (the omission to perform the examination), a reasonable, competent optometrist "in her [epistemic] shoes"[26] would have assessed the risk of death as remote. On the colloquial version of my account, Rose may have had 2 and 2, but 4 – the conclusion we would expect her, if she possessed sufficient concern for others' interests, to have drawn from those background beliefs – was something like: "There is a remote chance that I will miss signs of a life-threatening condition."[27] As the Court of Appeal concluded, that is not the same thing as a "serious and obvious" risk of death, and the foundation of a manslaughter conviction. Thorn is placed identically.[28]

Contrast, however, Shrub, who performed the examination that Rose omitted to carry out, and saw the signs of hydrocephalus, but failed to form the additional belief that there was a "serious" risk of death at hand. Shrub possessed 2 and 2 and, plausibly, should have concluded that 4: there was a "serious" risk of death present. Shrub was, accordingly, the closest to possessing the belief that there was a "serious" risk of death attendant upon her breach of duty (though her breach of duty is her failure to draw the "obvious", relevant inference about what to do about the test results, *not* omitting to perform the test). Her failure to recognise the existence of a "serious" risk of death was the most

16 See Laird's commentary on *Rose* at [2018] *Criminal Law Review* 76, 80.

17 For instance, would all reasonable, competent restaurant owners have followed up on the message "nuts, prawns" when received in the "comments" box on an online order? See *Kuddus* [2019] EWCA Crim 837, discussed further below.

18 Driving *may* be a context in which this type of approach would work (although often the "right" manoeuvre, etc. will be contested), but of course deaths arising from driving tend not to be dealt with via manslaughter.

19 Sight Test (Examination and Prescription) (No. 2) Regs 1989 (S.I. 1989/1230), reg.3(1) (created under the power in Opticians Act 1989, s.26(1)).

20 Perhaps this becomes an empirical question about the relative frequency and severity of the particular life-threatening condition and the availability of other avenues for detecting it. Even then, a line needs to be drawn, and it is not clear that it can be fairly and practically.

21 Laird, "The Evolution of Gross Negligence Manslaughter", 8. In *Adomako*, the focus is on the defendant's conduct, and exercise of "skill" (e.g. [1995] 1 A.C. 171, 188).

22 Stark, *Culpable Carelessness*, pp.179-192.

23 Stark, *Culpable Carelessness*, Ch.8.

24 There is not room here to rehearse the debate over the place of negligence in criminal law, but for a provocative account arguing for its total exclusion, see L. Alexander and K. Kessler Ferzan with S. Morse, *Crime and Culpability: A Theory of Criminal Law* (2009), Ch. 3.

25 See Stark, Culpable *Carelessness*, Chs.4-6; F. Stark, "The Reasonableness in Recklessness" *Criminal Law and Philosophy*, forthcoming.

26 *Rose* at [84].

27 *Rose* at [92].

28 See, also, Laird's hypothetical train conductor, who misses the presence of a passenger on the platform who is leaning on a train ("The Evolution of Gross Negligence Manslaughter", 8). Unless he has a nexus of extant background beliefs necessary for the formation of the belief that there is a "serious" risk of death attendant upon his conduct, the train guard should be acquitted of manslaughter, whatever the cause of that ignorance (in Laird's example, it is distraction).

dramatic, and – I contend – the most informative about her personal culpability with regard to killing another human being. One might ask, who is more culpable regarding the risking (and, if proved, causing) of another person's death: the optometrist who thought (as a reasonable, competent optometrist would have, if asked to assess the situation *ex ante*) "There was no particular medical need to perform this (admittedly mandatory) test in this case", or the one who admits "The evidence of a serious risk of death was right in front of me, and I failed to draw the obvious inference from it"?

Shrub is (counter-intuitively, perhaps) the most diligent optometrist, which is what a more behaviour-centric approach such as Laird's tells us. But she is also the most likely (on my account) to be culpable with regard to the existence of a "serious" risk of death, and that is more pertinent when a (gross) negligence-based manslaughter conviction is in contemplation. *Rose* recognises this point, by placing Shrub within the realm of manslaughter, but Rose and Thorn beyond it. That is why, in my view, the decision ought to be welcomed: it narrows (gross) negligence in a way that ensures the defendant is adequately, personally culpable with regard to the death her act or omission caused.

The next section considers the second allegedly "perverse" aspect of *Rose*.

"Perverse" Incentives?

Laird is additionally concerned that *Rose* provides "perverse" incentives to perform one's duties badly:[29]

> [T]here is a perverse incentive for those who owe a duty of care to another to do as little as possible to discharge it and in so doing avoid potential criminal liability. Whilst this may be unlikely to impact the high standard of care that doctors provide to their patients, it is not inconceivable that a landlord might decide not to provide his tenants with a carbon monoxide detector so that he remains ignorant should gas ever leak from the boiler.

