12 pages.

ROYAL COURT
(Samedi Division) 57.

Judgment reserved - 6th January, 1995
Judgment delivered - 24th March, 1995

Before: The Deputy Bailiff, Single Judge.

Attorney General

- v -

Anthony Kevin Hall

Preliminary point of law: in a case of alleged involuntary manslaughter involving a breach of duty, must the prosecution prove that the defendant acted with gross negligence or, alternatively, "recklessly" in the sense in which that adverb was employed in R. v. Lawrence (1981, 1 All ER 974 and adopted by the Royal Court in A.G. v. O'Neill (1992) JLR 234.

The Attorney General.
Advocate T.J. Le Cocq for the accused.

JUDGMENT

THE BAILIFF: I am sitting to determine a short but important point of law in relation to the prosecution of Anthony Kevin Hall for an offence of manslaughter. The defendant has pleaded not guilty to the indictment and his trial is due to commence before the criminal assizes on Monday 27th March, 1995.

I pause here to interpose that a minor piece of legal history has been made. This is, so far as I am aware, the first occasion upon which the Court has sat to determine a preliminary point of law in a criminal case before the jury has been empanelled. Generally such issues are determined at a trial within a trial.

However there is no statutory bar in the Loi (1864) réglant la procédure criminelle to proceeding in this way, provided of course that the defendant is present in conformity with Article 72. Both the Attorney General and Counsel for the defendant urged me to adopt this course and it seemed to me sensible and proper to do so. The ruling which I am about to deliver will enable both prosecution and defence to prepare for the trial with knowledge of the way in which I propose to direct the jury as to the ingredients of the offence of manslaughter in a case of this kind.

The question at issue is whether, in a case of alleged involuntary manslaughter involving a breach of duty, the prosecution must prove that the defendant acted with gross negligence or, alternatively, that the defendant acted 'recklessly' in the sense in which that adverb was employed is the English case of R. v. Lawrence (1981) 1 All ER 974 and adopted by this Court in Attorney General v. O'Neill (1992) JLR 234. The Attorney General contends for the first alternative while counsel for the defendant contends for the second. A layman might well interject "What is the difference?" but, as will appear below, lawyers and judges have contrived to cut much hay from this particular field.

The first matter with which I have to deal however, is the applicability of the doctrine of *stare decisis* in this jurisdiction. As I have indicated, very similar arguments were addressed to this Court not long ago in the case of Attorney General v. O'Neill. The Attorney General submits that that case was wrongly decided and that I should depart from it. Mr. Le Cocq, for the defendant, submits that O'Neill, as a decision of a Court of co-ordinate jurisdiction, should be followed unless I am convinced that it was "plainly wrong". He makes the further submission that in a small jurisdiction such as this, where reported decisions on points of law are infrequent, a reasoned judgement should be imbued with greater weight than might be the case in England and should not be departed from lightly.

The leading Jersey case on the subject is Attorney General v. Weston (1979) JJ 141. In the course of his judgment, Crill DB (as he then was) stated:-

> *"We think that the present position of the Inferior Number in relation to other judgments in pari materia of the same Court is similar to that of judges in the English jurisdiction in relation to judges of co-ordinate courts. It is interesting to note that the Jersey Court of Appeal in Shales v. Jersey Granite & Concrete Company Limited (1967) JJ 755 at p.758, said "The practice followed by the Inferior Number in proceeding to judgment is closer to that followed by a judge giving his own judgment" and that the Court of Appeal would have regard to the principles applied in the Court of Appeal in England on appeals from*

a judge of the High Court sitting without a jury. It is true of course, that that case was concerned with facts as found by the Inferior Number. As regards decisions of co-ordinate courts in England there is a passage in Halsbury, 4th edition, Vol. 22 at para.1689 which sets out the position. It is as follows:

> *'Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong'.*

We think that that is a description of the proper relationship which should apply in Jersey between the co-ordinate courts of the Inferior Number in matters of law at least. Accordingly, unless Mr Bailhache can satisfy us that Pennington was wrongly decided we propose to follow it. The Attorney General submitted that before we could do so we would have to be satisfied that Pennington was plainly wrong; that the consequences of holding it to be right would be far reaching in the sense that injustice would ensue and that there was an urgent necessity to correct an error which must be manifest. We find that none of those matters can apply to the Royal Court's decision in Pennington."

Mr. Le Cocq drew some support for his first submission from the last two sentences of the extract cited above. He urged that Crill DB had adopted the view of the Attorney General of the day and found that there was a distinction between being satisfied or convinced that a decision was "wrong" and being satisfied or convinced that a decision was "plainly wrong".

