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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 5 November 2009

B e f o r e:

LADY JUSTICE HALLETT DBE

MR JUSTICE HOLROYDE

MR JUSTICE KENNETH PARKER

R E G I N A

v

BENJAMIN DAVID GEEN

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(Official Shorthand Writers to the Court)

Dr M Powers QC and Mr M McDonald appeared on behalf of the **Applicant**
Mr M Austin-Smith QC and Mr J Price QC appeared on behalf of the **Crown**

J U D G M E N T

(As approved)

LADY JUSTICE HALLETT:

1 The applicant, Benjamin David Geen, was a staff nurse employed at the Accident and Emergency Department of Horton General Hospital in Banbury. The prosecution allege that between 4 December 2003 and 5 February 2004 he deliberately administered drugs or other substances to patients bought into A&E in order to make them collapse. The motive may have been so that he could enjoy the excitement of trying to revive them. As a result of his efforts, the prosecution claim that 18 people came close to death, of whom 16 recovered, but sadly two, a Mr Onley and a Mr Bateman, did not. The applicant was the only nurse on duty on every occasion.

2 A medical investigation revealed no recognisable medical explanation for the fact these patients suffered primary respiratory collapse in Accident and Emergency, a rare event. We shall return to the detail of some of the incidents, which the prosecution alleged formed an unusual pattern, where necessary later in this judgment.

3 Matters came to a head when a Mr Stubbs arrived at A&E on 5 February 2004. He was a reasonably fit man of 42, who went into hospital with suspected abdominal problems. He went into sudden and unexpected decline and stopped breathing. Doctors managed to revive him, but they could not work out why he had collapsed and why this had happened to yet another patient. They called an impromptu case conference. By this time, at least one doctor had her suspicions about the applicant. He was arrested on 9 February 2004. A syringe was found in the pocket of the fleece he was wearing over his work clothes. He had discharged the contents within his pocket. The pocket was still wet to the touch. The substance was identified as Vecuronium (a muscle relaxant). Traces of other drugs, including Midazolam (an anaesthetic) were also detected in the cloth. Both drugs, individually or together, can cause impairment of the senses.

4 When questioned, the applicant denied any wrongdoing. In relation to the syringe, he said he must have taken it home by mistake three days earlier and returned to work with it. He said that, when he arrived at the hospital on the last morning, he was asked to go to the office. On the way he discharged the contents of the syringe into his pocket in panic, unaware of what it contained. His fiancé later confirmed that she had found the (or a) syringe in his fleece, and she said she had thrown it away in or near a rubbish bin. If it was the same syringe, this would mean the applicant retrieved it and put it into his fleece. If it was a different syringe, on the appellant's own version of events it would mean the applicant must have taken home two different syringes by accident. The prosecution pointed to the fact that not only did the applicant have the syringe and traces of the drugs in his pocket, but, according to a forensic expert, the syringe was worn, indicating that it must have been frequently used. Syringes in hospital are usually used just the once and thrown away.

5 The applicant's trial began on or about 14 February 2006 at the Oxford Crown Court before Crane J. The trial lasted until April 2006, and on the 18th the applicant was convicted of two offences of murder and 15 offences of causing grievous bodily harm with intent. The jury's verdict on one count, relating to a Mr Feltham, was by a

majority. The jury acquitted on a count relating to another patient, Mr Zinram. The judge required no verdicts from the jury on alternative counts he had left to them of attempting to inflict grievous bodily harm with the intention of so doing.

6 On 10 May 2006, the applicant was sentenced to life imprisonment with a minimum recommendation of 30 years on the two murder counts, and eight years on the causing grievous bodily harm with intent counts.

7 The proposed appeal before us has taken a number of different forms since being launched 17 months out of time. The first application for leave was advanced on nine grounds. The single judge referred to the full court four grounds, two grounds relating to "fresh evidence" as to the cause of Mr Onley's death. At that time the "fresh evidence" came from a Dr Pumphrey, a cardiologist, and an American doctor, Dr Heath. The two other grounds referred related to a failure to leave alternative lesser verdicts of section 20 (of the Offences Against the Person Act 1861) and manslaughter.

8 Leave to appeal against conviction on grounds 5 to 9 was refused. On 16 December 2008, when the applicant was then represented by Mr David Perry QC, this court, differently constituted, gave directions as to timetabling. Mr Price QC for the prosecution expressed reservations at that time about the propriety of pursuing fresh avenues not pursued at trial, prompted by Dr Heath's report. However, the court did not inhibit the defence from pursuing those avenues subject to the timetable, which sadly was not adhered to. The case was therefore listed before Scott Baker LJ again. By this time Dr Michael Powers QC had been instructed in Mr Perry's place.

9 On 3 April 2009, Mr McDonald (Dr Powers' junior) informed Scott Baker LJ that Dr Heath was no longer relevant and would not be relied upon. The defence wished to instruct another expert to comment on the death of Mr Bateman. This was yet another new issue. The defence also wished to instruct a liver expert to comment on the death of Mr Onley, as had been recommended by Dr Pumphrey. The court was assured that these were not fishing expeditions. The court, gave further directions but in so doing was critical of the way the case was being conducted by the defence.

10 At another directions hearing on 9 June 2009, Dr Powers asked the court for funding for the liver expert recommended by Dr Pumphrey. It was said that a liver expert was the appropriate expert because Dr Pumphrey's lacked the necessary expertise. Dr Powers also wished to instruct a fresh pathologist, a Dr David Rouse, to opine on the cause of Mr Onley's death. Dr Powers indicated the defence would not be pursuing any ground of appeal relating to Mr Bateman's cause of death. However, Dr Powers did inform the court that a Professor Denison, who had been instructed to report on Mr Bateman's case, as a clinical physiologist, had thrown up another possible avenue of investigation, namely the admissibility and propriety of the Crown's "unusual pattern" argument.

11 Dr Powers told the court that he wished to add a ground of appeal that the Crown's evidence of unusual pattern was inadmissible and should have been excluded. He wanted to argue that, without a formalised audit, this evidence was simply

prejudicial with no probative value. He accepted that to go further than that might amount to a fishing expedition.