Three replies are available. First, the prospect of a criminal conviction for manslaughter is not the only conceivable incentive to perform one's duties here: regulatory, disciplinary and civil measures also deserve consideration as less severe (and possibly as/more effective) alternatives.[30] Secondly, the criminal law could (if thought necessary) capture such misconduct through specific offences relating to particular failures. If one is sufficiently concerned about the missing of a (thankfully rare) risk of death emerging from the failure to perform the examination in *Rose*, despite the absence of other clear symptoms, that could be made a specific criminal offence.[31] Thirdly, it is arguable that the landlord in Laird's example "deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed".[32] The legal fiction around wilful blindness could be employed to credit the landlord with the background information he has deliberately avoided possessing. Such a mechanism was explicitly recognised in *Rose*.[33]

Rose does not, then, lead to "perverse" results – applied carefully, it endorses an approach to (gross) negligence that speaks meaningfully to defendants' personal culpability for a caused death. Subsequent decisions suggest that stating and applying the law in the light of *Rose* is nevertheless proving complicated.

Stating and Applying the Law Post-*Rose*

The first noteworthy case, in this regard, is *Winterton*.[34] The defendant was responsible for safety on a building site. A trench had been dug in such a way that it should have been obvious to anybody looking on that it might collapse, killing those inside and/or nearby. A fatal collapse occurred. The defendant's case was, in essence, that there was no evidence that he had seen the trench, and so – following *Rose* – he should not be credited with background beliefs that he *would* have possessed, had he seen it.

The Court of Appeal held that there was, in fact, evidence that the defendant knew the trench's condition.[35] Alternatively, the Court of Appeal considered that Winterton had been wilfully blind regarding the state of the trench, and so could be taken to have known of its condition (even if, in fact, he did not).[36]

Whether the evidence convincingly demonstrated a deliberate attempt to evade knowledge so as to limit one's liability is, admittedly, difficult to tell from the Court of Appeal's judgment. But it is clear that Rose was not wilfully blind. She had not set out deliberately to avoid confirming a suspicion about the presence of signs of hydrocephalus.[37] On her account, she was dealing with an uncooperative young patient who was otherwise asymptomatic, and horrendous, tragic consequences ensued. This is a defensible way to distinguish *Winterton* from *Rose*.

(Another way to distinguish the cases, suggested to me by the Editor, is that *Rose* applies *unless* the failure to gather the relevant information was itself grossly negligent. But what would make such a failure grossly negligent? For my part, it would at least involve a finding that proceeding without gaining the relevant information *itself* presented an "obvious and serious" risk of death (for instance, if expert evidence in *Winterton* had suggested that a site manager's failure to visit a site where he knew that excavations had taken place was *itself* the kind of thing that gave rise to an "obvious and serious" risk of death). I thus think this suggested reading of *Rose* and *Winterton* involves asking the same questions as my account does. Negligence – even gross negligence – with regard to some other risk is not the stuff of culpability for manslaughter.)

Aside from quibbles about the inferences drawn from the facts, the explanation of the law in *Winterton* might mislead the unwary. The Court of Appeal said that "wilful blindness/ignorance" was at issue in that case.[38] Those are very different things. Wilful blindness can (at least sometimes) lead to a finding of knowledge of a certain matter where, in fact, no such knowledge existed. Ignorance, by contrast, is broad,

29 "The Evolution of Gross Negligence Manslaughter", 8-9.

30 As noted implicitly in *Rose* at [95]. Relevantly, if a landlord fails to install a carbon monoxide detector in certain rooms with solid fuel appliances, liability to pay a (civil) fine of up to £5000 can arise: The Smoke and Carbon Monoxide Alarm (England) Regulations 2015 (SI 1693/2015), reg.8. It has evidently not been felt necessary to mandate such alarms where a gas appliance is in issue.

31 The relevant Regulations and Act make the performance of such examinations an optometrist's duty, but do not state the consequences of a failure to perform that duty.

32 *Westminster City Council v Croyalgrange Ltd.* [1986] 1 W.L.R. 674, 684. Wider conceptions of wilful ignorance are sometimes defended, e.g. Jan Willem Wieland, "Willful Ignorance" (2017) 20 *Ethical Theory and Moral Practice*. The better view is, however, that wilful blindness requires a suspicion that a substantial risk of the relevant harm exists: A. Sarch, "Equal Culpability and the Wilful Ignorance Doctrine" (2016) 22 *Legal Theory* 276.

33 *Rose* at [92].

34 [2018] EWCA Crim 2435, [2019] 2 Cr.App.R. 12.

