

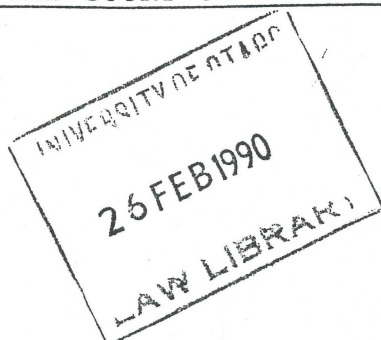
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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 119/89



THE QUEEN

v.

NAMSIVAYAM YOGASAKARAN

Coram: Cooke P.
Richardson J.
Casey J.
Bisson J.
Hardie Boys J.

Hearing: 27 November 1989

Counsel: D.B. Collins and Gaeline E. Phipps for
Appellant
J.C. Pike and Karen L. Clark for Crown

Judgment: 21 December 1989

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This case arises out of a tragic accident which occurred in the Te Kuiti Hospital on 16 September 1987. A woman had undergone gall bladder surgery. For a number of reasons she was a high risk patient. After the operation, while she was still under general anaesthetic, an emergency arose. She was biting on the tube in her mouth and having difficulty in breathing. Dr Yogasakaran, the anaesthetist, quickly decided to inject her with a drug called Dopram (a trademark for a preparation of doxapram hydrochloride). The evidence is that this was a proper method of treatment. He opened the top drawer of the anaesthetic drugs trolley and from among the array of drugs he took a packet. In a number

R v Yogasakaran

of statements he has consistently said that it was in the drawer at the place labelled Dopram; the prosecution has not disputed this and there is no evidence to the contrary. Out of the packet he took one of five plastic containers, peeled off at least partly the lid of that container and removed a plastic ampoule containing 5 millilitres of a clear colourless liquid. He broke the top off the ampoule, inserted and filled a syringe and injected the contents into the patient. In fact, unknown to Dr Yogasakaran, the drug was not Dopram but dopamine (more fully dopamine hydrochloride, also known by the trademark Intropin). It was entirely unsuitable for the purpose and administered in this quantity was a massive overdose. The patient died in consequence.

The inference is that whoever had stocked the trolley may have placed dopamine in the place in the drawer labelled Dopram. In fact there may have been no Dopram in the drawer. Dopamine is not a drug normally kept in the drawer. In the second of his two police statements, a statement taken on 12 January 1988, the doctor said 'It was given in some haste because the patient was biting on the endotracheal tube - because of the haste I didn't have time to check it properly. I went by the label on the drawer of the trolley - not by the label on the box'.

In New Zealand Dopram is supplied in a 20 millilitre vial or bottle through the cap of which individual doses for

intravenous injection are drawn by syringe. The bottle is packed in a small white-and-green cardboard box with the word 'Dopram' prominent in its lettering. The bottle itself has a pink label, the larger print on which reads 'Dopram Injectable'. The dopamine which Dr Yogasakaran used by mistake was in a yellow-and-white rectangular cardboard packet, the first line of the larger print on which reads 'Dopamine Hydrochloride Injection'. The plastic containers holding the ampoules are orange; each container is sealed by a printed peel-off label including the words 'Dopamine Hydrochloride Injection'. The ampoules themselves similarly have printed on them, among other words, 'Dopamine Hydrochloride Injection', but a fairly close inspection is needed to make out these words. Dr Yogasakaran had never personally had the need to administer dopamine. Dopram is apparently more commonly used by anaesthetists and he had been in the practice of using it from time to time. It now appears that his acknowledgment to the police of the extent of prior use by him in New Zealand, which was referred to in evidence at the trial, was rather exaggerated, but nothing turns on this.

At the trial the defence produced evidence, although not from Dr Yogasakaran himself, that in England, where he had been employed previously as an anaesthetist, Dopram is marketed in ampoules in flat rectangular blue-and-white packets. There was a suggestion for the defence that this could have contributed to the doctor's mistake. He himself

did not refer to this aspect in either of his police statements or in a report to the Medical Superintendent of the Hospital, dated 18 September 1987. He did not give evidence at his trial.