12 Dr Powers mentioned during the course of that hearing a Dr Sheila Willets. He wished to seek her opinion on the issue of the condition of seven patients where non-polarising muscle relaxants were administered. Dr Powers claimed that her expertise was required because she could pursue the avenues suggested by Dr Heath some months before. Her report was to cost several thousands of pounds, on what Dr Powers appears to have conceded might be considered another fishing expedition. If a report was obtained from Dr Willets, that report has never seen the light of our day.

13 Dr Powers applied to break the fixture. The full court gave leave to amend the grounds of appeal to include a new ground about unusual pattern, and, with some reluctance, adjourned the case until the autumn of 2009. By the time the case reached us in November 2009, there were still problems with the documentation. It has led to our wasting a great deal of our time during the course of the last few days trying to establish the true basis for the proposed appeal. We have also been confronted with another ground of appeal and another expert. Dr Powers wished to rely, for reasons that we will explain shortly, on a statistician, a Professor Hutton. It is not clear to us how she became involved or who authorised her instruction.

14 We return to the issue at trial. The prosecution case at trial was that sudden collapse involving breathing difficulties, namely primary respiratory arrest as opposed to cardiac arrest, is not only rare, but always has a cause. Nothing has been put before us to undermine either of those two assertions. The prosecution accepted, as they must, that patients admitted to A&E were often ill. Nevertheless, it was their unchallenged position that it was rare for a patient once in A&E to have to be moved into resuscitation. The treating doctors at Horton Hospital were, therefore, bemused when they found a series of collapsed patients and they could find no medical reason for their respiratory collapse. Not surprisingly the circumstances of each of the incidents of respiratory arrest or respiratory depression were examined carefully by a variety of experts.

15 At trial, the prosecution experts opined that a pattern had emerged: what they said was an unusual pattern. Patients who had never previously or subsequently suffered respiratory collapse did so within a very short time of coming into contact with the applicant in A&E. There was no obvious medical explanation for the collapse of these patients in their underlying illness or medical condition. The experts called by the prosecution were of the opinion that the incidents could only be explained on the basis that something unauthorised had been injected into the patients. Their symptoms were consistent with that. We shall give just two particular examples relied upon by the Crown. In Mr Stubbs' case, Vecuronium and Midazolam were found in his urine. The anaesthetist on duty, who was one of those who was suspicious of the applicant, said that she was the only person who could have authorised and/or administered drugs to Mr Stubbs. She had not authorised the two drugs found in his urine. Someone else, therefore, must have given Mr Stubbs not just one but two unauthorised substances.

16 During the course of cross-examination, the applicant was asked about this, and he accepted, as an experienced staff nurse, there was no innocent explanation for it. He conceded that somebody must have administered these substances maliciously. He accepted, therefore, the only question was who did it? The prosecution said that it was clear who it was because the same two unauthorised drugs were found in his possession, and he was responsible for the care of Mr Stubbs at the appropriate time.

17 In the case of Mr Nelson, Midazolam was found in his urine. Mr Nelson had been observed throughout the night, and nothing in his records suggested the presence of the drug. It had not been prescribed for him. The prosecution case, therefore, was that the drug must have been administered in unauthorised fashion, and if it was, it was administered at about the time the applicant admitted he had injected Mr Nelson.

18 The prosecution pointed to the fact that the applicant was involved in the treatment of all 18 patients, not only was he on duty, but his name appeared on their records. He had access to the relevant drugs, and so, they argued, he had deliberately administered a substance intending to cause and in fact causing really serious bodily harm. In relation to the two patients who died, Mr Onley and Mr Bateman, the Crown alleged the administration of the unauthorised substance was a significant cause of death.

19 The applicant for his part denied administering any drugs deliberately if they were not authorised or prescribed. It was submitted on his behalf by Mr Hussain QC and Mr Oke that no pattern had been established which could provide a basis on which the jury could draw any proper conclusions. Any deterioration in a patient was, they argued, or may have been, the result of their underlying medical condition, or of the treatment they received not suiting them. In particular, the defence denied that the death of the two deceased patients was caused by the administration of any drug.

20 Dr Powers and Mr McDonald, who, as we have indicated, were not counsel at trial, are instructed by solicitors who were acting for the applicant at trial. They have applied for leave on the basis they now have available "fresh evidence" which it is said challenges the whole basis of the prosecution case.

21 Ground 1 is that there is said to be new evidence which provides an alternative cause of death for Mr Onley. What we shall call ground 2A is that the judge erred in admitting evidence of unusual pattern. Ground 2B: if the evidence of unusual pattern was properly admitted, the judge failed to give the necessary special warning on its dangers. Ground 3: the existence of possible bias in different forms in the evidence of the expert witnesses mandated a special warning to the jury which the judge failed to give. Ground 4: the judge erred in not leaving an alternative verdict of section 20 for the Offences Against the Person Act 1861 to the jury on the section 18 counts. Ground 5: the judge erred in not leaving an alternative verdict of manslaughter to the jury on the murder count.

Ground 1

22 There is said to be fresh evidence on whether respiratory arrest contributed to Mr Onley's death. Dr Powers did not suggest that there has been a sea-change in medical opinion since the trial so that opinions given then have been fundamentally undermined. He did not suggest that, with due diligence, this material could not have been made available at trial. He conceded that medical issues were explored in considerable detail. He said, therefore, that he intended to restrict his submissions to what can truly be called fresh evidence and a fresh approach.

23 Unfortunately, we found it difficult to judge whether the material put before us was in truth based on a fresh approach because solicitors acting for the applicant have not lodged the kind of documents that we would expect to see in a case of this kind. In our view, no proper attempt has been made to explain why expert evidence upon which reliance is now placed was not adduced at trial. However, we do not intend to visit our criticisms of the applicant's lawyers upon the applicant himself. To that end we shall consider the merits of the points that Dr Powers wished to argue.

24 He argued that there is fresh evidence to suggest that Mr Onley died of acute liver failure, not heart failure. Further, that any hypoxia from the respiratory arrest was not an operating and significant cause of that liver failure.

