



OPERATION ROCHESTER

Draft Guidance for Medical Experts

Overview.

Operation ROCHESTER is an investigation by Hampshire Police into the circumstances surrounding the deaths of elderly patients at Gosport War Memorial Hospital.

Nine such cases are subject to ongoing investigation. The brief to medical experts in this respect is to examine the medical records and to comment upon the standard of care afforded to those patients in the days leading up to their death against the acceptable standards of the day. Where appropriate, if the care is found to be sub optimal comment upon the extent to which it may or may not disclose criminally culpable actions on the part of individuals or groups.

falls below acceptable standards

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It may be the case that the experts determine that the standard of care afforded was acceptable.

Conversely it may be determined that the standard of care delivered to those patients was either sub optimal, negligent or intended to hasten or end life.

Whatever the view of the experts, their statements of evidence/reports should be constructed with the following principles in mind:-

cannot give evidence of intention - could seem would be obvious to be reasonably competent person that would hasten death.

- 1) What treatment should ^{have} been proffered in each individual case? Experts should cover in their report the basic conditions of a particular disease and how the symptoms present themselves. They can then go on to describe how the condition would **normally** be treated in their own experience, referencing to recognised protocols of the day.
- 2) When creating reports the experts must bear in mind 'plain speak'. Whilst it is important to be professionally correct, opinions are likely to be challenged by defence experts. Equally reports should be set out in a way that allows for the police/counsel etc to dissect the report and ask for further work or clarification.
- 3) Experts should have an understanding of the terms Criminal Gross Negligence, and Unlawful Act within the context of Homicide. Language used to describe negligence should be consistent, and if appropriate able to demonstrate why one act is more negligent than another and the level of negligence.

Criminal standard will apply, 'sure, beyond reasonable doubt' and that it should be clear when opinions and/or findings are expressed whether they are to that standard or less certain.

- 4) Experts need to be clear from the outset that the language to be used in these cases will apply to the criminal standard of proof 'sure beyond all reasonable doubt' 'causative' etc, not 'balance of probabilities.'
- 5) Consideration must be given to explaining the use of statistical information in reports and what the statistics are seeking to establish.
- 6) Referenced documentation supporting any report must be included.
- 7) Analysis of supplementary paperwork such as prescription charts/fluid charts/observation charts needs to be undertaken. Paperwork differs from ward to ward let alone hospital to hospital. Ensure that if experts are commenting on procedures that have been carried out and are critical that they have already documented what procedures should have been in place and carried out in *their* experience. They cannot assume that the practices they follow are the same as the ones used by the staff at this hospital. They must spell things out.
- 8) Expert will be supplied with copies of relevant hospital protocols / procedures.

In order to assist experts with an understanding of the law the following passages may be relevant during their determinations.

MANSLAUGHTER BY UNLAWFUL ACT.

The following statements in respect of manslaughter resulting from an unlawful act are established:-

- a. Death must be the result of an unlawful act, not omission. *The act must be criminal*
- *the unlawful act must be the cause or a substantial cause of the death.*
 - b. The unlawful act must be one which all sober and reasonable people would inevitably realise must subject the victim to at least the risk of some harm resulting there-from even though it may not be serious harm.
 - c. It is immaterial whether or not the accused knew that the act was unlawful and dangerous and whether or not harm was intended.
 - d. Harm means physical harm.

The House of Lords have approved the following for the meaning of unlawful act.

"Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter."

MANSLAUGHTER BY GROSS NEGLIGENCE

The court in the case of R v Adomako (1993) created the following test for such manslaughter:

- (a) Was there, in the circumstances, a duty of care owed by the defendant to the deceased (assuming the Judge has ruled that on the facts such a duty was capable of arising)?
- (b) Was there a breach of that duty?
- (c) Did that breach ^{or significantly contribute} cause the death of the deceased ~~or was there a foreseeable risk of death by reason of it (R v Singh, 19/2/99)?~~ X
- (d) Should the breach of duty be characterised as gross negligence and therefore characterised as a criminal act? *The risk that has to be foreseeable is a risky death*

This ruling has become the standard test for such cases and it is important therefore that it is taken into account when reports are compiled.

This criminal offence can be complicated to prove. In medical based enquiries clinical experts can assist the authorities in assessing whether an offence has been committed by addressing certain key areas in their reports. The most important area for a clinician to comment upon is causation. With this point in mind consideration needs to be given as follows:-

For causation to be proved, the unlawful actions of the potential defendant need not be the only cause of death, nor the main cause provided they amount to a more than minimal cause of, or contribution to death. '

For any homicide, the burden is on the Crown to prove beyond reasonable doubt that the act (or omission) 'caused death in the sense that it more than minimally, negligibly or trivially contributed to the death' (the 'de minimis' rule). Unless the crown can establish that the act or omission was a cause of or a substantial contribution to the death, an essential link in the chain of causation is not established.

Murder.

Murder is defined at common law as 'where a person of sound mind and discretion unlawfully kills any reasonable creature in being with intent to kill or cause grievous bodily harm.'

Unlawfully means without legal justification or excuse.

Lawful conduct would be bona fide surgical or medical treatment.

The defendant's Act must be the substantial cause of death. Must not be so insignificant as to be dismissed by the court on the ~~de~~minimus principle. 2

27th July 2004.

COMMENTS ON DRAFT GUIDANCE TO MEDICAL EXPERTS

Overview.

In the second paragraph it is inappropriate to ask the experts to give an opinion on “the extent to which [the care provided] may or may not disclose criminally culpable actions ...”. What would be permissible and desirable is an opinion as to how far below acceptable standards or practice the care falls.

Similarly, at paragraph four, it is not admissible for the expert to give an opinion as to whether the defendant “intended to hasten or end life”. Any opinion should be limited to for example, stating that it would have been obvious to the reasonable person in the defendant’s position that their actions would hasten or end life.

In describing the standard of proof required for the prosecution to prove its case at paragraph numbered 4), the following alternative wording is suggested:

When reading the statements of the experts the prosecutor will be looking to apply the criminal standard of proof namely, the evidence to prove any element of the offence must be sufficient to satisfy the jury so that they are sure, or satisfied beyond reasonable doubt. Experts should bear this in mind when expressing opinions or findings so that it is clear as to the level of certainty they can give. Is it for example, only to the level of more likely than not (i.e. on the balance of probabilities), or to the higher level, of being sure so that other reasonable possibilities can be excluded.