



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Draft Guidance for Medical Experts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*

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*
- 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. *the unlawful act must be the cause or a substantial cause of the death*
- 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.

UNLAWFUL ACT MANSLAUGHTER

'Unlawful act' manslaughter requires that:

- (a) the killing must be the result of the accused's unlawful act, though not his unlawful omission. It must be unlawful in that it constitutes a crime. A lawful act does not become unlawful simply because it is performed negligently. The act must be a substantial (more than minimal) cause of death, but not necessarily the only operative cause (see "Causation" below);
- (b) the unlawful act must be one, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm resulting there from, albeit not serious harm;
- (c) it is immaterial whether or not the accused knew that the act was unlawful and dangerous, and whether or not he intended harm; the mens rea required is that appropriate to the unlawful act in question; and
- (d) "harm" means physical harm.

(Church [1966] 1 QB 59, DPP v Newbury [1977] AC 500, Goodfellow (1986) 83 Cr App R 23)

GROSS NEGLIGENCE MANSLAUGHTER

"Gross negligence" manslaughter require the satisfaction of a four stage test:

- (a) The existence of a duty of care owed by the defendant to the deceased;
- (b) A breach of that duty of care, which
- (c) Causes (or significantly contributed to) the death of the victim (see "Causation" below);
- (d) And the breach should be characterised as gross negligence and therefore a crime.

(Adomako [1994] 3 All ER 79)

The standard and the breach are judged on the ordinary law of negligence. Those with a duty of care must act as the reasonable person would do in their position. The test is objective. It does not matter that the defendant did not appreciate the risk, provided that such a risk would have been obvious to a reasonable person in the defendant's position. The risk in question is a risk of death.

CAUSATION

When prosecuting for an offence of homicide, there are a number of elements the Crown has to prove, and has to prove them to the criminal standard ie 'beyond

reasonable doubt.' One of those is the element of 'causation'. In simple terms this means that the prosecution must prove that the death was 'caused' (wholly or in part) by the defendant and ought to be straightforward but '(W)here the law requires proof of the relationship between an act and its consequences as an element of responsibility, a simple and sufficient explanation of the basis of such relationship has proved notoriously elusive.' - *R v Cheshire* [1991] 3 All ER 670.

Recent experience in the Casework Directorate has identified causation as a difficult element to prove in certain types of cases. These are typically, but not exclusively, cases involving medical negligence and deaths in custody. This paper considers some of the issues that have arisen and whether the approach so far adopted by the Casework Directorate is correct.

The classic statement on causation in manslaughter was provided by the present Lord Chief Justice in *R v HM Coroner for Inner London, ex parte Douglas-Williams* (1998) 1 All ER 344:

"...that the unlawful act caused death in the sense that it more than minimally, negligibly or trivially contributed to the death.

"In relation to both types of manslaughter it is an essential ingredient that the unlawful or negligent act must have caused the death at least in the manner described. If there is a situation where, on examination of the evidence, it cannot be said that the death in question was [not] caused by an act which was unlawful or negligent as I have described, then a critical link in the chain of causation is not established. That being so, a verdict of unlawful killing would not be appropriate and should not be left to the jury."

(There is an additional 'not' in the penultimate sentence, otherwise the sentence does not make sense.) It can be seen from this that the prosecution **must** be able to link the act to at least **an** operative cause of death. It is not sufficient to say that it **may have been** a cause of death.

Hastening/acceleration of death

This can be one of the most difficult aspects of causation. The 'hastening' or 'acceleration' of death and whether depriving a person of the opportunity to live can be a cause of death.

Death is inevitable. Any **action** that brings that day forward can therefore be said to have hastened or accelerated death and will itself be a cause of death. The case most often cited for such a proposition is *R v Dyson* [1909] 1 Cr App R 13. There the defendant had assaulted a child in November 1906 and December 1907. The child died in March 1908 but the charge of manslaughter did not specify the date of the assault (the 'year and a day' rule was then in force.) The child's condition had deteriorated as a result of the 1906 assault but the court said that the judge should have directed the jury to consider 'whether the appellant accelerated the death by his injury of December 1907'. In allowing the appeal the court said that 'it was not absolutely certain that the death had been accelerated' by the second assault as 'death may have been due to a fall'.

This is not a controversial proposition as it is simply a question whether the later act of the defendant brought about the death. Even if the deceased is dying (subject to the *de minimis* rule in *Sinclair*), if the defendant's act shortens life, causation is proved.

De minimis

It would not be sufficient to prove causation if the Crown could only show that the victim would have survived 'hours or days in circumstances where intervening life would have been of no real quality.' It is this meaning that is taken when referring to the *de minimis* rule. For example, if 'V' is dying, is in a coma, on life support and the defendant's act or omission brings forward the date of that inevitable death by hours or even days, if it can be said that there was 'no real quality' of life in that intervening period, the *de minimis* rule would apply. This is to be contrasted with a situation whereby the act or omission caused the coma and ensuing death or where there was a significant period between the act or omission and the ensuing death. It is not possible to be more definite as to the duration here but if 'V' survived in that state for more than a few days, *de minimis* would not apply and the ordinary rule of causation would do so instead.

Multifactorial

The insuperable difficulty comes when the doctors cannot say when or even if he may have died even if treated appropriately. This may be because they do not know the underlying cause of the illness or there are numerous factors present at death and it is not possible to identify which, if any had an operative influence on the death. In instances such as these, the death may be certified as 'multifactorial'. Although such a term should provide a warning to a prosecutor as to proof of causation, it does not necessarily mean that we cannot prove causation. If we can prove that one of the operative causes of death was due to the act or omission of the defendant, then this is sufficient to prove causation. Causation does not require that the particular cause would have caused death on its own, provided it is sufficient to be an operative **contribution** to the cause of death. Therefore, if the doctor in citing 'multifactorial' says that death was caused by a combination of factors and that factor 'X' was a more than minimal **contribution** to death (even if on its own it would not have caused death), if 'X' was caused by the act or omission of the defendant, we can show causation. This is so even if any one of the other factors would have been sufficient to have caused death on their own. This is an area that needs to be carefully analysed.