25 It is necessary to rehearse in a little more detail the circumstances of Mr Onley's death. He was 75 years old and a diabetic. He had suffered from a heart condition for some years. In 1990, he had suffered a myocardial infarction, and thereafter from angina. Shortly before his admission to Horton Hospital, he had been discharged from hospital having had a triple coronary artery bypass graft. Following that, he had developed an infected wound and a chest infection. This had left him feeling very unwell, aching all other, shivering, feverish and thirsty. He had fallen, and he was unable to weight-bear. He was therefore, on any view, very poorly when admitted to Horton on 21 January 2004.

26 On his arrival at A&E, he was handed over to Nurse Jennifer Banks. She said that she checked Mr Onley's blood sugar level and gave him insulin. During the night he received saline and antibiotics. Nurse Banks finished her shift at about 7.00 to 7.15 the next morning. Mr Onley, she said, had had an uneventful night, but within minutes of Mr Onley coming into contact with the applicant the next morning, he collapsed. The applicant first saw him at about 8 o'clock, when he gave Mr Onley his morning medication. The applicant checked Mr Onley's blood sugar level at 8.05. At that time Mr Onley was recorded as being conscious and stable for his poorly condition. The applicant stayed with him, it is said, for some 5 to 10 minutes. The crash call, indicating that Mr Onley was in a serious condition, was timed at 8.39am.

27 Dr Arnold, a Consultant Physician, arrived to examine Mr Onley at about 8.30. He found him pale and apnoeic, with a good pulse. A mask and bag were used for the purposes of artificial ventilation. He was intubated and his lungs ventilated artificially. His pupils were described as "average and reactive". There was no response to pain, and administration of Naxolone produced no immediate response. By about 9.15, however, Mr Onley had responded and tried to breath. The anaesthetist could not understand what had happened. The other treating doctors, including a

consultant, recorded in Mr Onley's notes that he suffered a respiratory arrest. This the applicant appears to have denied.

28 By 9.40, Mr Onley was breathing unaided and able to answer questions. However, he suffered further collapses when his heart stopped. Dr Arnold could still find no explanation for the respiratory arrest. Sadly, Mr Onley's condition continued to deteriorate and he died the following day.

29 A post-mortem was carried out by a Dr David Davies. It was noted that Mr Onley had developed acute liver failure, and despite active medical support, he failed to respond and died. The cause of death was cited as "ischemic heart disease due to coronary artery atheroma". At trial there was no dispute as to this. There was no dispute as to the expert's finding that the liver damage was hypoxic and was caused by ischemia. Cause of death was not an issue. What was in issue was whether the respiratory arrest had caused and/or made a significant contribution to the cardiac arrest.

30 The Crown relied on what has been called the domino effect. The respiratory arrest at 8.30 on 21 January 2004, the Crown argued, led to a cardiac arrest at 12.53, which in turn led to a second cardiac arrest at 15.45, causing progressive organ failure, including liver failure, and finally causing death at 8.25 on the 22nd.

31 The Crown relied upon a number of the experts who had produced an opinion. Primarily they relied upon Professor Aikenhead, Professor of Anaesthetics at Nottingham University. It was his opinion that Mr Onley's death was a consequence of the first respiratory arrest. He stated that arrest was caused by the applicant's administering a muscle relaxant. It would have worn off in 30 to 40 minutes, which is consistent with the observation that there was some respiratory effort at about 9.15.

32. The Crown had the benefit also of two pathologists, Dr Carey and Professor Milroy. They stated that, in their opinion, if there was a respiratory arrest at 8.30, it would have contributed significantly to Mr Onley's death. Dr Davies, the pathologist who carried out the post-mortem, agreed that the cause of death related to the heart, and the respiratory arrest was a contributory factor.

33 The defence had their own array of expert assistance upon which to call. A number of experts provided reports which have not been used or disclosed, although Dr Powers stated he was entirely happy to do so. The defence relied on Dr Lack, another Consultant Anaesthetist. He comes from Salisbury Hospital. He stated that Mr Onley died as a result of his various ailments, and was at risk of sudden death at any time. He could not be sure that Mr Onley had a hypoglycemic attack, but thought he may have had a stroke. He said he found no need to conclude, as Professor Aikenhead had done, that a muscle relaxant had been administered.

34 Dr Amadi, a Cardiologist instructed by the defence, also stated that Mr Onley was an ill man with a number of conditions, and after many cardiac arrests he was on a downward slope. Dr Amadi said his heart was abnormal, and the finding of thrombosis in one of the bypass grafts confirmed the first attack was a heart attack. The drop in Mr

Onley's blood pressure indicated either there was no significant effect from any respiratory arrest, or that the heart was not capable of responding to the adrenalin because it was incapacitated. If there was a respiratory arrest, he said he would struggle to link it to the cardiac arrest. He regarded the blocked bypass as significant.

35 Further, the defence relied upon the evidence of Dr Patel. He is a Pathologist, who, as the jury were told, was originally instructed by the Crown. He stated that the longer the time between a respiratory arrest and death the less likely for it to be a cause of or contributing factor to death. In his opinion, the post-mortem showed no signs of a respiratory arrest, and certainly not one which could have contributed to death.

36 The applicant now wishes to argue that the primary cause of death was in fact liver failure. The new evidence to this effect comes from Dr Charles Pumphrey and Dr Alexander Gimson. The material came to light in this way: Dr Pumphrey is a Consultant Cardiologist in the Cardiothoracic Unit at St George's Hospital, London. He prepared a report in May 2007 for the Horton General Hospital on Mr Onley's state of health. The hospital sought his opinion to answer a pre-action protocol letter from solicitors seeking damages on behalf of the late Mr Onley's family. Dr Pumphrey concluded in his report that the brief period of respiratory arrest did not accelerate or precipitate Mr Onley's deterioration because his problem was liver failure. Dr Pumphrey thought this was possibly associated with septicemia. He said this:

> "The striking feature was the hepatic disturbance reflected in the rising AST levels. In my view, it is unlikely that this rapidly deteriorating liver failure can be attributed to the unauthorised treatment given by Mr Geen (the nature of which I am not certain of). Given that the respiratory arrest was so rapidly reversed, it seems to me unlikely that the subsequent metabolic failure from which Mr Onley died can necessarily be attributed to the assault."

