



2.4 DINITROPHENOL ('DNP') AND THE DEATH OF ELOISE PARRY

R v KENNEDY (no 2) EXPLAINED

PROSECUTIONS FOR MANSLAUGHTER OF THOSE ENGAGED IN THE SUPPLY OF DRUGS AND LEGAL HIGHS

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1. The case of REBELO concerned a business run by the Defendant (D) which sold the highly toxic chemical DNP as a food supplement which promoted weight loss. On 4th April 2015, a 21 year old woman, called Eloise Aimee Parry (EP) purchased 250mg DNP tablets from him through the internet. She subsequently died on 12th April 2015 as a result of having taken them. She died of DNP toxicity. That was the verdict of HM Coroner and the finding of the jury. D was prosecuted by the Harrow Council within whose area D's centre of distribution was located. RICHARD BARRACLOUGH QC and GORDON MENZIES were instructed to prosecute as homicide, regulatory and food law specialists.
2. The defendant was convicted of selling unsafe food and manslaughter and sentenced to 7 years imprisonment.

3. This case may impact on the reluctance to prosecute for manslaughter of those who supply drugs and so called legal highs to young or vulnerable individuals who then die.

2.4 DINITROPHENOL ('DNP')

4. 2,4 Dinitrophenol ('DNP') is a synthetic benzene related chemical. It was originally used in the manufacturing of dyes, wood preservatives, photographic developers, explosives and insecticides. However, it has also been consumed as a '*fat burning*' and weight reducing drug. This is because the chemical blocks the normal processes by which energy is stored in the body which, in turn, causes energy to be released as heat. The result is that body temperature, metabolic rate, glycolysis (breakdown of glycogen energy stores) and lipolysis (breakdown of fat energy stores) all increase. As Professor Simon Thomas Professor of Clinical Pharmacology and Therapeutics at Newcastle University said:

'The drug works by preventing the cells in the body from making ATP. This is the chemical which stores energy in the cell. You need this for certain chemical reactions. You cannot make fat. You cannot do anything with the energy so it is released as heat. The heat is damaging. But also the lack of energy is also damaging as the body cannot do anything else'.

5. 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, sweating, abdominal pain, nausea, vomiting and diarrhoea progressing to worsening hyperthermia (high fever), rapid breathing and heart rate, dehydration, thirst, muscle rigidity and breakdown (rhabdomyolysis), acidosis and other chemical disturbances of the blood (for example high potassium or blood glucose). Kidney failure, liver failure, myocardial ischaemia or infarction, circulatory shock, coma, convulsions or cardiac arrest can occur in more severe cases.

6. The data available in relation to the effects of DNP are limited although experience indicates that DNP can cause fatalities after use of very modest doses. Most fatalities in the UK have occurred in the context of an acute overdose, although there have also been cases of death reported apparently arising from regular use. Studies quoted by Professor Thomas, identify that the doses involved in fatal acute ingestions were reported as 2.8g to 5g. The lowest weight adjusted dose reported in association with a fatality was stated to be 4.3mg/kg. Although there have been no specific studies which address the differential toxicology of DNP according to patient characteristics, Professor Thomas suggests that it is reasonable to assume that the risk of toxicity with DNP will be related to weight. The Head of Toxicology at the Food Standards Agency stated that case reports indicate lethality from doses of 3-50mg/kg bw/day. For example, for a 60kg/9.5 stone person 3mg/kg bw/day would be 180mg. A single capsule of 250mg of DNP could therefore provide the minimum lethal dose

7. Professor Thomas says:

“DNP is a chemical which can produce severe and potentially fatal toxic effects when consumed by humans. Risk is highest with larger doses, for example after acute overdose, but serious effects and deaths have occurred after use of doses recommended on websites.

DNP has not undergone appropriate development as would be appropriate for a pharmaceutical/medicinal drug. As a result of this lack of research no ‘safe’ dose has been established and there is no reliable evidence available on which to base dosing recommendations. Any human use of DNP may therefore be regarded as hazardous.”

In his evidence to the Court he described DNP as a frightening chemical because its effects were so unpredictable. Consuming DNP has been likened to playing Russian Roulette. As Professor Thomas reported, *‘Between 15% and 17% of those that referred (including those asymptomatic) will die. That is an enormous mortality. I cannot think of another poison which causes that amount’.*

8. Prior to 2012, this type of poisoning was very rare. Thereafter there has been an increase in the number of reported cases which suggests a rise in the use of DNP. The available statistics show that of the 87 reported cases of DNP poisoning between the years 2007 and 2017, 12 resulted in death. There were 6 deaths in 2015 alone.
9. Sharing of the available data collected by the National Poisons Information Service with Public Health England ('PHE') and the Food Standards Agency (FSA) resulted in warnings being published in November 2012, August 2013 and October 2013. The FSA, police and local authorities have also acted to restrict the illegal sale of DNP, focusing on internet sales. Educational work was also carried out, targeting places where DNP might be sold, such as gyms. Warnings were also provided to health professionals by PHE and Chief Medical Officers.
10. On 17/6/2003 the FSA issued "*urgent advice on consumption of "fat burner" capsules containing DNP*" in the following terms:

"The Food Standards Agency is issuing urgent advice to the public...following the identification of a serious problem with "fat burner" capsules containing DNP. This industrial chemical is known to have serious short term and long term effects on human health when eaten.

Independent toxicological experts advise that these capsules are extremely dangerous to human health.

Taking as few as three or four of these capsules (1000 mg of DNP) in one dose could result in death.

Smaller amounts (less than one capsule a day) taken over longer periods of time are known to have caused serious human health effects such as cataracts

The Food Standards Agency is therefore advising consumers not to take any product containing DNP at any level".