He was charged with manslaughter and tried before a Judge and jury in the High Court at Hamilton. The jury found him guilty and he appeals against his conviction. As has been said very often, manslaughter is a crime varying greatly in gravity. In this instance the trial Judge was satisfied that there were extenuating circumstances to such an extent that he merely gave effect to the jury's verdict by treating the accused as convicted and discharged him without sentence (as authorised by s.20 of the Criminal Justice Act 1985). He recognised, however, that conviction of such an offence is itself a serious penalty. That is true and the conviction may carry the risk of other consequences for the appellant, although it is to be hoped that any authority dealing with him in any other context will note that the circumstances were regarded by the Court as so special that no sentence needed to be imposed. Indeed the Crown asked for none.

The full charge was as follows:

NAMSIVAYAM YOGASAKARAN at Te Kuiti on the 16th day of September 1987 having undertaken to administer medical treatment namely the administration of a drug to Donna Lemburg did omit without lawful excuse to use reasonable knowledge skill and care in doing such act, thereby causing the death of the said Donna Lemburg.

The charge was laid under ss.155, 160(2)(b) and 171 of the Crimes Act 1971. These provisions operate in combination:

155. Duty of persons doing dangerous acts - Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

...

160. Culpable homicide -

...

(2) Homicide is culpable when it consists in the killing of any person -

...

(b) By an omission without lawful excuse to perform or observe any legal duty;

...

171. Manslaughter - Except as provided in section 178 of this Act, culpable homicide not amounting to murder is manslaughter.

Negligence in the Law of Manslaughter

The Judge directed the jury repeatedly that to establish a breach of a duty of care under s.155 sufficient to ground a manslaughter verdict the prosecution must show an omission by the doctor to exercise such care as was reasonable in all the circumstances. That direction accords with the actual language of the Act and the judgments of at least four of the six members of this Court who sat in R. v. Dawe (1911) 30 N.Z.L.R. 673 and the unanimous judgments of

the seven members who sat in R. v. Storey [1931] N.Z.L.R. 417. At least since Storey's case it has been understood to be settled law in New Zealand that under our Crimes Act, superseding the common law, no more than ordinary negligence need be proved to warrant a finding of manslaughter in breach of the duty under what is now s.156 (as to the duty of persons in charge of dangerous things). The language of ss.155 and 156 is the same as far as is material. In Storey at 435 Myers C.J. expressly said that the test under both sections is reasonableness. He went on to say - and the judgments of the other members of the Court were to the same effect -

This term cannot be defined, but the standard must be set in each particular case by the jury by applying their common-sense to the evidence as to the facts of the case and any admissible expert evidence that is adduced. The standard should be neither too high nor too low: it should be a 'reasonable' standard, the standard of skill and care which would be observed by a reasonable man. I desire, however, expressly to say that, while I think, having regard to s.171 of the Crimes Act and to what was said in Dawe's case, there is no distinction in New Zealand between negligence as the foundation of criminal liability and negligence as the foundation of civil liability, it follows that, under that section as under s.170, a mere mistake or error of judgment which should in a civil action prevent an act or omission from being imputed as negligence is equally as good a defence on a criminal charge involving negligence.

The argument for the appellant is nevertheless that Storey should not now be followed and that the Judge should have directed that what was required was 'a high degree of negligence', 'gross' or 'culpable' negligence. The main

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grounds of counsel's argument were that the standard of the duty set in Storey is inconsistent with the standard of criminal negligence applied in Australia, the United Kingdom and Canada; that, as was said by the High Court of Australia in Callaghan v. R. (1952) 87 C.L.R. 115 about a similar section, the section must be construed in the context of a criminal code dealing with major crimes involving grave moral guilt; and that the forerunner of the present s.155 was intended to reproduce the common law at the time when what is often called the Stephen code was prepared. For the common law at that time Mr Collins cited R. v. Spencer (1867) 10 Cox C.C. 525 where, on an indictment for manslaughter against a medical man for administering poison by mistake, Willes J. directed that the prosecution had to show 'such gross and culpable negligence as would amount to a culpable wrong, and show an evil mind...' and R. v. Noakes (1866) 4 F. & F. 920, a similar case against a chemist, where Erle C.J. also distinguished in his direction between civil and criminal negligence.