We note the word "necessarily".

37 Nevertheless, Dr Powers argues it is possible, and the jury never heard of this possibility, that Mr Onley's septicemia gave rise to the rapidly deteriorating liver, which was inevitably going to deteriorate further notwithstanding the unauthorised treatment. Such acute liver failure, Dr Powers insisted, would explain Mr Onley's hypertension, metabolic disturbance and possibly the unstable nature of his diabetes following his surgery. If this is the case, then it is reasonable, he argued, to believe that Mr Onley would not have survived, and that the brief respiratory arrest caused by any proven assault did not accelerate or precipitate Mr Onley's deterioration.

38 In his report dated 14 October 2008, prepared for the Crown in reply, Dr Carey (Pathologist) cast doubt on the expertise of Dr Pumphrey (Cardiologist) in venturing a cause of death. Dr Carey remains of the same opinion. As a Pathologist, he states there is strong clinical evidence for the causation as put before the jury He considered the question of sepsis and circulation in relation to liver function, and he advanced two mechanisms for the relationship between the respiratory arrest and the

cardiac arrest: (i) the vulnerability of the heart to hypoxia; and (ii) stress in a conscious patient.

39 Dr Carey complained that Dr Pumphrey had not addressed what he called the pathophysiological mechanisms in his report.

40 Professor Milroy also questioned the suggestion that Mr Onley had septicemia. He concludes that the post-mortem findings were of hypoperfusion of the liver and the kidney, which he says can be attributed to the cardiac failure that occurred following the cardiac arrest and the long-term heart disease. He too remains of the view that respiratory arrest was a significant contributory factor in Mr Onley's death.

41 Dr Pumphrey produced a report for the purposes of this application. He addressed the matters raised by Dr Carey, and took issue with him over the effect of the liver function of what Dr Carey described as persistently low blood pressure. Dr Pumphrey said:

> "Cardiologists treat heart failure in vivo and liver failure is a recognised rare complication of a low cardiac state. In this case, Mr Onley's cardiac function remained normal on echo. The majority of patients with terminal heart failure have only mild derangement of liver function and when severe dysfunction occurs, it does so over a matter of days or weeks.
>
> Low blood pressure which persists for a few hours, as seen for example during cardiac surgery, does not result in liver dysfunction. If Mr Onley's heart condition had deteriorated significantly which the echo suggests was not the case here (and the blood pressure fall can be attributed to deteriorating liver function) then I would expect not only a significant tachycardia, but also a narrowing of the pulse pressure. The energy of a circulation generated by the heart is measured by the area under the pressure pulse. If Mr Onley's blood pressure had fallen because of cardiac failure, then I would expect the blood pressure to be 70/50 rather than 85/30. This low blood pressure was secondary to vasodilatation secondary to liver failure."

42 Professor Forrest, a Consultant Forensic Chemist and Toxicologist, who gave evidence for the Crown at trial, has also produced an updated report in the light of laboratory data he has acquired in relation to Mr Onley, and the reports of Dr Pumphrey. He sets out his reasoning for the rise in liver enzymes found in the blood following Mr Onley's admission to hospital. He concluded:

> "It is not known for how long Mr Onley had been hypoxic when he was found not breathing at 08.38 on the morning of 21 January 2004. It is unlikely to have been more than a few minutes given that he still had a good pulse when he was found. This episode is, in my opinion, likely to have been the precipitant of his hypoxic liver injury and as Professor Milroy and Dr Carey have explained, is likely to have been the cause of

his death taking into account his pre-existing disease."

43 The full report of Dr Pumphrey dated 12 May 2009 makes clear that his expertise is in the management of ischemic heart disease in patients following coronary artery bypass surgery. He readily accepts he is not an expert in liver failure. In that report, he purported to rebut the opinion of the pathologist that the cardiac arrest at 12.53 was caused by stress. He emphasised that the nature of the arrest, it is clear from the records, was asystolic. Moreover, in light of the evidence of the echocardiograms, he opined that it is "extremely unlikely" that the continuing hypotension could be attributed to poor ventricular function, and he said that systemic deterioration from sepsis and deteriorating liver function were the most likely causes.

44 Given that this was not Dr Pumphrey's field of expertise, he advised a liver expert should be consulted on the liver dysfunction. However, he personally remained of the view that the brief period of what was called "down time" during the respiratory arrest and the two cardiac arrests was not sufficient to account for liver failure. It was therefore on his recommendation that a report was obtained from Dr Gimson. He is a Consultant Physician and Hepatologist and Director of Division of Medicine at the Hepatobiliary and Liver Transplant Unit at Addenbrookes Hospital, Cambridge. He undermined Dr Pumphrey's theory of septicemia. In his report of 30 June 2009, Dr Gimson agreed with the treating hepatologist, who said that the two cardiac arrests most likely precipitated the liver damage. Dr Gimson said this:

> "In my opinion [Mr Onley] sustained hypoxic liver injury due to a number of factors, some minor such as the respiratory arrest and possible pre-existing mild liver dysfunction and some major, including his heart disease, poorly controlled diabetes, severe infection and two cardiac arrests."

45 It seems, therefore, that Dr Gimson is entertaining the possibility that respiratory arrest has played at least a minor role in the mild liver dysfunction. Dr Gimson did, however, offer the defence a lifeline on the question of the effect of the respiratory arrest. Here Mr Price QC accused the defence of moving the gateposts of this appeal yet again. Given Dr Gimson's opinion about the cause of the liver failure, and given the fact he has rejected septicemia as a cause, Mr Price argued that the defence are trying to renew the argument on whether respiratory arrest caused and/or contributed to death.

46 Dr Gimson commented on whether or not respiratory arrest was a direct cause of the liver failure and of the death. He said this:

> "My contention is that such a short period of low arterial oxygen level in the presence of an adequate pulse and pressure is unlikely to result in acute liver failure. This was also the view of Dr Jane Collier, another liver specialist, who examined Mr Onley in the ICU in Oxford on 22/01/2004 at 1700hrs and concluded that the damage was due to the cardiac arrest.

