Let's talk about *Thelwall* [2016] EWCA Crim 1755

Introduction

This case has had a mixed reception, and in some quarters misunderstood.

Unfortunately, the judgment in this appeal against sentence (for an offence contrary to section 37 of the Health and Safety at Work Act 1974) does not portray the intended focus upon the question of 'culpability' under the new 2015 Definitive Guidelines.

As will be expanded upon, much of what the Court of Appeal said through the Lord Chief Justice is not strictly new in terms of principle, though the position may not be so clear as first appears. It is hoped that this paper will put the matter into proper context.

Before dealing with what the Court of Appeal said, and the attempted basis upon which the appeal was put on culpability, it is important to understand both the facts and background to the case.

Facts / Background

The plea in this case related to the loading and unloading of a mobile elevated platform ("MEWP") from a flatbed vehicle by the use of a remote control unit to guide the MEWP up and down a set of detachable metal ramps.

In theory, as well as in practice, the remote control allowed the operator to have a clear view of MEWP tracks and ramps without having to stand in close proximity to the MEWP as it was moved on or off the flatbed.

Whilst loading the MEWP onto the flatbed, it fell from its ramps, crushing the 51 year old deceased who had been operating the remote.

The appellant accepted the core breaches identified, which consisted of a failure to have the deceased formerly trained. Training had been undertaken by the appellant himself over a two hour period, which was corroborated by two witnesses on a previous date. Further, the appellant had failed to check the work tasked to the deceased in drilling holes in the flatbed for the ramps to be secured. It transpired that this had been undertaken incorrectly. Moreover, there was no written risk assessment or method statement in any event.

First Instance

At the Crown Court, the learned judge *"paid considerable heed"* as the Lord Chief Justice described it, to a previous conviction in 2012 for an offence pursuant to section 4 of the 1974 Act in 2009.

The judge found that culpability in the instant case was *High - Very High*, together with Level A harm risked and a *High likelihood of harm* materialising.

In the result, the judge took an 18 month starting point and ordered an immediate 12 months term of imprisonment, having discounted for the guilty plea.

The Appeal

It was obvious that the custody threshold had been crossed. It was a bad case. Whilst there was scope to argue that any term of imprisonment could be suspended, with a high level of community sentence imposed, the focus of the appeal was on the following:-

- The starting point was manifestly excessive given the approach to culpability and the cogent mitigation which was present in the case.

- A characterisation that the appellant posed a 'medium' risk to the public and employees as well as a 'medium' risk of re-offending, was wrong.

- Although the previous conviction in 2012 was relevant for the court to take into account, the judge had failed to justly and properly distinguish the appellant's part in that case, and for which he was a co-defendant, when he had no control over that co-defendant's employees. The impression was that the appellant was being sentenced a second time for that previous offence.

For the purposes of this paper, the first ground of appeal is looked at more closely.

Given that the 2015 Guidelines were in their infancy, with little to assist on strict application, the first submission before the Court was to highlight that the company (in administration and un-represented) faced a charge pursuant to section 2(1) of the 1974 Act, from which the secondary liability of the appellant flowed.

As such, that wide duty, which is coterminous with the duty imposed in *Tort* to take reasonable care, should be the approached thus and distinguished from a level of culpability seen in gross negligence manslaughter cases, since the appellant was guilty of exercising poor judgement.[1]

It was the intention in oral submissions, to develop the appellant's written case by reference to the 2010 Definitive Guidelines, where the Sentencing Council drew a clear distinction and placed the level of culpability for manslaughter as *significantly higher than a health and safety offence*. [2] This was in reference to Corporate Manslaughter of course, but it is difficult to see how the distinction would be anything other than the same for gross negligence manslaughter.

To support the submission drawing the distinction between poor judgment and gross negligence manslaughter, a case by analogy was to be put to the Court.

The case by analogy was *Attorney General's Reference No 9 of 2015: R v. Babamiri & Hastings Securities Limited* [2015] EWCA Crim 2152.

[1] There was no suggestion in the manslaughter sense that the appellant recognised the risk of death which was serious and obvious, although the 2015 Guidelines were applied and Level A risked with *High likelihood* of harm eventuating found.

[2] See the 2010 Definitive Guidelines at paragraph 24.

Babamiri was convicted following a four week trial for gross negligence manslaughter together with two further offences under the 1974 Act as director of a small company. At Snaresbrook Crown Court, he was sentenced to a term of 18 months imprisonment, suspended for 2 years, with a 12 month supervision requirement, along with concurrent terms of 6 months, suspended for 2 years, in relation to the 1974 Act offences.