11. By 1/11/2012 the advice had developed and the FSA issued a "*warning about "fat burner" substances containing DNP*" in the following terms:

“Urgent advice has been issued by the Food Standards Agency to the public...following the deaths of two people believed to have taken a “fat burner” substance in tablet or powder form.

The substance contains DNP, an industrial chemical known to have serious short term and long term effects which can be extremely dangerous to human health.

The Food Standards Agency is therefore advising consumers not to take any product containing DNP at any level. This chemical is not suitable for human consumption...Depending on the amount consumed signs of acute poisoning could include nausea, vomiting, restlessness, flushed skin, sweating, dizziness, headaches, rapid respiration and irregular heartbeat, possibly leading to coma and death. Consuming lower amounts over longer periods over longer periods could lead to cataracts and skin lesions and effects on the heart and nervous system. Anyone who believes they may have taken DNP should seek medical advice immediately.”

12. The 2015 report of the National Poisons Information Service reported:

“DNP is an industrial chemical with a legitimate use in biomedical research and in the manufacture of other chemicals. Although not licenced as a medicine, DNP is sometimes taken orally by body builders to promote “fat burning” and may also be used more generally as a weight reducing agent. This is of great concern because DNP is highly toxic, causing fever which can be severe and lead to multi organ failure and death in spite of optimum medical treatment. Because of its severe toxicity the NPIS has been monitoring enquiries relating to DNP in recent years. Steep increases in the numbers ofenquiries and TOXBASE accesses in 2012 and 2013 were reported in our annual report for 2012/13. These prompted warnings to the public from the FSA and actions by the Police and local authorities to restrict the illegal sales of DNP.....The FSA’s national Food Crime Unit also launched an operation during 2015 to tackle online sales of DNP and close several websites....The situation needs to be kept under close review because of the severity of toxicity associated with DNP. Of

77 cases discussed in telephone enquiries with NPIS since 2008 11 (14% 7 male 4 female) are known to have died including six reported to NPIS during 2015."

13. On 29/4/2015 Interpol issued an Orange Notice in respect of DNP describing DNP as:

"a dangerous and well known substance which is also used as a base material in the composition of certain explosives. This product was used in the 1930s to stimulate metabolism and induce weight loss but was quickly withdrawn because of its severe side effects and specifically its high risk of mortality which resulted in the deaths of numerous patients. In the 1980s medical teams attempted to reintroduce DNP as a nutritional supplement. However it was once again withdrawn following the death of a patient and the doctor responsible was convicted. Over the past several years and even very recently DNP has resurfaced on the black market. The product's toxicity and the significant risk of mortality associated with its consumption remain a cause for concern for pharmaceutical and medical specialists. Not only is consuming the product dangerous in itself but combining it with other performance enhancing drugs...multiplies the risks for the consumer. Besides being inherently dangerous the risks of consuming DNP are compounded by the fact that DNP is usually produced in clandestine laboratories in questionable sanitary conditions. Manufacturers not only have a poor grasp of the preparation process but they also expose consumers to risks of potential overdose...In the present case the DNP had been ordered from the website "drpharmaceuticals.com"...The following was printed on the box: "Health and Beauty Turmeric capsules Extra Strength 125 mg each capsule. Contains 125 mg of Turmeric Powder".

THE OFFENCES

14. The product is 'food' by virtue of the definition provided in Article 2 of Regulation EC 178/2002 as it is a substance or product intended to be or reasonably expected to be ingested by humans. It does not fall within any of the exceptions provided for by that Article, including the exception relating to medicinal products as was confirmed by the

evidence given by the Medicines and Healthcare Products Regulatory Agency ('MHRA'). In particular there is insufficient to bring this substance within either the category of substances or products which are presented as having properties for treating or preventing disease or those substances which may be used for modifying physiological functions in a beneficial way.

15. DNP is '*unsafe*' within the meaning of Article 14 of Regulation (EC) 178/2002 in that it is injurious to health and unfit for consumption.
16. Rebelo established and ran a business which advertised DNP for sale on the internet and placed it on the market and distributed it for consumption by humans. The product was unfit for human consumption, injurious to health and ultimately potentially lethal.
17. Rebelo was therefore guilty of an offence under the 2013 Regulations.
18. The base unlawful act for the purpose of unlawful act manslaughter was therefore the act of placing an unsafe product on the market for human consumption.
19. For the purpose of gross negligence manslaughter, he owed a duty of care not to place such a product on the market for the purpose of human consumption. In gross breach of that duty he placed the product on the market with the intention that it be consumed by individuals seeking to lose weight. He advertised and encouraged its consumption for this purpose knowing that it was unfit for human consumption, injurious to health and potentially lethal.
20. Both the unlawful act and the gross breach of their duty of care caused EP who lacked capacity and was a vulnerable individual, to die when she consumed the product which she had bought from the defendant. It is the question of capacity which impacted on the decision to have two counts of manslaughter as will become clear later.

MANSLAUGHTER- ONE OR TWO COUNTS

21. Lord Hope in A-G REF (No 3 of 1994) 1998 AC 245 said that:

“Criminal homicide is divided by the common law into the two separate crimes of murder and manslaughter. Manslaughter itself can be divided into various categories, depending on the context for the exercise. In regard to mens rea it is usually convenient to distinguish between (1) cases where the defendant intended to injure the deceased and (2) cases where the defendant had no such intention. Within the first category there are the cases (a) where he intended to cause grievous bodily harm to his victim but his criminal responsibility is reduced on the ground of provocation at the time of the act; and (b) where he intended to cause only minor harm to the victim but death ensues as a result of his act unexpectedly. Within the second category there are the cases (a) where the defendant's act was not unlawful but the death of the victim was the result of negligence of such a gross nature as to be categorised as criminal; and (b) where the defendant's act was both unlawful and dangerous because it was likely to cause harm to some person”

22. Lord Atkin in ANDREWS V DPP 1937 AC 576 at 581 stated:

“...of all crimes, manslaughter appears to afford most difficulties of definition for it concerns homicide in so many and so varying conditions....the law...recognises murder on the one hand based mainly though not exclusively on an intention to kill and manslaughter on the other hand based mainly though not exclusively on the absence of intent to kill but with the presence of an element of unlawfulness which is an elusive factor”.