The Attorney General agreed that there was such a distinction in that a finding that a previous decision was "plainly wrong" amounted to a commentary on the quality of that previous decision. To be satisfied that a previous decision was "wrong" was simply an expression of the judge's own state of mind. He submitted that Crill DB in Weston did not make a finding that he had to be satisfied that the previous decision was "plainly wrong".

I accept the Attorney General's submission on this point. In my judgment the passage cited above, taken as a whole, is consistent only with the conclusion that the test is that set out in the extract from Halsbury. Before I can depart from the law laid down in O'Neill I have to be convinced that the judgment was

wrong. As to Mr. Le Cocq's second submission I agree that I should not lightly depart from a previous decision of this Court. But that is not to say that a previous decision should be imbued with any greater weight in this jurisdiction than would be the case in England. If a judge of this Court is convinced that a previous decision is wrong, he is not required to apply it merely because this is a small jurisdiction and practitioners clasp precedents gratefully to their bosoms. If a judge is convinced that a previous decision is wrong, he has a duty to depart from it and to apply the law as he conceives it to be. Any resulting inconsistency is a matter for the Court of Appeal to resolve.

I turn now to the decision in O'Neill. That, like this case, was also one involving alleged 'motor manslaughter', although it appears that the argument took place upon a slightly different footing. In O'Neill the then Solicitor General argued that "What the Crown had to prove .... was no more than grave fault on the part of the accused, such as dangerous driving to the public danger; and depending on the degree of that fault there [was] .... a hypothetical sliding scale in accordance with which the Court would impose the appropriate sentence". In this case the Attorney General has submitted that what the Crown has to prove is that the defendant has been guilty of "gross negligence".

In the Court's judgment in O'Neill, Crill, Bailiff, reached the following conclusion.

> *"In my opinion, in order to establish criminal liability, the act upon which the Crown seeks to base that liability should go beyond a mere matter of compensation between subjects and show 'such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment' (Bateman 19 CR.App.R. at 13). Further, in Andrews v. DPP, Lord Atkin - a very famous judge indeed - having considered Bateman, went on to say this ([1937] AC at 583):*
>
> > *'Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualise a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all embracing, for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in*

the means adopted to avoid the risk as would justify a conviction'.

The Jersey statutory offences of "dangerous driving" and "careless driving" do not require mens rea, but, in my opinion, the statutory offence of "reckless driving" under Article 14 of the Road Traffic (Jersey) Law 1956, as amended, does. Article 13 of that Law also allows a jury which acquits an accused person of manslaughter to convict him of an offence under Article 14. This could mean one of two things. First, that the jury was not satisfied as to the degree of culpability necessary to convict the accused of manslaughter but might convict him instead of an offence under Article 14. If it did so and brought in a verdict of guilty of dangerous driving, then it would have had to apply its mind purely to the physical activity of the vehicle and nothing more. If, on the other hand, it bought in a verdict of reckless driving under Article 14, it would have had to apply its mind, in my opinion, not only to the different degree necessary - if, indeed, it is different - to convict under that article in respect of recklessness, but also to the penalties set out in that article and to the penalties "at large", so to speak, in respect of the common law crime. Moreover, the difference lies between causing death and not causing death. I find it difficult to accept that had the concept of recklessness been in our Road Traffic Law (or its 1934 equivalent), the Royal Court in Renouf would not have directed its attention to it in considering the law on manslaughter in respect of a motor vehicle, notwithstanding, as I have said, that that law is part of the general law.

In the instant case, the Crown has encapsulated the actus reus in the alleged dangerous driving to the public danger. It has not alleged reckless driving, but that degree of driving is, I believe, part of the offence of manslaughter in Jersey. If the jury is not satisfied with the high degree of fault which, I have already said, is required to be proved under Renouf, it can bring in a verdict under Article 14. If, I repeat, it does so on the ground of dangerous driving, the actus reus suffices; but if it does so on the grounds of reckless driving, what is that standard to be, and how is the Crown to address itself to that problem?

In my view, once the concept of recklessness has been reduced, as it was in 1956, to a statutory offence, it would be impossible for the Crown, or indeed for a judge in summing up, to advise the jury of its alternative rights without specifying the degree of negligence necessary to constitute an offence of reckless driving

under Article 14. That was the very problem in R. v. Lawrence. Moreover, the degree of recklessness in the statutory offence could not be any lower than that required for culpability in the common law offence. Accordingly, I find that the degree of culpability in manslaughter in Jersey requires recklessness, embracing the three elements mentioned of criminal imprudence, criminal lack of skill or criminal negligence and I therefore propose in due course to apply Lord Diplock's summing up in R. v. Lawrence in my directions to the jury, suitably modified, if I think it necessary, to accord with the decision of the House of Lords in R. v. Reid [1992] 1 WLR 793; [1992] 3 All ER 673; (1992) 95 Cr.App.R."