The Court of Appeal allowed the Attorney General's Reference that the sentence was unduly lenient, and substituted a sentence of 12 months immediate imprisonment for the gross negligence manslaughter. The Court imposed the same concurrent sentence for the 1974 Act offences. It was observed by the Court that 4 or 5 years alone could have been imposed for the manslaughter conviction after trial.

The relevance of the case was that:-

a. *Babamiri,* as with *Thelwall,* was a sole director of a small company.[3]

b. A warning had been given to *Babamiri* as a result of a Health & Safety Compliance Audit where no risk assessments or training for the handling of heavy equipment was in place. The warning had been given two years prior to the incident in question. This could be said analogous to *Thelwall's* previous conviction referred, being a warning or notice to comply with health and safety more carefully.[4]

c. The *Babamiri* case involved the loading and unloading of heavy machinery, which fell and crushed the deceased.

d. The Lord Chief Justice, giving the judgement in *Babamiri* said that the case was *not* to be equated with *"negligence"* since the conviction was for "*gross negligence"* and had to be assessed in that context.[5]

e. The aggravating features were the death, previous warning which was ignored, and the gross negligence covering a long period which exposed a number of people to a risk death which was obvious.

The significance of this case on 'culpability' was manifest. There is a clear distinction between the levels of culpability from a sentencing point of view, especially after running a trial; it was therefore a difficult case to ignore.

As it turned out, the Lord Chief Justice in *Thelwall* was unimpressed with the appellant's attempts to make the intended submission and refused to hear them articulated in open court.

[3] 'Micro' pursuant to the 2015 Guidelines in *Thelwall's* case.
[4] The deceased in the 2009 incident was not an employee of Thelwall's. The circumstances were very different.
[5] See paragraphs 25, 26, 27 and 32 of the judgment.

Result

Leave was given but the appeal against sentence dismissed.

What can be taken from *Thelwall* is this:-

- *"The citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of guidelines is generally of no assistance…It is important that practitioners appreciate that our system now proceeds on the basis of guidelines, not case law. It will, therefore, be very rare, where there is an applicable guideline, for any party to cite to this court cases that seek to express how the guideline works, other than in the rare circumstances we have set out. Decisions of this court are of particular importance to the individuals concerned, but they are unlikely to be of any assistance to further appeals where the guidelines are in issue."* See paragraphs 21 & 22. [6]

- That health and safety cases *"are no different to other criminal cases."* See paragraphs 24 & 25.

  With respect, this is obvious and all concerned in this field are dictated to by the Criminal Procedure Rules and other aspects of practice, procedure and evidence. What can be said is that with a new guideline and the nature of some of the cases, a more nuanced approach needs to be taken. Matters which proceed under the 1974 Act can be viewed as hybrid to a large extent and if, as stated so often, the 2015 Guidelines are not to be approached mechanistically, that may be said to invite flexibility to some extent.

- In sentence appeals, an overly long respondent's skeleton is inappropriate. See paragraph 25.

  Again, there is nothing new here. With respect once more, the Court did not need to refer to the Civil Practice Direction since the Criminal Division of the Court of Appeal has its own provision in similar terms.

- *Friskies* Schedules are *"no longer of any materiality."* See paragraph 26.[7]

- The recovery of costs by the HSE at a sentencing appeal in general, should be no greater than that which the CPS can recover. Further, that the HSE cannot recover costs against an impecunious appellant; again obvious. See paragraphs 27 and 28.

[6] See also CPD XII General Application D: Citation of Authority and Provision of Copies of Judgements to the Court - D3. This can be found in *Blackstone's* Criminal Practice 2018 Supplement 1 at PD-103. The Court also made it clear that cases reported on the CPS & HSE websites should not be raised either.

[7] It is observed that at no time either in the documentation or in oral submission did the appellant refer or rely upon *R v. Friskies Pet Care Uk Ltd* [2000] 2 Cr App R (S) 401 or such a Schedule.

Discussion

As referred to earlier, the Lord Chief Justice would not entertain the attempted submissions on culpability under the 1974 Act to which the new 2015 Guidelines are directed; nor in seeking to draw analogy with the level of culpability in gross negligence manslaughter cases and *Babamiri* in particular.

The appellant was never given notice of, nor invited to address the court by way of written and oral submissions, on the citation of cases when the appellant felt it necessary, so as to make a valid point on the application and interpretation of the new guideline in the circumstances.