23. Manslaughter is set purposely wide because there is a policy need for the many and varied situations involving homicide outside murder to warrant the intervention of

the criminal law. Unsurprisingly such a wide approach results in a considerable overlap between the different forms of manslaughter as recognised by the Court of Appeal in **WILLOUGHBY [2005] 1 WLR 1880** *“.....as a matter of law, the two categories of manslaughter, by an unlawful and dangerous act and by gross negligence, are not necessarily mutually exclusive. In some circumstances a defendant may be guilty of the offence by both routes (para 19)... A verdict of manslaughter may depending on the circumstances, be appropriate both by reason of an unlawful and dangerous act, and by reason of gross negligence (para24)”*.

24. The reference to a verdict being appropriate both by reason of unlawful act and by gross negligence suggests that it may be appropriate in certain circumstances to combine both elements in a single count. This appears to be recognised in **EVANS [2009] EWCA Crim 650** where the Court of Appeal emphasised the importance of not compartmentalising what is a wide offence. In **EVANS** (para 21) referring to **WILLOUGHBY** it was stated: *“Gross negligence manslaughter and unlawful act manslaughter are not necessarily mutually exclusive... Care must be taken to avoid the risk of allowing the convenience of addressing the different circumstances in which manslaughter may arise to be converted into a compartmentalised, mutually isolated series of offences, each inconveniently described by the same word “manslaughter””*.

25. **SIMESTER** speaks of the role of the courts in cases of involuntary manslaughter (page 408):

“The various ways in which liability for involuntary manslaughter may arise are not explicable by reference to any conceptual scheme or overarching principle. They merely reflect the assessments of judges down the years of which killings merit a punitive response. To an extent the wide scope of involuntary manslaughter is a function of the complete sentencing discretion that judges are permitted at common law; D may receive anything from an absolute discharge to life imprisonment.”..

26. The difference in evidential burden in relation to awareness as between unlawful act and gross negligence manslaughter is that in unlawful act manslaughter, D having

committed the unlawful act, the safety net is the **CHURCH 1966 1 QB 59** test of dangerousness (the risk of some injury would have been obvious to the reasonable person). For gross negligence manslaughter, once duty and breach are proved D must be proved to be aware of the risk of death.

27. Thus the use of two counts of manslaughter permits the judge to sentence, knowing the key elements of the offence as found by the jury.

UNLAWFUL ACT MANSLAUGHTER

28. For a conviction for unlawful act manslaughter it must be established (see **KENNEDY NO 2**) that:

- i. D committed an unlawful act;
- ii. Such unlawful act was a crime;
- iii. D's unlawful act was a significant cause of the deceased's death.

29. The Court in **CHURCH** stated :

"...the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject to the other person at least the risk of some harm resulting therefrom albeit not serious harm".

The test of dangerousness is objective.

30. REBELO was engaged in the distribution of an unsafe food. The substance is injurious to health. Thus he was guilty of this base offence under Food Safety and Hygiene (England) Regulations 2013 Regulation 19.

MENS REA IN UNLAWFUL ACT MANSLAUGHTER

31. The only mens rea required is an intention to do the unlawful act and any fault required to render it unlawful. Negligence is not a prerequisite to guilt save where the base offence is one of negligence.
32. **ANDREWS V DPP 1937 AC 576** the base offence charged was reckless driving (RTA 1930 S11) which resulted in death. Lord Atkin said that it was “...*only necessary to consider manslaughter from the point of view of an unintentional killing caused by negligence, that is, the omission of a duty to take care*” . “*Simple lack of care such as will constitute civil liability is not enough*”. Gross negligence as per **BATEMAN (1927) 19 Cr.App. R 8** is required. The Road Traffic Act imposed a penalty for driving without due care and attention, for reckless driving and driving at a speed or in a manner which is dangerous. Lord Atkin said: “*I entertain no doubt that the statutory offence of dangerous driving may be committed though the negligence is not of such a degree as would amount to manslaughter if death ensued*”. He went on to say that “*There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter*”.
33. The House was considering an unlawful act which had as its essential ingredient degrees of negligence. The House made it plain that in such a case the hurdle to be crossed by the Prosecution is not simple negligence but the **BATEMAN** gross negligence.
34. A sensible reading of **ANDREWS** suggests that only crimes of more than mere negligence will suffice to ground an unlawful act manslaughter. As the Court of Appeal said in **LOWE 1973 QB 702**: “...*the speech of Lord Atkin is in the widest terms and is clearly intended to apply to every case of manslaughter by neglect.*”
35. Thus in **ANDREWS 2002 EWCA CRIM 304** where D injected insulin into V in order to give him a “rush” the judge made it plain “*that the basis of the Crown case on manslaughter was not negligence but rather that the appellant had committed an*

unlawful and dangerous act which caused the death of the deceased” (para 4). The base offence was S58 Medicines Act 1968 which provided that “no person shall administer (otherwise to himself) any such medicinal product unless he is an appropriate practitioner or a person acting in accordance with the directions of an appropriate practitioner”. The argument that consent provided a defence was rejected by the Court of Appeal. The fact that the base offence was strict liability was not challenged on appeal.