It will be necessary in due course to analyse the reasoning which led the Court to that conclusion. But it is desirable first to refer to the case of Renouf v. Attorney General for Jersey [1936] AC 445; [1936] 1 All ER 936; (1936) 155 LT; 52 TLR 455; 105 LJPC 84; 80 Sol.Jo. 304. Both Counsel agreed that this case was the leading Jersey authority on the law of manslaughter. It was indeed so described by Crill, Bailiff, in O'Neill. Renouf had been convicted by the jury on an indictment which charged him with having driven his motor car at a dangerous speed and to the danger of the public, and with having by his criminal imprudence, want of skill, or negligence collided with one Whiting and inflicted injuries upon him which caused his death. Renouf appealed, by special leave, to the Privy Council. The ground of appeal was that the then Bailiff had misdirected the jury as to the degree of negligence necessary to constitute the offence of manslaughter. The judgement of the Board was delivered by Lord Maugham LC. His Lordship first summarised the facts and continued:

"Their Lordships, even if they were a general Court of appeal hearing the case, would not attempt to usurp, however remotely, the functions of the jury, and the facts above stated are mentioned only to explain the questions which arise for consideration on special leave to appeal granted in a criminal case. They are content here to observe that the undisputed evidence was sufficient to justify a conclusion by the jury that the car was being driven by the appellant with gross negligence in relation to, and with entire disregard of, the safety of other persons using the road, in the sense that it was being driven at night at an excessive speed, and to the danger of the public in the town of St. Helier."

His Lordship then referred to the then Bailiff's summing up in that case in these terms:

"In the present case the learned Bailiff (as is usual), alone summed up the case to the jury, and in so doing explained to them the law as to manslaughter. After some

prefatory remarks he referred to the statement of the law by the Attorney General, which was in these terms: 'Fortunately the law upon this subject is one which is abundantly clear, and it can be set out in a minimum of words. The law is this: "Any person causing the death of another by gross negligence in the performance of a legal duty owed to that other, is guilty at least of manslaughter". That is the law of the land, as clear a statement of law as any statement can be. Now, you have also to bear in mind, and I place it in the very full front of my address to you this fact, that the question of whether the victim in a case of this kind contributed to his own death or not by any negligence on his part is, so far as you, as a jury, are concerned in arriving at your verdict, absolutely immaterial and beside the point .... The law is very clear. The charge of manslaughter cannot be maintained unless it is proved that the negligence of the prisoner is the proximate cause of the death'.

The Bailiff adopted this statement."

The Lord Chancellor referred to the ground of appeal, and continued:

"Their Lordships are far from saying that the summing up in question is not open to criticism, and they are not to be taken as expressing any opinion as to the course which would, or might, be taken in a general Court of Criminal Appeal if such a summing up were before them. They observe, however, that the Attorney General for Jersey began by stating the law (assuming that the law of Jersey in this case is similar to that of England) in unobjectionable terms, and that his statement was adopted by the Bailiff. Indeed phrases are used which are taken from an English text book (Law of Collisions on Land, by Roberts & Gibb, 2nd ed, pp. 189 to 195). The Bailiff himself stated plainly that the appellant was accused by the Crown of having killed a man owing to the fact that he drove at a dangerous rate and to the danger of the public, and "by his imprudence or lack of skill criminally killed him". It is doubtless unfortunate that, in the latter part of his address, the Bailiff left out (to use the language of Lord Hewart LCJ in Rex v. Bateman ... "some of the adjectives which have always been used in explaining criminal negligence" to a jury, and that some sentences, taken alone, are consistent with the view that a hostile verdict might be given on the ground of mere carelessness, negligence or lack of skill such as would justify a verdict in a civil case.

On the other hand, their Lordships have noted that the Attorney General had stated the law as being that any

person causing the death of another by gross negligence in the performance of illegal duty owed to that other, is guilty at least of manslaughter, and that the speech of the advocate for the defence referred repeatedly, and without being contradicted, to the fact that there was no homicide unless the defendant had been guilty of "negligence tantamount to criminal negligence"."

The appeal was then dismissed. It may be noted that the Privy Council proceeded upon the footing, as indeed had the Attorney General and the Bailiff in the Royal Court, that the law of Jersey on this point was similar to the law of England. As Crill, Bailiff attached some importance in O'Neill to the maintenance in our criminal law of conformity with English concepts, the Attorney General asked me to examine the development of English law since Renouf was decided. It may be said at the outset that English law appears to have travelled on a circuitous route.

In R. v. Bateman (1925) 19 Cr App R a doctor was convicted of the manslaughter by negligence of his patient, a woman who was in childbirth. On appeal to the Court of Criminal Appeal, Hewart LCJ stated in a passage to which reference was made in O'Neill:

"In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable", "criminal", "gross", "wicked", "clear", "complete". But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving a punishment.