It is convenient to dispose of the historical point at once. True it is that the English Criminal Code Commissioners in their 1879 Report, which has often been referred to by this Court, said that they believed that the relevant Part of their Draft Code would be found to state in a clear and compendious form the unwritten law; and that one of their number, Sir James Stephen, in his History of the Criminal Law of England (1883) vol.2, 108-9, vol.3, 1-23,

was (later at any rate) of the opinion that there was 'a distinction of a somewhat indefinite kind' and that for homicide by omission to be criminal 'There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability'. See also his direction to the jury in R. v. Doherty (1887) 16 Cox C.C. 306. Mr Pike for the Crown pointed out to us, however, that the Draft Code had a long gestation and that Reports of the Criminal Code Commissioners in 1834 and 1845 on which it had probably drawn had adopted the simple test of a reasonable degree of caution. He cited for example British Parliamentary Papers on Criminal Law, vol.3, p.1263. Further, Mr Pike pointed to reports of cases of the first third of the nineteenth century which suggested that then and in previous centuries ordinary negligence was enough for manslaughter at common law: Tessymond's case (1828) 1 Lewin 169 (negligence of chemist's apprentice); Nancy Simpson's case (1829) 1 Lewin 262 (person not having medical education taking on herself to administer medicine though qualified person available).

The net result of all this is inconclusive. If the 1879 Commissioners had given their attention to the point it is hardly possible to believe that they would have been content with words such as 'reasonable care' and 'omitting without lawful excuse to discharge that duty' to indicate, that the duty for the purposes of manslaughter was merely not to be grossly negligent. Moreover, in the end the

provisions of the New Zealand Crimes Act should be given their natural and ordinary meaning in their context unless that produces some result so incongruous that Parliament cannot have intended it. Due weight has to be given to the fact that the context is criminal law, which was the major influence in the result reached in Australia in Callaghan, but the argument for the appellant based on the intention of the 1879 Commissioners reduces to speculation or is a two-edged sword and seems to us to help not at all.

What is of much more moment is that the law of New Zealand as declared in Dawe and Storey is clearly different from the common law of England and the codified law as interpreted in Australia and Canada. We have already mentioned the leading Australian case. The common law of England has undoubtedly come to distinguish between civil and criminal negligence. A high authority in which in a case of a manslaughter charge against a medical practitioner the decision turned on the need to show gross negligence, coupled with recognition that it is a question of degree leaving much to the jury, is Akerele v. R. [1943] A.C. 255 in the Privy Council. For Canada, see the judgment of the Supreme Court in R. v. Baker [1929] 2 D.L.R. 282. Subsequent statute law in Canada appears to have expressly adopted the distinction: see for instance R. v. Rogers (1968) 65 W.W.R. 193. The fact that New Zealand law has been out of line with such a widespread trend must give one pause before reaffirming it.

It should be mentioned that since the coming into force of the Accident Compensation Act 1972 negligence causing personal injury by accident has ceased to be actionable in civil law in New Zealand; but that development has no real bearing on the present question.

One factor telling against abandoning this rule of our criminal law as previously settled, however, is that there are apparently uncertainties or difficulties in jurisdictions where the law is different. In England, at least since R. v. Lawrence [1982] A.C. 341 and R. v. Caldwell [1982] A.C. 510, there may be confusion about whether there exists a gross negligence test separate from Lawrence recklessness. Smith and Hogan on Criminal Law, 6th ed. 352-5, discuss the question and the recent cases, saying that writers trying to elucidate the law have experienced great difficulty in doing so. R. v. Seymour [1983] 2 A.C. 52 and Kong Cheuk Kwan v. R. (1985) 82 Cr.App.Rep. 18 bring out that the common law of England in that and related areas has become far from simple. In Australia Professor Howard in his Criminal Law, 4th ed. 101, comments that the High Court has not yet ventured upon its own definition of criminal negligence. By contrast the New Zealand law as hitherto understood has at least been straightforward.