36. The House of Lords in **KENNEDY (No 2)** put no gloss on the definition of unlawful act manslaughter.

37. Thus the Court in REBELO ruled that it is acceptable to construct a charge of manslaughter charge on a base regulatory crime (whether or not strict liability) where negligence is not a necessary ingredient.

38. The safety net in unlawful act manslaughter is the **CHURCH** direction approved in **DPP V NEWBERRY [1977] AC 500** “...an unlawful act causing the death of another cannot simply, because it is an unlawful act render a manslaughter verdict inevitable. For such a verdict inexorably to follow the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to at least the risk of some harm resulting therefrom, albeit not serious harm”.

39. Thus whilst there is no requirement that the defendant foresaw harm, a defendant cannot be guilty unless the crime involves an act which all sober and reasonable people would inevitably recognise entailed the unjustifiable risk of harm to others. There must be a likelihood of harm and not a mere possibility. The type of harm is “some” harm and not necessarily serious harm or death

40. In this case the sober and reasonable person would be entitled to take into account not that EP was vulnerable but that at least some of those taking this chemical are likely to be vulnerable because they are obsessed with losing weight.

CAUSATION AND DALBY

41. The Defence relied on DALBY [1982] 1 WLR 425 for the proposition that the act must be “*directed at*” V (victim) and that death must be an immediate and inevitable result of the unlawful act. They relied on the fact that the DNP was supplied on the internet and thus there was no immediacy in the supply which linked it with V as a direct act.
42. The court in GOODFELLOW 1986 83 CR APP R 23 said that Waller LJ in DALBY was “*intending to say that there must be no fresh intervening cause between the act and the death*”. This reflects KENNEDY (NO 2). See also WILLOUGHBY and WATSON, 1989 89 CR APP r 211 where the acts resulting in death were not “*aimed*” at V.
43. SIMESTER at page 361/2 discuss DALBY in the following terms:

“In the now discredited case of DPP V SMITH the House of Lords spoke in terms of an act “aimed at the victim” as a defining element of the crime of murder. That requirement, if such it ever was, did not survive the later decision of the House in HYAM. Yet in DALBY Waller LJ.....incorporated this limitation into the definition of constructive manslaughter.....The validity of this requirement was soon tested against the facts of MITCHELL where D began a fight with E in a crowded post office. In the ensuing fracas V a frail old lady was crushed to death. D’s manslaughter conviction was confirmed by the Court of Appeal notwithstanding that D’s violence was directed at E and not V. All that was required was a criminal and dangerous act which was a legal cause of V’s death, an approach followed by the Court of appeal in GOODFELLOW and vindicated by the House of Lords in A-Gs REFERENCE (NO 3 OF 1994) 1998 AC 245”.

44. It has been said that a better reason for ruling out manslaughter in DALBY is the absence of any causal nexus between the defendant’s act of supply and V’s subsequent death. V was aware that he was injecting drugs into his blood stream; it was a fully informed decision. V’s intervention amounted to a novus actus breaking

the causal chain. This justification in DALBY was suggested in MITCHELL 1982 1ALL ER 916.

45. SIMESTER (414) concludes:

“Despite the rejection of the “aimed at” requirement the result in DARBY can now be defended on the basis of the absence of a causal nexus between D’s act of supply and V’s subsequent death. Following the decision of the House of Lords in KENNEDY (No 2) the fully informed and voluntary decision of V in injecting drugs into his blood stream will break the chain of causation.”

CAUSATION IN THE SENSE OF VOLUNTARY CONSUMPTION

46. The defendant argued that the chain of causation was broken because as in the drugs cases, EP voluntarily consumed the chemical knowing its dangers and thus accepted the risk of death; that the decision to consume the chemical was the decision of a person of sound mind able to make her own decision.

47. This has often been the justification for declining to prosecute cases involving death resulting from the ingestion of drugs supplied by another whether they be controlled or non-controlled. We suggest that such an approach needs to be re-examined. Careful consideration should be given to whether the consumer lacked capacity in relation to the decision whether or not to take the substance or, perhaps more importantly, was vulnerable. It can readily be appreciated how often legal highs and similar substances are taken by those who are young, uninformed and vulnerable in any number of social contexts.

48. In KENNEDY (NO 2) Lord Bingham said *“The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who are for any reason not fully responsible for their actions and the vulnerable and it acknowledges situations of duress and necessity as also of deception and*

*mistake. But generally speaking informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act...causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arise....Lord Hoffman (**in EA (FORMERLY NATIONAL RIVERS AUTHORITY V EMPRESS CAR CO (ABERTILLERY) LTD 1999 2 AC 22)**) made clear that common sense answers to questions of causation will differ according to the purpose for which the question is asked; that one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule”.*

The answer to the certified question is “in the case of a fully informed and responsible adult, never (para 25)”

49. The court in the case of REBELO was entitled to consider as a backdrop the purpose of the legislation prohibiting the placing of unsafe food on the market. It is not dissimilar to the legislative purpose of the Medicines Act as in the case of **ANDREWS (2002)**.

THE EVIDENCE ON THE ISSUE OF CAPACITY

50. As regards unlawful act manslaughter the prosecution must prove that either EP lacked capacity in the sense that by reason of an impairment or disturbance of the mind she was unable to weigh up the decision making process. When considering mental capacity the Mental Capacity Act 2005 ('MCA') was considered. There is no doubt but that EP understood the information she had gathered about DNP and her decision to take it; she was able to retain that information. She was an intelligent young woman. The problem is that her mental condition was such that she could not rationally and appropriately use or weigh that information when deciding whether to consume it.
51. Put in a common sense way the idea that this young woman was able to weigh everything and make a rational decision to take DNP appreciating the danger, knowing

that it might kill her and yet deliberately and freely took it made no sense. She was unable to control herself.