The Attorney General then referred me to Andrews v. DPP (1937) 26 Cr App R34, a decision of the House of Lords to which I shall return in another context. For present purposes it is sufficient to note that Lord Atkin described the substance of the judgement in Bateman as "most valuable" and "correct". In a significant passage of which only part was cited in O'Neill his Lordship stated:

"The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before

the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualise a case of death caused by "reckless" driving in the connotation of that term in ordinary speech which would not justify conviction of manslaughter. But it is probably not all embracing for reckless suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction. If the principle of Bateman (supra) is observed, it will appear that the law of manslaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent driving, though unhappily much more frequent, is to be treated in law as death caused by any other form of negligence, and juries should be directed accordingly."

There matters rested for many years. In the meantime however the English legislature had been active in defining and re-defining criminal culpability in connection with the negligent and reckless driving of motor cars. At the time when Andrews was decided, it was an offence to drive a motor vehicle on a road recklessly, or at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case. See section 11 (1) of the Road Traffic Act 1930. By section 34 of the Road Traffic Act 1934 a new provision was introduced in the following terms:

"34. Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 11 of the principal Act (the Road Traffic Act 1930, which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of section 21 in words of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence."

The next development was the introduction, in the Road Traffic Act 1956, of the offence of causing death by reckless or dangerous driving. Those offences were enacted in the Road Traffic Act 1960. By section 1 (1) of the 1960 Act *"a person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, ... shall be liable on conviction on indictment to imprisonment for a term not exceeding five years".* There was no material change in the definition of the offences of reckless and dangerous driving. Section 2 (3) of the same Act provided that *"Upon the trial of a person who is indicted for manslaughter in*

England or Wales .... in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under this section, to find him guilty of that offence".

In the new Road Traffic Act 1972, the offences of causing death by reckless or dangerous driving, and driving recklessly or dangerously were retained. The manslaughter provision contained in section 2 (3) of the 1960 Act was however abolished.

By section 50 of the Criminal Law Act 1977 the offences contained in sections 1 & 2 of the Road Traffic Act 1972 were abolished and new offences of causing the death of another by reckless driving and driving recklessly were enacted. The offences of causing death by dangerous driving and driving dangerously disappeared.

By section 1 of the Road Traffic Act 1988 the offences of causing death by reckless driving and driving recklessly were re-cast in marginally different terms.

By section 1 of the Road Traffic Act 1991 the offences of causing death by reckless driving and driving recklessly were abolished and offences of causing death by dangerous driving and driving dangerously were reinstated.

While all this legislative activity was taking place in England, the statutory offences relating to reckless and dangerous driving in Jersey remained unchanged. By Article 14 of the Road Traffic (Jersey) Law, 1956 ("the 1956 Law") it was an offence for a person to drive a vehicle on a road or other public place recklessly or at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case. Article 18 of the 1956 Law provided that: *"If, on the trial of a person on a charge of manslaughter in connection with the driving of a vehicle by him, the Court or the jury, as the case may be, is of the opinion that he was not guilty of manslaughter but was guilty of an offence under Article 14 of this Law, he may be found guilty of that offence and thereupon he shall be liable to be punished accordingly".*

It will be seen therefore that the Jersey statutory provisions substantially mirrored, and still do substantially mirror, the equivalent statutory provisions contained in the Road Traffic Acts 1930 and 1934.

Reverting to judicial developments in England, in 1977 the case of R v. Lawrence (1981) 1 All ER 974 was decided by the House of Lords. The case was concerned with the meaning of the word "recklessly" in the context of the offences of causing death by reckless driving and driving recklessly under section 1 of the Road Traffic Act 1972. Their Lordships expanded the meaning

hitherto attributed to that word, and Lord Diplock in the course of his speech gave guidance to trial judges as to the appropriate direction for juries in the context of prosecutions for driving recklessly:

> *"In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: first, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and, second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk, or having recognised that there was some risk involved, had none the less gone on to take it.*
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> *It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves."*

That was the "Diplock direction" referred to by Crill, Bailiff in O'Neill. Lawrence was followed by R. v. Seymour (1983) 2 All ER 1058. The decision of the House of Lords is described in the headnote as follows:

> *"Where manslaughter is charged when the victim was killed as a result of reckless driving by the defendant on a public highway, the trial judge should give the jury the direction laid down as appropriate in a case of causing death by reckless driving, while also pointing out that to constitute the offence of manslaughter the risk of death being caused by the manner of the defendant's driving must be very high, and omitting if necessary any reference to there being a risk of damage to property if that is irrelevant.*
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> *Although the legal ingredients of the common law offence of manslaughter and the statutory offence of causing death by reckless driving contrary to S1 of the Road Traffic Act 1972 are identical they should not be joined in the same indictment, one count alleging manslaughter and another alleging the statutory offence, because the degree of recklessness required for conviction of the statutory offence is less than that required for conviction of manslaughter and a jury ought not to be required to assess differing degrees of turpitude when determining a defendant's guilt or innocence, since the degree of*

turpitude is a matter relevant to sentence rather than conviction".