In theory the New Zealand rule might seem at first sight too severe, but in practice its effect is mitigated by the necessity for the Crown to prove causative negligence

beyond reasonable doubt. Juries do not lightly find manslaughter by negligence and there is the exceptionally wide judicial discretion as to penalty already mentioned. We are not aware of any case, including the present, in which the long-standing rule in New Zealand has produced an unjust result. If a charge of manslaughter were brought against a medical practitioner based on wrong diagnosis or treatment the defendant would normally be entitled to a direction that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion, even though other doctors adopt a different practice. See the House of Lords cases of Maynard v. West Midlands Regional Health Authority [1985] 1 All E.R. 635 and Sidaway v. Board of Governors of Bethlem Royal Hospital [1985] A.C. 871.

The circumstances in which this Court should be willing to reconsider one of its own previous decisions have not been the subject of full argument or judgment in recent years. There was some discussion in Collector of Customs v. Lawrence Publishing Co. Ltd [1986] 1 N.Z.L.R. 404. Probably we should be rather readier to do so in the criminal field in the interests of the liberty of the subject or to avoid injustice to the accused: compare R. v. Taylor [1950] 2 K.B. 368. But, in our opinion, in the light of the various considerations already mentioned, the grounds for departing from the decisions in Storey and Dawe are not strong enough to justify our altering the rule so firmly stated in those

cases. Indeed it might savour of the presumptuous to differ from an interpretation of the Act which was clearly open and was adopted unequivocally by so many of our predecessor Judges. Accordingly we think that Storey should be reaffirmed and the first ground of appeal rejected.

A secondary submission for the appellant is that there is no identifiable need for medical persons to be held criminally liable for every omission. That of course is not the law: a failure to exercise reasonable care must be shown. As already indicated, a medical person acting in accordance with a professionally accepted standard of diagnosis or treatment will normally be protected. That apart, to the extent that the submission may hint at some special protection for doctors there can be no need or warrant for it. Just as a person in charge of a thing which, in the absence of precaution or care, may endanger human life is under a duty to take reasonable precautions, so a doctor should be. One cannot imagine that the medical profession with their high traditions would contend otherwise.

The trial, the summing up, the jury's deliberations (as shown by a question asked by them) and to a minor extent the hearing of the appeal were complicated by a submission for the appellant based on the words in s.155 'except in case of necessity'. That exception is plainly intended to cover the case of persons unqualified or insufficiently

qualified who in emergencies undertake surgical or medical treatment or the like. It is not intended to emancipate a professional medical practitioner from the exercise of reasonable professional care and skill in an emergency. Instant decisions may have to be taken in an emergency; that must be a major factor to be kept prominently in mind in determining whether there has been a failure to live up to the appropriate professional standard. The statutory exception, however, was needlessly introduced into the present case.

Something was attempted to be made in argument for the appellant of the fact that the Transport Act contains provisions as to causing death by reckless or dangerous driving which afford a basis for prosecution alternative to manslaughter. It is well known that such provisions have been thought needed because of the reluctance of juries to convict of motor accident manslaughter. The availability of the alternative in motoring cases can have no bearing on the present case. If anything it merely underlines that juries do not readily find manslaughter by negligence.

Counsel for the appellant criticised the Judge's directions to the jury, assuming that Storey's case is to be followed, on the ground that the Judge should have told them that s.155 is not breached by 'mere carelessness': that the Judge should have said that-the duty is breached if the accused's omissions would not have been made by a reasonably

skilful and competent practitioner placed in the same circumstances. We regard this as something of a quibble. The Judge emphasised time and again that the issue was what care was reasonable in the particular circumstances. He told them to forget about knowledge and skill, because the doctor was a skilful man. Referring to the onus on the prosecution he said '... has it satisfied you that there was an omission by the doctor to exercise such care as was reasonable in all the circumstances'.