It is my opinion therefore that such effect as the respiratory failure may have had on the liver was not an operating and significant cause of the liver failure which followed the cardiac arrests and which resulted in Mr Onley's death."

47 Thus, on that basis, Dr Powers wished to call both Dr Pumphrey and Dr Gimson, for them both to say the cause of death was not heart failure but liver failure, and for them both to opine that the respiratory arrest would not have been a significant cause of the liver damage directly, or indirectly.

48 Dr Powers insisted that Dr Pumphrey deals with four important points which amount to new evidence. The Crown's argument the mechanism was stress, he says, is countered by the fact that both cardiac arrests were asystolic, as pointed out by Dr Pumphrey. Asystolic arrests are said to be more commonly associated with occlusion of the right coronary artery, supporting the contention that thrombosis of the right coronary artery may have been the immediate cause.

49 He also relied on the interpretation of the echocardiogram timed at 16.30 hours, just two hours before death. At that time overall left ventricular function appeared reasonable.

50 However, Mr Price was able to point out that these were not in fact fresh issues. The issues were explored at trial. The central medical issue at trial was whether Mr Onley's records and condition supported or contradicted the assertion that the respiratory arrest at 8.30 was a cause of the heart attack at 12.53. The prosecution witnesses were cross-examined on Mr Onley's medical records. The defence cardiologist expressly considered the echocardiograms. He considered the impact of the fact the cardiac arrests were asystolic in his report.

51 In the light of this, Dr Powers was forced to concede that there is an element of further, as opposed to new, evidence on the issue of whether or not the respiratory arrest played any significant role in the first cardiac arrest and in the death. Dr Powers submitted the court should consider the admission of this further evidence for these reasons: any link between the respiratory arrest and liver failure as the cause of death is more tenuous, involving a two-stage process -- respiratory, heart, liver -- rather than the process assumed to be the case at trial. If the court accepts there is force in the argument that Mr Onley died of liver failure as a consequence of ischemia, and there was no material contribution from any hypoxia associated with the respiratory arrest, then this evidence would further support the defence case that any short-lived hypoxia from the respiratory arrest was of similar insignificance in the causation of the first cardiac arrest some five hours later. In his submission, these were issues that, in the interests of justice, required exploration in oral evidence. Mr Austin-Smith QC and Mr Price disagreed. So do we.

52 The first observation we make is that this court has deprecated on a number of occasions the practice of fresh counsel instructed to run a case before the Court of Appeal, Criminal Division on a totally different basis from the way in which it was run at trial. We similarly deprecate attempts to rely upon the opinions of new experts asked

to report on what are essentially the same issues as have been explored in depth at trial. This court has said on a number of occasions that the time to deploy all relevant material is at trial. It is abundantly clear in this case that the defence team at trial had very considerable expertise at their disposal from a wide variety of experts. Not one of them seems to have thought it right to challenge the cause of death. They did, however, challenge the extent to which, if at all, respiratory arrest contributed to the cardiac arrest and thereby to death.

53 On the new evidence, Dr Gimson accepts that there was a respiratory arrest. He accepts there were two cardiac arrests, which he accepts were the most likely precipitants of the fatal hypoxic liver damage. His contention is that the short period of oxygen deprivation would not be sufficient directly to result in acute liver failure. However, that was not the prosecution case. The prosecution case, as we pointed out, was the domino effect. The respiratory arrest caused and/or contributed to the cardiac arrest, which in turn caused and/or contributed to the organ failure.

54 In our judgment, Dr Gimson's opinion, with all respect to his distinguished career, does not come close to providing us with credible fresh evidence that fundamentally undermines the chain of causation, and the impact of the respiratory arrest within that chain as alleged and as explored at trial. Hence our refusal to hear from him orally.

55 That leaves Dr Pumphrey, who (we assume) would have said, had we heard from him, that in his opinion the cause of death was liver failure caused by septicemia. On that issue, he is a lone voice. More importantly, he is not an acknowledged expert in this field. He himself says so. The specialists in the field for the prosecution and for the defence disagree with him. He is therefore not only swimming against the tide of medical opinion, he is swimming in the wrong sea. Even if we were to receive his opinion that Mr Onley died of liver failure caused by septicemia, we fail to see how, in the light of the way this case was run at trial and the overwhelming medical opinion, his opinion as to cause of death could afford a proper ground of appeal.

56 To our mind, in truth, the real reason that the defence wished us to hear from Dr Pumphrey is for him to give his opinion that respiratory arrest would not have caused and/or contributed to the cardiac arrest and to death. This is well trodden ground. Much of what Dr Pumphrey says was covered at trial. At one stage during argument Dr Powers seemed to be suggesting that important medical documents had not been disclosed to the defence in time, and that this made an important difference to what Dr Pumphrey had to say. That would have been a very significant factor. However, when challenged to identify relevant documents upon which Dr Pumphrey has relied but have not been made available to the defence in the past, Dr Powers was unable to point to any. It became apparent that the defence have, by various means over the last few years, received all the relevant medical material which they have required.

57 As it seems to us, this is an attempt by the defence to call a doctor or doctors who are using the same material to put a different slant on the way the case was presented at trial. That is not the purpose of section 23 of the Criminal Appeal Act. To

our mind, therefore, there is no reasonable explanation for the failure to adduce this evidence at trial. We are not persuaded it significantly undermines the prosecution case as alleged at trial. It does not afford a ground of appeal, and we decline to receive it.

58 We turn to ground 2, that the judge erred in admitting evidence of unusual pattern. This was a ground about which Mr Austin-Smith and Mr Price protested that it was added very late in the day. Dr Powers observed that a principal component of the case advanced by Mr Austin-Smith and Mr Price at trial was evidence of an unusual pattern of respiratory collapses over a two-month period at Horton which only occurred when the applicant was on duty. He now wishes to submit on behalf of the applicant that the evidence of an unusual pattern was based on unscientific anecdotal accounts which were highly prejudicial and had no probative value. Accordingly, it is said, the evidence should not have been placed before the jury.

59 If, contrary to his submissions, the evidence was properly put before the jury, he sought to argue that they should have been given a special warning as to the dangers of relying upon it.