That was the state of the law in England when O'Neill was decided in 1992 by Bailiff Crill. It is true that in R. v. Reid *(supra)*, decided a few months before, the worm had begun to turn. Lord Keith and others of their Lordships stated that the *ipsissima verba* of the Diplock direction would not always be the appropriate way in which to direct a jury in a case of reckless driving.

In R. v. Adomako (1994) QB 302 [CA] (1994) 2 All ER 79 [HL] the process of tergiversation was however completed. The appellant was an anaesthetist who was acting as such during an operation when a tube became disconnected from a ventilator and the patient died. The appellant was convicted of manslaughter of the patient by breach of duty. The Court of Appeal, holding itself bound by R. v. Seymour to exclude motor manslaughter, held that the ingredients which had to be proved to establish an offence of involuntary manslaughter by breach of duty were the existence of the duty, a breach of the duty which had caused death, and gross negligence which the jury considered justified a criminal conviction.

A divide thus opened up with regard to the ingredients of the offence of involuntary manslaughter by breach of duty between those cases where the breach involved the driving of a motor car and those cases where it did not. Adomako appealed to the House of Lords. There it was held that:

> *"A defendant was properly convicted of involuntary manslaughter by breach of duty if the jury were directed, and had found, that the defendant was in breach of a duty of care towards the victim who died, that the breach of duty caused the death of the victim and that the breach of duty was such as to be characterised as gross negligence and therefore a crime. Whether the defendant's breach of duty amounted to gross negligence depended on the seriousness of the breach of duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury's judgment to a criminal act or omission. Although it was open to a trial judge to use the word 'reckless' in its ordinary meaning if it appeared to be appropriate in the circumstances of the particular case as indicating the extent to which the defendant's conduct had to deviate from that of a proper standard of care, it was not obligatory for the judge so to direct the jury and it would not be proper in cases of gross negligence to give detailed and elaborate directions on the word 'reckless'. On the facts, the jury in the defendant's case had been*

properly directed and therefore his appeal would be dismissed."

Although Lord Mackay LC declined expressly to overrule R. v. Seymour it is clear from his judgment that that case is no longer good law. The Lord Chancellor referred to the old cases of R. v. Bateman and Andrews v. DPP and stated:

> *"In my opinion the law as stated in these two authorities is satisfactory as providing a proper basis for describing the crime of involuntary manslaughter. Since the decision in Andrews v. DPP [1937] 2 All ER 552, [1937] AC 576 was a decision of your Lordships' House, it remains the most authoritative statement of the present law which I have been able to find and although its relationship with R. v. Seymour [1983] to 2 All ER 1058, [1983] 2 AC 493 is a matter to which I shall have to return, it is a decision which has not been departed from. On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.*
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> *It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter, which is supremely a jury question, is whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgement to a criminal act or omission."*

English law has therefore come full circle. The principles set out in R v. Lawrence and R v. Seymour which were applied by Crill, Bailiff in O'Neill are no longer good law in England.

I return now to O'Neill. The Attorney General submitted that I should rule that O'Neill was wrongly decided for three principal reasons.

(1) The Court was not free to depart from the authority of Renouf v. Attorney General for Jersey, a decision of the Privy Council.

(2) The Court erred in being influenced by the enactment of Article 18 of the 1956 Law. As was clear from the extract from the judgment cited above, the Court had considered that the decision in Renouf might have been different if the concept of recklessness had existed in Jersey's Road Traffic Law in 1934. But the corollary of that proposition, as the Attorney General submitted, was that the 1956 Law, which was concerned only with road traffic, amended by a side wind the general law of manslaughter where the breach of duty did not involve the driving of a motor vehicle. The Attorney General contended that that could not be right. Furthermore he pointed out that the English statutory equivalent of Article 18 was in force at the time when Andrews v. DPP was decided by the House of Lords in 1937. Indeed the very point which troubled the Court in O'Neill was specifically addressed in Andrews.