It could not seriously be thought that the task of the jury would have been understood by them to be any different if a reference to a reasonably careful and skilled anaesthetist had been expressly included in the directions of that kind.

The Reasonableness of the Jury's Verdict

It is contended for the appellant that the jury's verdict is unreasonable and cannot be supported having regard to the evidence. During the argument in this Court Mr Collins added the ground that there was no evidence that the accused's omission would not have been made by a reasonably skilful and competent practitioner placed in the same circumstance as the accused. The addition followed a reference from the bench to the Sidaway case.

The anaesthetist was not responsible for the stocking of the drawer and the argument for him was of course that

especially in an emergency he was entitled to act rapidly on the assumption that the drug he picked up was the one supposed to be in that position. Two specialist anaesthetists were called as witnesses, Dr R.C. Clark for the Crown and Dr H.T. Spencer for the defendant. Dr Clark said that it is usual of course to check the labelling on ampoules or bottles from which one is drawing drugs for administration to a patient. In cross-examination he acknowledged that an emergency such as faced the defendant could be a situation where the anaesthetist would not carefully check the ampoules. Dr Spencer stressed the need for instant reaction in an emergency, giving the example of a motorist suddenly confronted by a child running across the road. In his cross-examination the following passages occur:

Do you mean to say you would inject either of those for instance without checking you had the right one? Again it depends how you define checking. Make sure to see you had the right one for the purpose you require it. You do do that don't you? Again it depends, you can check something with meticulous care if you have all the time in the world, the standard of checking when up against emergency situation in everyday life.

...

In emergency situation you would still have to make sure you had the right drug because of the situation you are dealing with so you wouldn't make it any worse if you were to administer the wrong drug? You would certainly reach for the drug in the appropriate labelled compartment, you would see that a glance I would hope. You would take the drug and look at it quickly to check. Check writing on ampoule.
To find out name of drug?
It's a glance check.

To find out name of drug?

Yes.

You would check that regardless of circumstances to check you had right drug to administer on occasion? As I said before the speed with which you check may be different in different situations.

But you would still check wouldn't you?

You would look at the label.

...

Would you in any circumstances administer drug to person without checking the drug you were administering?

I would certainly hope I would not.

You would always check the drug, label, identity of the drug you were administering?

As I said before certainly according to the degree of checking.

Do you always ensure that the drug you are administering is the one you are intending to administer?

I always check drugs for that purpose.

And the way you check for that purpose is to read the label on the container?

Certainly to look at and if possible to read.

No point in looking at it if you can't read it because wouldn't be certain what is in it?

I am trying to distinguish careful reading when in planned situation and when you are ready for something, perhaps in emergency, it is fear we all have that in glancing at drug we miss something vital, and it is inevitable with speed one has to react sometimes and I am trying to put it at realistic level...

Considering the expert evidence as a whole, we are satisfied that the jury could properly find that, even in the kind of emergency that arose, the practice of reasonably skilled and careful anaesthetists would be to make at least a quick check of the labelling or packaging on the drug to be injected. The defendant did not claim that he made any such check, only that he went by the labelling in the drawer. The limited evidence of accepted professional standards contains no suggestion that this is enough.

Further, the issue is one on which evidence of accepted professional standards would not necessarily be conclusive. It is not a technical question as to diagnosis or treatment but a simple question whether an elementary precaution should have been taken. In the end it is the kind of issue which a jury in a criminal case is well capable of deciding. We do not think that the Sidaway and Maynard cases warrant any different approach. What happened in the present case was a great misfortune for the doctor as well as the patient, but the jury were entitled on the evidence to find as they did.

For these reasons the appeal must be dismissed.

R B Cooke P.

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