60 Dr Powers submitted that to support their assertion of an unusual pattern, the Crown relied upon what Dr Powers insisted on calling the anecdotal evidence of Professor Aikenhead and the anecdotal evidence of Mr Stuart Harper. They both gave evidence that, in their experience in their respective departments, respiratory arrests in general are not very common, and that they never had an unexplained respiratory arrest. The third category of evidence to which Dr Powers took exception was the evidence of the head nurse of Horton's Accident and Emergency Department, Michelle Blogg. She introduced a "Resus Register" following the events in December 2003 from which she was able to give evidence as to what happened in the comparable period the following year. Of the 53 patients who went to resus, only three went there after their initial admission.

61 In summing up to the jury, Crane J said this about Professor Aikenhead's evidence of unusual pattern:

> "The evidence of Professor Aikenhead was that primary respiratory arrest, in other words the breathing stopping first, is very unusual except in the operating theatre, and he was asked specifically about the Accident [and] Emergency at Nottingham, which is one of the biggest in the country, where it is rare. He said 'Although no records are kept which I can quote, because an anaesthetist is always called' - (he is in charge of the anaesthetist department) - he is well aware of how many such events occur."

62 Dr Powers argued that this evidence was opinion evidence; but that it could not properly be considered expert opinion evidence. In his submission, Professor Aikenhead was simply and in a general way stating what he believed to be the case in the A&E Department of his hospital. The evidence was not supported by documentary evidence or any data. His evidence, Dr Powers argued, was unlikely to escape the taint of inadvertent observer bias. The evidence was incapable, he said, of being challenged

by the applicant's defence team, and further the evidence was incapable of being assessed by the judge or the jury. The jury might be minded to accept it given its distinguished source. He made similar points in relation to Mr Stuart Harper.

63 As far as Miss Blogg's evidence was concerned, he submitted the evidence was flawed because the data was collected for the following year in the light of what had happened the previous year. There was no evidence as to changes in overall patient admissions because no data was said to be available. All that could be said, Dr Powers argued, was that 18 patients went from A&E to resus in 2003 and 2004, but no evidence was given as to the denominator in that period, and there is no evidence as to whether or not practices or training had taken place between 2003-2004 and 2004-2005. These are points which may well have some force and no doubt would have occurred to defence counsel at trial.

64 Dr Powers, however, argued that, as far as he was aware, defence counsel at trial were unaware of the dangers of this evidence and of the lack of probative value. It was his submission to the court when this application first began two days ago that trial counsel had failed to apply to exclude the evidence. He argued that the acceptance of a pattern of unusual events became self-fulfilling in the further investigation of the events, because in reaching a conclusion on the cause or causes of respiratory collapses in different patients with complex conditions, observer or clinical bias would have tended to lead to the explanation that something unnatural and unlawful was going on. Unconsciously it became, he argued, easier for the experts asked to give their opinions to explain all the events on the basis the applicant was responsible for them because it then constituted the alleged unusual pattern. He asserted that this may not have been obvious to defence counsel because it was not immediately obvious to him. It was brought to his attention by the report of Professor Denison, the Clinical Physiologist who was asked to report on Mr Bateman's death.

65 Professor Denison said this:

> "... opinion evidence about normal/unusual patterns of patients going through a department without proper evidence that this variation was not simply due to chance should not, in my opinion, have been put before the jury. This is clearly a statistical issue, and requires statistical evidence to address it. Absent a proper statistical basis, opinion evidence is valueless and misleading."

66 To be able to identify what is abnormal, one first has to identify what is normal, and what variation around a norm can be considered to be normal. A pattern may not be declared to be abnormal without there being a sound database.

67 Dr Powers had originally indicated an intention, with the court's leave, to call Professor Denison to give evidence before us. However, during the course of argument, it became apparent that he was contending for the proposition that only an expert in statistics should give evidence about statistics, and on that basis he decided not to call Professor Denison on the issue.

68 He did, however, wish to rely upon an acknowledged expert on this field, Professor Jane Hutton, Professor of Statistics at Warwick University. Her opinion had been sought in response to Professor Denison's comments. She made a number of points about the difficulties confronting a layman in interpreting data, and she commented on the possibility of bias creeping into any inexpert interpretation of statistical data. She is of the view that a statistical analysis, perhaps several, would have been required before the pattern of patients' behaviour in Accident and Emergency could be declared unusual. In this case, as far as she was aware, such studies had not been undertaken. She pointed to the fact that control groups are necessary in assessing whether or not an unusual pattern exists, and she gave us some interesting examples of what we shall call possible cluster errors.

69 We do not need to go into the detail of her comments on clustering because there was, as we saw it, a fundamental flaw in this line of argument. The flaw is that all the facts upon which the Crown relied to establish that respiratory arrests were rare and that the applicant was the only nurse on duty at the time were agreed. It was agreed that respiratory arrest in A&E is rare. Respiratory arrest without explanation is even rarer. This was the common experience of all the medical professionals concerned, and as Mr Price brought to our attention it was an experience of shared by Professor Denison. He too accepts it is rare.

70 It was also an agreed fact that the applicant was on duty for each incident. Thus in this case the prosecution were not attempting to prove primary facts by the use of statistics or untested data. They proved their primary fact of the rarity of these events and presence of the applicant by unchallenged evidence. They then invited the jury to draw the inference that this formed an unusual pattern, which if formed by chance, which it may have been, it was a remarkable coincidence. This was a straightforward argument of a kind often put before a jury, upon which an expert statistician's evidence was not, in our view, required, provided of course proper attention was paid to the circumstances of each of the incidents relied upon. The Crown here did just that. They pointed to the material in relation to each individual patient to establish that the respiratory arrest was unexplained and unnatural.

71 In any event, far from this being a point that trial counsel had failed to appreciate, we now know from Mr Oke, who kindly attended (unexpectedly) the hearing of this appeal, what happened. He offered to assist us if privilege was waived, which it was. He told us that defence counsel considered very carefully and eventually rejected the possibility of obtaining expert evidence on this very issue. He was so concerned about the possible prejudicial effect of the evidence and what he considered the lack of probative value, he had what he called "heated discussions" with Mr Price for the Crown over a period of months about its admissibility.