At page 48 Lord Atkin stated:

> *"Section 11 imposes a penalty for driving recklessly or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter.*
>
> *The Legislature appears to recognise this by the provision in section 34 of the Road Traffic Act 1934, that on an indictment for manslaughter a man may be convicted of dangerous driving. But, apart from any inference to be drawn from section 34, 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, as an instance, in the course of argument it was suggested that a man might execute the dangerous manoeuvre of drawing out past a vehicle in front with another vehicle meeting him and be able to show that he would have succeeded in his calculated intention but for some increase speed in the vehicles in front - a case very doubtfully of manslaughter but very probably of dangerous driving."*

The Attorney General accordingly submitted that Article 18 of the 1956 Law made sense in this way. At the highest level of culpability a defendant causing death by reckless or grossly negligent driving would be guilty of manslaughter. If the standard of driving was negligent but not sufficiently bad to warrant a conviction for manslaughter the Court or the jury could convict of dangerous driving under Article 14. The Court or the jury would convict of reckless driving under Article 14 only if the reckless driving was not the proximate cause of death.

(3) As a matter of public policy the preservation of the Lawrence test was highly undesirable for three reasons.

(a) The Lawrence test had generated considerable problems in England. As Lord Taylor of Gosforth CJ said in the Court of Appeal in Adomako, [1994] QB 342 at 319H: ***"It is beyond doubt that, at least since 1982, the word "reckless" has caused the courts problems in regard to involuntary manslaughter which would not have occurred had the focus been on gross negligence rather than on recklessness".*** Later in his judgment the Lord Chief Justice stated, at page 321E, that the Lawrence direction had created ***"conflicting approaches and uncertainty as to the appropriate tests and proper jury direction in cases of involuntary manslaughter involving breach of duty".***

It would be highly undesirable, the Attorney General submitted, to preserve all these difficulties in Jersey.

(b) The Lawrence test of "recklessness" contained the lacuna to which Lord Atkin had alluded in the passage from his Lordship's judgment cited above in Andrews. This was explained succinctly by Professor Smith in a commentary published in the Criminal Law Review (1985) at page 788:

> ***"Where there is an obvious (Caldwell), or (as it mysteriously becomes in Lawrence) an obvious and serious, risk of causing personal injury the Caldwell/Lawrence test imposes liability in two cases: (i) where the defendant has recognised that there was some risk involved and has nonetheless gone onto take it; and (ii) where the defendant has not given any thought to the possibility of there being any such risk. This leaves out ... the case where the defendant has given thought to the question whether there was a risk and concluded that there was none. What if this conclusion was reached by gross negligence? Under the pre-Caldwell/Lawrence law (at least if the negligence were as to death or grievous bodily harm) he would certainly have been guilty of manslaughter. If Caldwell/Lawrence provides the exclusive test, he would now escape. Is this what their Lordships intend? Take***

the facts of W. v. Dolbey. W, aged 15, playing with an air gun and having been warned by P not to point it at him, said, "There is nothing in the gun, I have no pellets". He then pulled the trigger and wounded P. He was acquitted of an offence under section 20 of the Offences against the Person Act 1861, to which Cunningham [1957] 2QB 396 and not Caldwell applies. Suppose, however, that P had been killed by the pellet and W charged with manslaughter. Now the Caldwell/Lawrence test would have applied. But W had given thought to the possibility of there being a risk; and he had decided (though probably with gross negligence) that there was none. He was not reckless under the Caldwell/Lawrence test."

If the Lawrence test were preserved, submitted the Attorney General, so would this lacuna be preserved in Jersey law.

(iii) The Lawrence test had caused difficulty where there was evidence that excessive alcohol had been consumed. I was referred to R. v. Woodward, an unreported judgement of the English Court of Appeal delivered on 1st December 1994. The Court referred to the Lawrence test articulated by Lord Diplock that the jury must be satisfied: *"First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and second, that in driving in that manner, the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved had nevertheless gone on to take it".* In the Woodward case the Court held itself bound by authority to the proposition that evidence that the defendant had been drinking was admissible only in relation to the second limb of the Lawrence test but not in relation to the first limb.

The Attorney General told me that there was a drink factor in this case, and submitted that this was another reason for preferring the 'gross negligence' test.

Mr Le Cocq did not dissent from the Attorney General's summary of the development of English law and he agreed that the statutory context in which O'Neill was decided was substantially the same as that in which Andrews had been decided by the House of Lords in England in 1937. He submitted, however, that once the Court had made its decision in O'Neill the law of Jersey had crystallised. It was, he argued, open to the Court where the law was unclear to adopt a dissenting view in England and thus to declare the law of Jersey. This Court was then bound by the declaration thus made unless convinced that it was wrong.

In relation to the Attorney General's specific arguments itemized above, Mr. Le Cocq's reply may be summarised as follows; I follow the same numerology.

(1) The Court had not been bound to follow Renouf v. Attorney General for Jersey because the ratio of the case was concerned with whether or not there existed a right of appeal. The Privy Council had made no finding as to what constituted the offence of manslaughter in Jersey. There had been no reasoned judgment in the Royal Court; there had merely been a summing up in a particular way which had been examined by the Privy Council.