52. Alternatively that she was vulnerable as described by law and in truth she had no real free will in or control over what she was doing. The two concepts overlap.

53. The essence of the case is that her free will was fettered. She knew just how dangerous this product was. She was however so coerced by the effect of her condition and the effect of DNP, that her free will was sapped, she could not control herself and the consumption of DNP. Thus her ability to exercise free and informed consent was compromised.

DR ROGERS

54. Her condition was described by a Consultant Forensic Psychiatrist Dr Tim Rogers. It is not a question of her being able to communicate with friends and the professionals who were treating her; or that she was able to study and indeed was capable of attaining a First class degree; or that she could run her finances. Nor was it a question of her being intelligent and articulate and had ambition. Incapacity is decision specific. It was her decision to take the DNP which was the focus of the inquiry into her capacity.

55. Anorexics and those suffering an eating disorder may be very intelligent but unable to make rational decisions about their condition.

56. In fact, the MCA Code of Practice envisages this very situation when giving guidance to professionals on assessing someone's ability to weigh or use information. *"A person with the eating disorder anorexia nervosa may understand information about the*

consequences of not eating. But their compulsion not to eat might be too strong for them to ignore.”

57. Dr Rogers explained the similarities and differences between anorexia and bulimia, but made it clear that a morbid dread of fat was a common factor in both disorders.
58. In the opinion of Dr Rogers, EP was not someone who had the proper capacity to make decisions relating to use of this chemical. In his view she was someone who was aware of but unable to properly weigh the dangers of using DNP. He reported:

“In my view, when her presentation is carefully examined, it is apparent that most of the features of psychological dependence were apparent in Ms Parry in relation to the effects and rewards of DNP. Indeed, she recognised and suggested this phenomenon to professionals on several occasions prior to her death, as above.

11.6 In my view it is the issue of (c), her ability to use or weigh information as part of the process of making a decision to use DNP that is of concern. Emotionally unstable personality disorder, defined under F60.3 in ICD-10², confers by definition a tendency to act impulsively and without consideration of consequences: a person’s mood is unpredictable and capricious. There is a liability to outbursts of emotion and an incapacity to control the behavioural explosions. There are also disturbances in self-image, aims and internal preferences, including in relation to physical appearance and diet. Bulimia nervosa also appears in ICD-10. It is a syndrome characterised by repeated bouts of overeating and an excessive preoccupation with the control of body weight, leading to a pattern of overeating followed by vomiting or use of purgatives. This disorder shares many psychological features with anorexia nervosa, including an over concern with body shape and weight. The psychopathology of both bulimia and anorexia nervosa is characterised by a pervasive, morbid dread of fatness. The patient sets themselves a sharply defined weight threshold, well below that which constitutes an optimum or healthy weight. When they see their own appearance they perceive and are convinced by a distortion of their true body image. This belief has a fixed, unshakable and quasi-delusional quality.

11.7 In my opinion, a mental state in which a disordered person: acts without consideration of consequences; is unable to perceive their true body image and; is overwhelmed by a pervasive, morbid dread of fatness; is not one in which they can be said to be able to effectively use or weigh information about the dangers of taking a lethal weight loss drug. It is apparent from Ms Parry's notes that there is a range of opinion here, but, I disagree with the opinions quoted by others in paragraphs 10.4 and 10.10, on the basis set out above. In my view Ms Parry was aware of but unable to weigh the dangers of using DNP in making the choice to do so.

11.8 If the Court accepts, as above, that Ms Parry demonstrated psychological dependence on the effects of DNP, this would have further impaired her ability to effectively take account of and weigh information about the risks, despite having an intellectual awareness of them....

Although it is not my view that she was capacitous, had she had capacity in terms of decision making about DNP, the additional problems she probably experienced with self esteem, personal identity, the maintenance of a hopeful outlook for the future, negative emotions, stable relationships and the perception of caring support (and more) would all have had the potential to explain the making of choices that were simply unwise in her. It is my view that the Court should consider Ms Parry to have been a vulnerable person in this sense".

59. When he reviewed her life history he concluded:

'This contributed to the development in her of an emotionally unstable personality disorder in which there was a marked tendency to act impulsively without consideration of the consequences, together with affective instability. Her ability to plan ahead was likely to have been impaired, together with outbursts of intense anger that seem frequently to have been directed at herself. She also suffered from clinically significant periods of low mood, reflected in serious suicide attempts as well as episodes of self-harm in other contexts. Although it is not my view that she was capacitous, had she had capacity in terms of her decision making about DNP, the additional problems she probably experienced with self-esteem, personal identity, the

maintenance of a hopeful outlook for the future, negative emotions, stable relationships and the perception of caring support (and more) would all have had the potential to explain the making of choices that were simply unwise in her. It is my view that the Court should consider Ms Parry to have been a vulnerable person in this sense.'

60. The trial judge directed the jury as follows:

"Generally, informed adults of sound mind are regarded by the law as autonomous (self-regulating) beings, able to exercise free will and decide for themselves how they will act – I will call this the "presumption of autonomy". Therefore, if Eloise Parry was able to make a free, informed and deliberate decision to take DNP on 12 April 2015, her act of swallowing the capsules - however unwise it might have been - would relieve the defendant of criminal responsibility for her death. This is because her autonomous act would be an intervening event between the supply of DNP and her death.