72 Mr Oke told us that the defence successfully applied to break the trial fixture on one occasion, partly on the grounds that they were giving very serious consideration to calling expert evidence of this kind. They discussed what to do with their instructing solicitors, ie those who instruct Dr Powers and Mr McDonald, and they discussed the question of obtaining this evidence with the applicant. This was all done in detail with them all present. Counsel advised against obtaining the evidence, but the decision was

the applicant's, and he decided to accept their advice. No doubt underpinning their advice was the fact that they were advised by their own experts that the evidence as to rarity, was accepted.

73 It was also agreed that Michelle Blogg's figures were to be expected. Respiratory arrest in these circumstances was rare. It was agreed it was rare for patients to be transferred from A&E to resus. This was all Michelle Blogg's figures showed.

74 Thus, a statistician might have explained for many hours to a jury the dangers of drawing inferences from clustering, however, what the statistician could not challenge was the basic premise that these incidents were rare. This was not a case as was suggested before us of non-experts using untested and unsubstantiated data to prove an assertion. It is not surprising therefore, in our view, that defence trial counsel settled on a compromise with prosecuting counsel. They decided not to object to the evidence of these three witnesses, provided Mr Austin-Smith and Mr Price agreed not to call the many other witnesses they had lined up to give evidence about the rarity of this event.

75 Mr Price argued, in our view with considerable force, that what Professor Aikenhead said was properly admissible. He was entitled to draw on his own clinical experience and as an expert opine on a topic within his field of expertise. Such evidence is routinely admitted. It is, with respect, nonsensical to suggest that a witness like Professor Aikenhead is not entitled to say, as a very experienced Consultant Anaesthetist, "In my experience this is a rare event", unless someone has conducted a data based, properly analysed, peer reviewed, research study. The evidence of rarity was agreed and put before the jury, in a way which left the jury well able to assess, with the assistance of the trial judge and counsel (but without expert assistance), whether this material indicated an unusual pattern.

76 Further, the twin propositions that primary respiratory arrests are rare, and the only person on duty on each occasion was the applicant were relied on as part of the overall circumstances upon which the Crown relied. This evidence was not adduced to establish the veracity of the assertion that the most likely cause of these incidents was administration of drugs or substances by the applicant. The crown proved that element of the case by a careful analysis of the individual cases, each of which bewildered the treating doctors. The only explanation for what happened to all these patients to produce these symptoms and in some cases rapid recovery so far put forward with any degree of confidence is deliberate human intervention.

77 The applicant himself acknowledged the existence of an unusual pattern when he said, "I seem to have a jinx. Whenever I'm around there seems to be a resuscitation or an event of that kind". After he had injected Mrs Probert and she had passed out, he said, "My patients always go off on me".

78. Thus, we are satisfied the jury was entitled to and perfectly capable of drawing proper inferences from the evidence that this pattern of events was as a result of deliberate action rather than mere chance. Accordingly, we declined to hear from

Professor Hutton on this issue. To our mind it does not afford a ground of appeal, and given the background we have now heard from Mr Oke, there is no reasonable explanation for the failure to adduce this evidence at trial.

79 Had the applicant's solicitors focused on the arguments deployed by counsel, they would and should have been in a position to point out to Dr Powers that his submissions were wrong. This issue was discussed by counsel at trial. If more attention had been paid to the provisions of section 23 in relation to the reception of fresh evidence in this court, we doubt that this ground would ever have been advanced, certainly not in the way it began. It was only as a result of questioning from the bench and the fortunate presence of Mr Oke in court that we learned the truth. We intend to hear submissions on whether or not our comments on this subject should be brought to the attention of the taxing authorities.

80 Finally, as Mr Price observed, there was in any event a wealth of material pointing to the applicant's guilt from which the jury would have drawn their own safe and proper inferences. Mr Price argued the danger of approaching this particular case on the basis of academic statistical opinion, however distinguished, is divorced from the actual facts. We agree. That the jury gave consideration to the individual cases rather than to any pattern alone is evidenced by the acquittal of the count in relation to Mr Zinram, the fact that there was a majority verdict on another count, and the fact that they were in retirement for just under 28 hours.

81 For those reasons, as conscious as we are of the limitations on expert evidence and the dangers of experts venturing into fields that are not their own, we were not persuaded that this was a case for yet more expert evidence commenting on other experts. In our judgment, it is unarguable to say that, had an application been made to exclude the evidence, the judge would have been obliged to exclude it, or that its admission, given that most of it was agreed, undermines the safety of the conviction.

82 Having found the evidence was properly admitted, Dr Powers argued strongly for a special warning to be given about it. As we understood the argument, it was to this effect: it is dangerous to draw inferences of an unusual pattern from evidence of this kind, absent expert help. He argued that what he called a Luttrell direction is called for. This is a reference to the decision of this court, differently constituted, in R v Luttrell [2004] EWCA Crim 1344. Absent such a direction, he submitted, the jury may adopt an impermissible line of reasoning. This is a case, he argued, where experienced research or commonsense have indicated that there is a difficulty with a certain type of evidence that requires a warning to the jury of the dangers and the need for caution tailored to meet the needs of the case.

83 We challenged Dr Powers during the course of argument to provide us with a copy of the directions he suggested were essential in this case: 1) "Members of the jury, you must be particularly careful before reaching any conclusion that there was here an unusual pattern of events"; and (2) "Members of the Jury, when Professor Aikenhead, Mr Harper and Nurse Blogg gave evidence as to the rarity of these events, they did not do so as experts".

84 It never became clear to us what difference it would have made to the jury's consideration of the evidence of rarity of events from Professor Aikenhead, Mr Harper and Nurse Blogg, to be told that what they said in this one respect was as a witness as to fact rather than as an expert. We repeat the evidence they gave to this effect was not challenged. We also doubt the assertion that when Professor Aikenhead provided the jury with the benefit of his clinical experience, he was no longer acting as an expert.