What appears to be an almost blanket ban in relation to the citation of cases where there is a guideline in place, has been described by Lyndon Harris, in the Criminal Law Review[8], as *"deeply regrettable."*

In his Commentary on *Thelwall,* Lyndon Harris identifies a series of cases where the Court of Appeal has sought such assistance in interpreting and applying guidelines for various offences.[9]

It is difficult to disagree with his observation that to ignore such cases: *"would appear to disregard the need for consistency in sentencing. While we know that the Sentencing Council has interpreted consistency to mean consistency of approach (as opposed to consistency of outcome, or a hybrid of the two), to positively require courts to close their eyes to decisions of differently constituted courts…on the same point risks (or indeed invites) a divergence of practice…* [and]*…surely undermines the legitimacy and public confidence in the system."*

It is right to say that cases used purely as the *"going rate"* do not address principle, interpretation or application in the true sense, though there are matters which can be said crossovers or are hybrid and may require greater scrutiny.

Nevertheless, to say that *Babamiri* is of no relevance could be said a little harsh, especially when the facts were similar, and following a conviction after trial for an offence where culpability was much greater. The coextensive nature of the 1974 Act offence with *Tort* simple is very different to manslaughter.

Scotland

The approach in Scotland is interesting in comparison, and the case of *Scottish Power Generation Ltd v. Her Majesty's Advocate* [2016],[10] illuminating.

This was a health and safety case involving a faulty valve in some high pressure pipework. Repairs were necessary but not undertaken. An employee of the appellant came across the pipe which was

[8] Crim. L.R. 2017, 3, 240-243. Lyndon Harris is the General Editor of Current Sentencing Practice and Criminal Appeal Reports (Sentencing).
[9] *Thomson* [2016] 1 Cr. App. R. (S) 26 p. 162; *Laverick* [2015] 2 Cr. App. R. (S) 62 p.434; *Dillon* [2015] 1 Cr. App. R. (S) 62 p 434; *AG's Reference (No. 115 of 2015) (Greenfield)* [2016] 2 Cr. App. R. (S) 23.
[10] HCJAC 99

leaking steam. In attempting to stop the leak, he was engulfed in high temperature steam under pressure. A fine of £1,750,000 was imposed reduced from £2,500,000 following a guilty plea.

The Sheriff at first instance had applied the 2015 Guideline and took the view that the *ratios* from Scottish cases did not prevent him from so doing.

The appellant argued that the Sheriff was wrong to apply the 2015 Guideline and should, instead, have followed Scottish case law.

It was argued that the 2015 Guideline was too mechanistic and formulaic, therefore inconsistent with the discretion which a court has in sentencing north of the border. Indeed, it was argued that the *"absence of appeals in Scotland was testimony to the consistency in the Scottish sentencing regime."* It was further submitted that the *"flexibility of the Scottish approach was to be preferred."* It was the Crown who had brought the 2015 Guidelines to the Sheriff's attention.

The respondent accepted that Scottish case law was extant but consistency in both jurisdictions for the same offences was desirable. Further, that the Guidelines were of value and could be used as a *"crosscheck"* and therefore helpful.

In the result, the Appeal Court accepted the importance of Scottish case law for levels of fine though the 2015 Guideline could be used as a *"crosscheck"*. The Court emphasised that the Guidelines should not be used mechanistically. See paragraphs [35 – 51]. The appeal was allowed and the fine reduced to £1,200,000.

Conclusion

The 2015 Guidelines can be said a blunt instrument. Some relevant and necessary flexibility is required in certain circumstances to avoid a 'ready reckoner' approach. After all, the provenance of the guidelines flow from a body of principle enunciated in case law.

Of course, the increase in fines, and the number of individuals prosecuted has been well documented. To this can be added the increase in the number of individuals sentenced to terms of imprisonment both immediate and suspended. This was precisely part of the motivation for the 2015 Guidelines coming into force in the first place, notwithstanding the power to sentence offenders up to two years before the 1st February 2016.

The old adage that hard cases make bad law just might ring true. In *Thelwall,* a starting point of 12 months rather than 18 might not have been viewed as unreasonable.

Only time will tell as to the citation of cases in the future, and whether a true consistency of approach can be achieved, including those matters of a hybrid nature or demanding a more nuanced approach.[11]

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[11] For completeness on the citation of cases, see also *Thorley (James William)* [2011] 2 Cr. App. R. (S) 62 p.361; and *Dyer* [2014] 2 Cr. App. R. (S) 11 p. 61.

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