The law, however, recognises certain exceptions to the presumption of autonomy, including those acting under duress, the very young or those who for any reason are vulnerable and not fully responsible for their actions. It is not disputed that Eloise Parry was informed as to the dangers of DNP and that she took it deliberately, but the prosecution submit that her choice was not a free one. You have heard evidence that Ms Parry suffered from the eating disorder bulimia nervosa and had an emotionally unstable personality disorder; you also heard that she was, at the relevant time, psychologically dependant on DNP. You heard this evidence because the prosecution claims that, as a result of these disorders:

- i. she lacked capacity to make the decision because she could not use or weigh up the information which she had in making the decision; or*
- ii. she was vulnerable and unable to make an autonomous (self-regulating) decision to take DNP.*

To put it more simply, she was unable to exercise free will in making her decision to take DNP, despite her knowledge of the dangers, because of her compulsion to take it. If the prosecution makes you sure of this (the burden being on them), there would be no intervening act and the defendant would bear responsibility for her death.”

61. The categories of vulnerability are not restricted to eating disorders.

GROSS NEGLIGENCE MANSLAUGHTER

62. The Prosecution’s case was that the Defendant distributed the DNP on the black market and cynically and with a view to substantial profit encouraged the consumption of a toxic product intending that it be consumed and knowing of its dangers. It is toxic at any dosage. EP consumed the chemical and died.

63. The fact that there may be a “vast” number of individuals who wish to lose weight as was suggested by the Defence, and that the product is distributed on line is irrelevant in terms of criminal liability. The law is not reluctant to condemn a variety of acts in manslaughter e.g. eccentric forms of sexuality which result in death (**PIKE 1961 Crim LR 547**).

64. The test for gross negligence is set out in **ROSE [2017] EWCA Crim 1168**:

“In the circumstances, the relevant principles in relation to cases of gross negligence manslaughter can be summarised as follows:

(1) the offence of gross negligence manslaughter requires breach of an existing duty of care which it is reasonably foreseeable gives rise to a serious and obvious risk of death and does, in fact, cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to go beyond the requirement of compensation and to amount to a criminal act or omission;

(2) there are, therefore, five elements which the prosecution must prove in order for a person to be guilty of an offence of manslaughter by gross negligence:

(a) the defendant owed an existing duty of care to the victim;

(b) the defendant negligently breached that duty of care;

(c) it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death;

(d) the breach of that duty caused the death of the victim;

(e) the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction;

(3) the question of whether there is a serious and obvious risk of death must exist at, and is to be assessed with respect to, knowledge at the time of the breach of duty;

(4) a recognisable risk of something serious is not the same as a recognisable risk of death, and

(5) a mere possibility that an assessment might reveal something life-threatening is not the same as an obvious risk of death: an obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation.

A further point emerges from the above analysis of the authorities which is particularly germane to the present case: none of the authorities suggests that, in assessing either the foreseeability of risk or the grossness of the conduct in question,

the court is entitled to take into account information which would, could or should have been available to the defendant following the breach of duty in question. The test is objective and prospective.”

65. The defendant as retailer owed a duty to the public and thus to EP not to place the product on the market intending it to be consumed as a slimming agent, knowing the dangers inherent in so doing.
66. The defendant “*played some causative part in the train of events that ...led to the risk of injury*” and owed a “*duty to take reasonable steps to avert or lessen the risk which may arise*” (**MITCHELL V GLASGOW CC 2009 2 WLR 482**) referred to in **EVANS** at para 18).
67. The duty of care is not restricted to professional relationships (see **EVANS** and the cases referred to **ADOMAKO [1995] 1 AC 171 ; MILLER [1983] 2 AC 161; WILLOUGHBY; WACKER [2002] EWCA Crim 1944**). 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). For a case where the criminal courts have accepted a simple civil law duty see **WINTER AND WINTER 2010 EWCA CRIM 1474**.
68. The judge directed as a matter of law that the defendant owed a duty of care to consumers. Once the Court finds that it is open to the jury to find that there was a duty of care it is for the jury to decide the issue (**EVANS**)

DOES KENNEDY (NO2) APPLY TO GROSS NEGLIGENCE MANSLAUGHTER

69. It was stated in the case of **KENNEDY No 2** at para 6 that:

“It is well-established and not in any way controversial that a charge of manslaughter may be founded either on the unlawful act of the defendant (“unlawful act manslaughter”) or on the gross negligence of the defendant. This appeal is concerned only with unlawful act manslaughter and nothing in this opinion should be understood as applying to manslaughter caused by gross negligence”.

70. See also **EVANS** (a case of omission liability) para 16 and referring to that case *“Her involvement in the supply to her sister of the fatal dose of heroin could not found a conviction for manslaughter on the basis of her unlawful and criminal act. (R V KENNEDY No 2) an authority expressly stated to have no application to gross negligence manslaughter”*

71. **EVANS** refers to a chain of causation in the following terms:

“The principle was recently summarised by Lord Scott of Foscote in Mitchell v Glasgow City Council [2009] UKHL 11; [2009] 2 W.L.R. 481 at [40], where he said:

“Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that have led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise”.....(Referring to various authorities):

“These authorities are consistent with our analysis. None involved what could sensibly be described as manslaughter by mere omission and in each it was an essential

requirement of any potential basis for conviction that the defendant should have failed to act when he was under a duty to do so. The duty necessary to found gross negligence manslaughter is plainly not confined to cases of a familial or professional relationship between the defendant and the deceased. In our judgment, consistently with Adomako and the link between civil and criminal liability for negligence, for the purposes of gross negligence manslaughter, when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise."

72. See also **EMPRESS** referred to in **KENNEDY (No 2)**: The court in **EMPRESS** commented on causation in the following terms:

"The first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty of an offence or liable in damages.....

Not only may there be different answers to questions about causation when attributing responsibility to different people under different rules.....but there may be different answers when attributing responsibility to different people under the same rule."