Notwithstanding the above, Mr Le Cocq submitted that O'Neill had in fact followed Renouf. The gross negligence test which was followed in Renouf and explained by Lord Atkin in Andrews had been interpreted by Lord Roskill in Jennings v. United States (1982) 3 All ER 104. At page 114 Lord Roskill stated : ***"My Lords, that decision of your Lordships' House [Andrews v. DPP] left the law as it was at that date in no doubt. It was decided that conviction for what was then popularly called 'motor manslaughter' could only be justified if reckless driving were proved against the defendant; proof of dangerous driving was not enough".*** The Court in O'Neill was therefore following Renouf and Andrews as the dictum of Lord Atkin had been interpreted by Lord Roskill.

(2) There had been in fact no statutory offence of reckless driving in Jersey at the time Renouf was decided. There was a different statutory context when O'Neill was decided in 1992. It had been open to the Court in O'Neill to take that different context into account. The impact of Article 18 of the 1956 law was significant. Mr Le Cocq did not go so far as to submit that it had changed the general law of manslaughter, but the article really only made sense, he submitted, if recklessness were the test in manslaughter.

(3) On the public policy arguments of the Attorney General, I was reminded that public policy was an unruly steed.

There is no doubt, in my judgment, that Renouf v. Attorney General for Jersey, a decision of the Privy Council, is binding on this Court. I cannot accept the submission that its ratio was confined to the question of whether or not there existed an appeal as of right in a criminal case from this Court to the Privy Council. That issue was certainly before their Lordships. But the second issue, as appears both from the headnote and from the judgment, was whether there had been a misdirection on the applicable law such that there had been a violation of the principles of justice. The terms of the then Bailiff's direction in Renouf had been the subject of considerable argument. The thrust of the submission on behalf of Renouf was that the Bailiff's direction could be interpreted as justifying a hostile

verdict on proof of mere carelessness, negligence or lack of skill such as would justify a verdict in a civil case. Their Lordships were satisfied that it had been made sufficiently clear to the jury that a guilty verdict could be justified only if they were persuaded that the defendant had driven with gross negligence. It is true that their Lordships were not called upon to determine whether gross negligence or recklessness was the appropriate test. Nevertheless the Privy Council specifically approved the then Attorney General's statement, adopted by the Bailiff in his summing up, that: *"Fortunately the law upon this subject is one which is abundantly clear, and it can be set out in a minimum of words. The law is this: 'Any person causing a death of another by gross negligence in the performance of a legal duty owed to that other, is guilty at least of manslaughter'. That is the law of the land, as clear a statement of law as any statement can be".* In the light of that unambiguous statement, approved by the Privy Council, the adoption of the narrower Lawrence recklessness test enunciated by Lord Roskill is in my judgment untenable. It was not open to the Court in O'Neill to depart from a statement of the law approved by the highest appellate tribunal. My conclusion on this first limb of the Attorney General's argument is of course decisive but in deference both to the Court in O'Neill and to the careful arguments of Counsel it seems to me that I should express my conclusions on the remaining arguments addressed to me.

It does seem clear that the Court's decision in O'Neill was influenced by Article 18 of the 1956 Law. I agree with Counsel that the statutory framework in England was practically identical when Andrews was decided in 1937. It is surprising therefore that Crill, Bailiff did not refer to the judgments both of the Court of Appeal and of the House of Lords in Andrews on this point. The likely explanation is that in the time available his attention was not directed to the relevant passages. If it had been so directed it is difficult to see how he could have reached the conclusion that Article 18 caused such problems that Renouf might have been differently decided if the 1956 Law had been in force at that time. The answer to Crill, Bailiff's quandary lay in the judgments both of the Lord Chief Justice in the Court of Appeal and of Lord Atkin in the House of Lords in Andrews.

In the Court of Appeal, the Lord Chief Justice referred to section 34 of the Road Traffic Act 1934 [the equivalent of Article 18 of the 1956 Law] and continued:

> *"It would be strange, and in our opinion wrong, to put upon that section an interpretation which involves either of two conclusions - either that by enacting that section Parliament was intending to vary the criminal law under the head of manslaughter, or that Parliament was inviting a jury who were satisfied that a prisoner had committed manslaughter to refuse to convict of manslaughter and to convict instead of the offence of reckless or dangerous*

driving. It seems to this Court that that section is plainly an enabling section, and enables a jury upon the trial of a person charged with manslaughter to convict of reckless or dangerous driving notwithstanding that notice of prosecution for reckless or dangerous driving under the principal act has not been given."