35 At [25].

36 At [27].

37 The Court noted this point in *Rose* at [92].

38 *Winterton* at [27].

and covers what was at issue in *Rose* (and, for that matter, *Rudling*). The Court of Appeal's comments in *Winterton* about how the danger "was or should have been apparent to anybody"[39] also gloss over the precise questions at issue: did Winterton possess the background beliefs that would have led a reasonable, competent site supervisor to recognise the "serious" risk of death arising from his failure to do anything about the trench? If not, had he deliberately avoided obtaining the relevant background beliefs about the trench's condition, despite his suspicions, in order to avoid being in a position where the "serious" risk of death became "obvious"? If not, the fact that a person who had gone to visit the site would have appreciated the danger is, following *Rose*, irrelevant, and Winterton's conviction was unsafe.[40]

The Court of Appeal was more faithful to *Rose* in its careful statement of the law in the subsequent case of *Kuddus* (and accommodated *Winterton* fully within that framework),[41] but that judgment nevertheless raises further questions about the consistency of the law's application in practice. A takeaway manager received a vague message ("nuts, prawns") in the comments box in an online food order. He did not communicate this message to the owner/chef, who prepared a meal containing nuts. Ingesting this meal caused a fatal allergic reaction in a customer. The owner/chef had his conviction for gross negligence manslaughter quashed on the basis that, having not seen the message, he was not in a position where a "serious" risk of death was "obvious" (otherwise, all chefs who work with allergens are in a similar position whilst in the kitchen). This was a proper application of *Rose*.

The manager does not appear to have appealed against his conviction for gross negligence manslaughter. Is it not arguable, however, that the reasonable takeaway manager would have seen the message "nuts, prawns" as an indication of a *possible* risk of death, but investigated the matter further before concluding that a "serious" risk of death existed?[42] If so, the manager's conviction for gross negligence manslaughter was (without more evidence of culpability)[43] also unsafe, on the basis of *Rose*. It is unfortunate that the case against the manager was not tested before the Court of Appeal, as it would have presented a good opportunity to demonstrate the importance of *Rose*.

Conclusion

Rose captures something crucial about when the controversial concept of negligence can legitimately be recognised as part of the criminal law's culpability arsenal. It does so by bringing gross negligence closer to more familiar and less controversial fault elements by focussing on the defendant's beliefs and what conclusions about risks she could reasonably be expected to draw from them. Solidifying culpability judgments in this area is particularly important given that gross negligence manslaughter has (like all varieties of manslaughter) seen a gradual upwards creep in sentencing, now solidified in guidance from the Sentencing Council.[44] Indeed, one suspects that this trend in sentencing has played its part in making a more "subjective" direction of travel in this area seem worth exploring.[45]

It is thus concerning that subsequent decisions can be read to be less precise than *Rose*, or at least raise concerns about how consistently "*Rose* points" are being noted in practice. Careful reading and application of *Rose*, in line with the account of negligence presented above, is required to ensure the preservation of this rare instance of progress in the notoriously haphazard area of involuntary manslaughter. What is certainly not required, in my view, is the intervention of Parliament or the Supreme Court.

39 *Winterton* at [28].

40 For further problems with the trial judge's directions in *Winterton* (which were, it should be noted, written without having had the benefit of reading *Rose*), see Laird's commentary at [2018] *Criminal Law Review* 338-339.

41 [2019] EWCA Crim 837 at [33]-[56].

42 Added to this point, the manager claims (although it is impossible to tell how credibly) not to have known that almonds were nuts.

43 Contrast the very different facts in *Zaman* [2017] EWCA Crim 1783, [2018] 1 Cr.App.R. (S.) 26.

44 *Manslaughter: Definitive Guidance* (2018). For analysis, see M. Wasik, "Reflections on the Manslaughter Sentencing Guidelines" [2019] *Criminal Law Review* 315, 325-7.

45 It is worth emphasising that *Rose* does not turn "gross" negligence into "subjective" recklessness, however. The defendant can still be unaware of the "serious" risk of death, so long as the reasonable person/competent specialist would, with the defendant's background beliefs, have appreciated it.

The Surgeon of Crowthone, and *Windle*

In *The Surgeon of Crowthorne* – later republished as *The Professor and the Madman* – Simon Winchester tells the sad story of William Chester Minor: the former US Army surgeon whose mental illness led him to believe that evil-doers were breaking in on him at night to attack him and abuse him, and who after one of these hallucinations rushed out into the streets of Lambeth and shot dead a passer-by – wrongly believing that he was his latest tormentor, and that being so, that it was right to kill him. Under the *M'Naghten Rules* as then understood his defence of insanity easily succeeded and he was sent to Broadmoor. During his 38 years there he was kindly treated. A scholarly man, he was permitted to correspond with the compilers of the Oxford English Dictionary, giving them invaluable help by sending them a huge number of useful references.

80 years after the verdict in Dr Minor's case the Court of Criminal Appeal in *Windle*[1] glossed the *M'Naghten Rules* in a way which, if applied to Minor, might well have meant he failed in his defence. Under the *M'Naghten Rules* the insanity defence succeeds if the defendant shows that he did not know his act was "wrong": a word which the Court in *Windle* interpreted to mean "contrary to law", rather than wrong in the wider moral sense.

The decision in *Windle* has been much criticised, both on grounds of law and grounds of general fairness.[2] The possibility that the gloss invented in that case could deprive a person such as Dr Minor of the insanity defence suggests that the critics of that case are right.

JRS

1 [1952] 2 QB 826.

2 For a recent comment see James Manwaring, "*Windle* Revisited" [2018] 12 Crim LR 987-992.

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