"... one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. Does the rule impose a duty which requires one to guard against, or makes one responsible for, the deliberate acts of third persons? If so, it will be correct to say, when loss is caused by the act of such a third person, that it was caused by the breach of duty. In Stansbie v. Troman [1948] 2 K.B. 48, 51-52, Tucker L.J. referred to a statement of Lord Sumner in Weld-Blundell v. Stephens [1920] A.C. 956, 986, in which he had said:

"In general . . . even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the

occasion for B's mischievous activity, B then becomes a new and independent cause."

Tucker L.J. went on to comment:

"I do not think that Lord Sumner would have intended that very general statement to apply to the facts of a case such as the present where, as the judge points out, the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened."

73. Thus the approach is substantially different as between unlawful act and gross negligence manslaughter.

74. In REBELO the judge gave the following direction as regards causation and **KENNEDY (NO 2)**

"There is..., a different emphasis to intervening acts and causation than in UAM above. The focus in GNM is on the failure of a defendant to take reasonable care to guard against that which in fact happened as a result of his acts or omissions. It is the prosecution's case that, by indiscriminately placing DNP on the market, the defendant created a situation that was foreseeable - that persons with eating disorders and/or distorted body image were likely to use and/or misuse it and die – the very thing which, they say, happened. For this reason, whether Ms Parry was lacking in capacity or was vulnerable is of potentially less significance than in UAM.

However, if you were of the view that her decision to take DNP in the quantity she did was so unreasonable, despite her mental disorders, that it eclipsed the defendant's grossly negligent breach of the duty of care (if that is what you were to find it to be), then you could conclude that it constitutes an intervening act".

APPENDIX

On an application made pre trial to quash the relevant part of the ruling is as follows:

1. *"The indictment contains two counts.*

Count 1 alleges that the defendants' placed food, namely DNP, on the market which was injurious to health or unfit for human consumption, contrary to Article 14 of Regulation (EC) 178/2002 and Regulation 19 of the Food Safety and Hygiene (England) Regulations 2013.

Count 2 alleges manslaughter contrary to common law. It is alleged that the defendants, on 12 April 2015, unlawfully killed Eloise Parry in that:

- i. they placed on the market and distributed for consumption by humans a product containing DNP;
- ii. the product was unfit for human consumption or injurious to health and potentially lethal;
- iii. in so placing the product on the market they acted unlawfully.

And/or

- iv. they owed a duty of care to consumers at large not to place the product on the market for the purpose of human consumption;
- v. in gross breach of that duty of care they:
 - a) placed the product on the market,
 - b) in particular with the intention that it be consumed by those who might wish to use the product as a slimming agent,
 - c) advertised and encouraged the product to be so consumed by humans and in particular as a slimming agent,
 - d) knowing that the product was unfit for human consumption, injurious to health and potentially lethal,
 - e) without any appropriate warning.

Further:

- vi. Eloise Parry was a vulnerable individual who consumed the product and in particular the DNP which caused her death.

2. *It can be seen immediately that i – iii above allege an unlawful and dangerous act as founding liability for manslaughter, whereas iv – vi alleges gross negligence as the foundation. The unlawful act alleged at (iii) above is the offence in count 1. It is this which the defence submit is objectionable, in that liability for manslaughter is founded upon a regulatory offence involving strict liability.*

The submissions

3. Miss Gerry's submissions in support of her application to quash count 2 are succinct and to this effect:
- i. *the criminal courts have limited criminal liability in unlawful and dangerous act manslaughter (UDAM) to those cases where the unlawful act itself is dangerous or is performed in circumstances rendering it dangerous, in the sense that it places a person in immediate and inevitable danger.*
 - ii. *The acts of 'placing the food on the market' and/or 'distribution' do not create the necessary liability either as a question of causation or in relation to the scope of liability. The scope of liability based on a strict liability base offence carries no safe legal foundation and the scope of liability would be far too wide (potentially encompassing all consumer protection regulations). Such an extension of liability is a matter for Parliament when considering, at least, the Law Commission reports.*
 - iii. *For UDAM the unlawful act must be against the criminal law. All elements of the unlawful act must be present. If there is no unlawful act, there can be no conviction for unlawful act manslaughter.*
 - iv. *In respect of gross negligence manslaughter (GNM), the criminal courts have limited criminal liability for individuals in GNM to those cases where there is a formal relationship that creates a duty to act with reasonable care and skill (e.g. doctor, prison officer, parent) or where there is a voluntary assumption of such a duty, including where the accused deliberately commits a wrongful act that places another person, or a particular class of person, in immediate danger.*
 - v. *To establish liability for GNM the prosecution must establish that the defendants had knowledge of the essential facts, including knowledge of the circumstances of the deceased.*
 - vi. *The court should not permit criminal liability in GNM where the act is of online distribution to a person unknown. To extend liability this far is a matter for Parliament and not the court.*
 - vii. *The courts must have regard to the wider issues of general criminal liability and whether those issues are for the common law or parliament. In respect of the instant allegation the following propositions apply:*
 - a) *aside from questions of fact, as a matter of law, given the lack of immediacy, there is no offence of UDAM and insufficient proximity of breach necessary for GNM.*
 - b) *The act of placing on the market and/or distribution is not sufficiently 'dangerous' for UDAM liability.*
 - c) *The potential liability the prosecution seeks to create is too wide for the criminal courts, particularly without further Parliamentary debate and decision-making.*

4. Mr Barraclough, on the other hand, submits as follows:

- i. *For a conviction for UDAM it must be established¹ that:*
 - a) *D committed an unlawful act;*
 - b) *such unlawful act was a crime;*
 - c) *D's unlawful act was a significant cause of the deceased's death;*