In the House of Lords, Lord Atkin stated, at page 48, that the introduction of motor vehicles on the road had not changed the law of manslaughter. Death caused by their negligent driving was to be treated in law as death caused by any other form of negligence, and juries should be directed accordingly. He continued:

"If this view be adopted it will be easier for Judges to disentangle themselves from the meshes of the Road Traffic Acts. Those Acts have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions, while directed, no doubt, to cases of negligent driving, which if death be caused would justify convictions of manslaughter, extend to degrees of negligence of less gravity."

Furthermore the notion that the introduction of the concept of recklessness in the 1956 Law changed the level of culpability required to establish the common law offence of manslaughter is difficult to accept. Why should the enactment of the 1956 Law affect the culpability of a surgeon for breach of duty owed to his patient? Even Mr. Le Cocq conceded that this could not be right. Mr. Le Cocq attempted to square the circle by praying in aid the dictum of Lord Roskill in Jennings v. United States (1982) 3 All ER 104, at 114, cited above. Lord Roskill there asserted that Lord Atkin in Andrews had stated that a conviction for motor manslaughter could be justified only upon proof of reckless driving. But it seems that that conclusion can be reached, with respect to his Lordship, only on a rather selective reading of Lord Atkin's judgment. What Lord Atkin stated was that while the epithet "reckless" most nearly covered the case it was *"probably not all embracing, for 'reckless' suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction".*

I do not need to mount the "unruly steed" of public policy but I nevertheless draw comfort from the fact that the difficulties caused by the Lawrence recklessness test to which the Attorney General adverted are avoided by the conclusion at which I have arrived.

In my judgment O'Neill was wrongly decided and I should not therefore follow it. The old form of words alleging manslaughter, which was employed in the charge laid against Renouf, was that the accused had *"par suite de son imprudence, son impéritie, ou sa negligence criminelles"* caused the death of the victim. In my judgment those words may now be most accurately and succinctly rendered in the English language by the phrase "by his gross negligence". I have not been addressed in any detail on the facts of this case. I propose however to direct the jury in terms that before they can convict they must be satisfied that the defendant caused the death of the cyclist by his grossly negligent driving.

Authorities

Loi (1864) réglant le procédure criminelle.

R. v. Lawrence (1981) 1 All ER 974.

A.G. v. O'Neill (1992) JLR 234.

A.G. v. Weston (1979) JJ 141.

Road Traffic (Jersey) Law, 1956, as amended: Articles 14, 18.

Renouf v. Att. Gen. for Jersey [1936] AC 445; [1936] 1 All ER 936; (1936) 155 LT; 52 TLR 455; 105 LJPC 84; 80 Sol. Jo. 304.

R. v. Reid [1992] 1 WLR 793; [1992] 3 All ER 673; (1992) 95 Cr.App.R.

R. v. Bateman (1925) 19 Cr.App.R.(S); (1925) All ER 45.

Andrews v. DPP (1937) 26 Cr.App.R. 34.

Road Traffic Act 1930: s.11(1).

Road Traffic Act 1934: s.34.

Road Traffic Act 1960: ss.1(1), 2(3).

Road Traffic Act 1972.

Criminal Law Act 1977: s.50.

Road Traffic Act 1988: s.1.

Road Traffic Act 1991: ss.1, 2.

Road Traffic (Jersey) Law, 1956: Articles 14-19.

R. v. Seymour (1983) 2 All ER 1058.

R. v. Prentice, Adomako & ors. (1994) QB 302 CA; (1994) 2 All ER 79 (HL).

Criminal Law Review (1985): p.788: commentary on Kong Cheuk Kwan v. The Queen.

Criminal Law Review (1992): pp.292, 758: Commentary on R. v. Prentice, Adomako & ors.

Criminal Law Review (1986): p.406: commentary on R. v. Crossman.

R. v. Woodward (1st December, 1994) Unreported Judgment of the Court of Appeal of England.

Jennings v. United States (1982) 3 All ER 104.

Indictment (Jersey) Rules 1972.

First Report of the Commissioners appointed to inquire into the state of the Criminal Law in the Channel Islands (London, 1847): p.xviii.

R. v. Scarlett (1993) 3 All ER 629.

R. v. Caldwell (1982) AC 341.

R. v. Smith (1979) Cr.L.R. 257.

R. v. Stone; R. v. Dobinson (1977) 2 All ER 341.

R. v. Cato (1976) 1 WLR 110 CA.

R. v. Lowe (1973) 1 All ER 805.

Nettleship v. Weston (1971) 3 All ER 581.

R. v. Lamb (1967) 2 All ER 1282.

R. v. Church (1966) 1 QB 59.

R. v. Evans (1962) 3 All ER 1086.

R. v. Larkin (1944) 29 Cr.App.R. 18; (1943) 1 All ER 217.

R. v. Fenton (1830) 1 Lewin 179; 168 ER 1004.