¹ Kennedy (No 2) [2007] UKHL 38

- d) *the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to at least the risk of some harm resulting therefrom, albeit not serious harm.*
- ii. *The only mens rea required is an intention to do the unlawful act and any fault required to render it unlawful. It is therefore acceptable to construct a charge of manslaughter on a base regulatory crime when negligence is not a necessary ingredient.*
- iii. *The safety net is the **Church**² direction, viz “an unlawful act causing the death of another cannot simply, because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the un-lawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to at least the risk of some harm resulting therefrom, albeit not serious harm”.*
- iv. *So far as GNM is concerned, the prosecution does not seek to extend the scope of liability and the law does not prevent charging GNM in circumstances such as these, where a dangerous and toxic chemical is placed on the market with the intention that it be ingested by humans.*
- v. *It is not necessary, for GNM to be established, that the defendants had knowledge of the particular circumstances of the deceased. What has to be established is:*
- a) *a duty of care to the deceased,*
 - b) *a negligent breach of that duty,*
 - c) *it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death,*
 - d) *the breach of that duty caused the death of the victim,*
 - e) *the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.*

The defendants as retailers owed a duty of care to the public, and therefore to the deceased, not to place a food supplement on the market intending it to be consumed by those who may wish to use it as a slimming agent, knowing the dangers inherent in so doing.

Judgement

Unlawful and Dangerous Act Manslaughter

5. *It is settled law that to establish liability for UDAM, the accused’s act must be unlawful, in that it is a crime in its own right. It is not suggested that regulation 19 of the Food Safety and Hygiene Regulations 2013 does not create a criminal offence. Ms Gerry’s submissions reflect academic criticism of the current state of the common law, as*

² [1966] 1QB 59

encapsulated in the following passage by the editors of Blackstone's Criminal Practice 2018³:

The unlawful act must be an act which is unlawful in itself rather than one which is unlawful because of the negligent manner of its performance. Thus, driving without due care and attention does not count as an unlawful act for these purposes (Andrews v DPP [1937] AC 576, per Lord Atkin at p. 585), otherwise unlawful act manslaughter would swallow up both the statutory offence of causing death by dangerous driving and also killing by gross negligence in the context of road traffic deaths. Perhaps a better way of excluding driving without due care and attention would be to say that the unlawful act must be an offence which requires the proof of full mens rea in the sense of intention or recklessness or some equally culpable state of mind. This would have the merit of also clearly excluding offences of strict liability (e.g., under health and safety legislation) which happen to result in death. Such situations should only be capable of amounting to manslaughter (and are only so treated) if they come within the gross negligence head.... Unfortunately, in Andrews [2003] Crim LR 477, the Court of Appeal treated the strict liability offence under the Medicines Act 1968 of administering a prescription only medicine (in this case insulin, in order to give someone a 'rush') as a sufficient unlawful act [my emphasis].

6. *Critical though the editors are, they clearly acknowledge the current law and it is the current state of the common law that I am concerned with. I am in no doubt that UDAM encompasses, as a base offence, regulatory offences such as that engaged here. Insofar as Regulation 19 creates a crime of strict liability, it is worth noting that it is not an 'absolute' offence in that Regulation 12 provides for a due diligence defence. It is not, therefore, an offence that can necessarily be committed without any element of 'fault'.*
7. *Nor does this conclusion, in my judgement, create too wide a liability. Those people who will be affected by a breach of the regulation are consumers of the product. This is a relatively limited and, in this case, identifiable group and precisely those that Parliament has sought to protect by implementing the Regulations. Furthermore, the Church direction limits liability for UDAM to those cases where there is an objective risk of harm.*
8. *Finally, in respect of UDAM, I do not accept that the criminal courts have limited criminal liability in such cases to those where the unlawful act itself is dangerous, or is performed in circumstances rendering it dangerous, in the sense that it places a person in immediate and inevitable danger. Whilst it is correct to point out that examples of UDAM featuring in Court of Appeal judgements may have this characteristic, I do not understand these to be taken as limiting the scope of the offence in the way suggested. Far from it being the role of Parliament to extend liability for UDAM, it seems to me that it is Parliament that could (and Professor Ormerod would say, should) limit it.*

Gross Negligence Manslaughter

9. *Turning to gross negligence manslaughter, I am not persuaded that the courts have limited its scope in the way submitted. Whilst it is usual to see GNM used in cases of professionals performing caring roles, these are simply specific examples where a duty of care is virtually inevitable. Furthermore, although "knowledge of the essential facts" is*

³ Para. B1.53

relevant to establishing a duty of care, and foreseeability of risk from breach of that duty, it does not extend, in my judgement, to knowledge of the particular circumstances of the deceased. It seems to me that there are very good reasons why the law should permit criminal liability for GNM resulting from online distribution of unsafe food supplements to consumers. The safeguard for the defendants is found in the very high thresholds contained in the elements of the offence at 14(v) above, in particular (c) and (e). Proof of these elements will depend upon the evidence put before, and accepted by, the jury.

Duplicity

10. *Although not strictly duplicitous, count 2 undoubtedly alleges one offence which can be committed in one of two ways - or even both, as they are not mutually exclusive. However, it seems to me that if the jury was to convict, it would be impossible to know on what basis they did so. Ordinarily it might be thought that GNM is more serious than UDAM based on a regulatory offence, although the underlying facts in this case are essentially identical.*
11. *A further consideration is the possibility of an appeal based on my ruling in respect of UDAM and GNM above. If both types of manslaughter remained in one count and there was a conviction, the Court of Appeal would be in no better position than anyone else in determining the basis on which the jury reached its verdict. In my judgement, whilst there is always the possibility of some jurors being sure of GNM and others of UDAM, potentially resulting in a "hung jury", that possibility is remote in this case.*
12. *Count two must be split into two counts, one alleging GNM and one alleging UDAM. Whilst the order of counts in the indictment is a matter for the prosecution, thought should be given to the order so that verdicts are clear and unambiguous."*

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