85 As to the suggestion that the judge was obliged to direct the jury to exercise special caution before reaching the conclusion there was an unusual pattern, for the same reasons we rejected the need for expert evidence, we reject the need for any special warning. The judge directed the jury in clear terms as to the basis of the Crown's assertion there was an unusual pattern here. He directed them to be careful not to leap to any unjustifiable conclusions simply on the basis of being satisfied a pattern was established. He directed them to focus on the individual patients, as the experts had done. Their verdicts indicate they have plainly followed his directions to the letter. Accordingly, we reject the proposed ground 2A and 2B.

86 We turn to ground 3, which is that it is said bias by the experts in different forms mandated a special warning which the learned judge failed to give. It seemed that Dr Powers was insisting here too a Luttrell-type direction was required. He sought to argue that there is clear evidence from the likes of Professor Denison, Professor Hutton, and no doubt many others, that clinical bias can creep in to an expert's opinion. Dr Powers argued that medical experts asked to provide a diagnosis or opinion on causation may be affected by bias. In other words, if they are told a death is suspicious, and if for example they are told the suspect has an unauthorised syringe in his pocket at the time of arrest, subconsciously their minds may find it simplest to assert that death was due to the injection of noxious substances. The suspicion, Dr Powers argued, fills the medical gap. For that reason, he submitted the evidence of the experts in this case who were looking for a cause, where there was no obvious medical cause, should not have been left to the jury without a clear and explicit warning as to the danger of bias.

87 We note, as Mr Price noted, that Dr Powers did not say that the jury should have been warned of the danger of bias in the defence's expert evidence. If this principle applies to the experts called on behalf of one party, it must surely apply to the experts called on behalf of the other. Experts owe a duty to the court. Whoever calls them, they are meant to provide an objective opinion.

88 Dr Powers wanted to call both Professor Hutton and Professor Denison to deal with this issue. We declined to hear from them on the basis that, as it seemed to us, most of what they had to say again amounted to little more than commonsense. This was not a subject upon which we required expert evidence from either a statistician or a clinical physiologist, however distinguished they both may be. Nevertheless, Dr Powers argued the problem here lay in the nature of the charges laid against the applicant, and what he called the largely circumstantial evidence in support of them. In none of the patients was there direct evidence of the applicant's unlawful administering one or more of the several substances said to have been responsible for the collapse. Once there was acceptance of an unusual pattern, the natural tendency for the jury and the experts was to explain that pattern on the basis of criminal activity.

89 When pressed, Dr Powers expressly disavowed the proposition that a special warning was required whenever a doctor was asked to provide an opinion and given the background material with which to do so. He argued the special warning was required when, as here, there was no obvious medical explanation for an event, and the issue was a particularly difficult or troublesome one. As we have indicated, we accept there may well be cases where the question of clinical bias will arise. It will then be incumbent upon the judge to remind the jury of the issue and any evidence upon it. Here, the issue was raised, if only in passing. We are told it was raised belatedly by Dr Patel in re-examination. It was not a matter put to any of the prosecution witnesses. Professor Aikenhead, for example, was not invited to explain whether he felt there was the possibility that inadvertent clinical bias had crept into his conclusions.

90 However, as the matter had been raised, Crane J, with his customary fairness and thoroughness, properly directed the jury to give anxious consideration to the issues mentioned by Dr Patel. He gave the jury the fullest possible direction on the use they could make of expert evidence and the proper approach to be adopted in relation to it. He directed the jury on at least two occasions to be conscious of the possibility of inadvertent bias. He reminded them of the evidence on the subject, which, for the reasons we have given, was not much. It is not clear to us, therefore, what more Crane J could have been expected to do. His summing up was, in our judgment, scrupulously fair and totally balanced. Where there were limitations or reservations expressed about the evidence given, the judge highlighted every occasion for the jury throughout his comprehensive review of the evidence. Accordingly, we reject ground 3 as well.

91 We turn to grounds 4 and 5, which we can take together. These are: ground 4: the judge erred in not leaving alternative verdicts of section 20 and section 47 on the section 18 counts and ground 5: the judge erred in not leaving unlawful act manslaughter on the murder charge.

92 Mr McDonald advanced the submissions on this issue for the applicant. He relied, not surprisingly, very heavily on the decision of their Lordships' House in R v Coutts [2006] 1 WLR 2154, in which Lord Bingham of Cornhill observed as follows:

> "The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support ... I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."

93 Mr McDonald submitted that in this trial there was a proper evidential basis for leaving to the jury alternative verdicts on lesser counts on the basis the jury may be sure the applicant committed the acts, but not sure he intended to cause grievous bodily harm. Mr McDonald at one stage appeared to be trying to persuade us that there was not a basis for the jury's finding that respiratory arrest was capable of mounting to grievous bodily harm. However, he eventually accepted that it was not open to him to make that submission. Nevertheless, he argued that triggering a respiratory arrest from which a patient then makes a full recovery is not necessarily the same as causing them grievous bodily harm. He argued that had the jury had before them a mid course -- a realistic alternative to acquitting altogether or convicting as charged -- they may have chosen the mid course. They may have accepted that the applicant had been reckless, rather intended to cause really serious bodily harm.

94 Mr McDonald properly reminded us that the fact trial counsel may, for tactical reasons, seek to persuade a trial judge not to leave an alternative count to the jury does not relieve a trial judge of the responsibility of doing so where the alternative is a viable one on the evidence as presented. Here he submitted the fact that trial counsel seemed to have agreed that section 20 verdicts and manslaughter verdicts did not arise is irrelevant. The prosecution's case was that the applicant did not intend to kill any patient. Their case was that he intended to cause them really serious harm. The jury were told that the applicant enjoyed the thrill of trying to revive the patients; that the applicant was fond of self-aggrandisement.

95. The harm relied on by the prosecution was, Mr McDonald emphasised, the respiratory arrest itself. It could have been for a very short period in the case of some patients. Generally it was for a period lasting between five to 30 minutes.

96 The respiratory deterioration seems to have been recognised almost immediately in every patient and given proper medical treatment. Except for Mr Onley and Mr Bateman, he reminded the court that all patients recovered. None of the patients it seems remembered either stopping breathing or any medical intervention. Mr McDonald submitted that, by adding the alternative count of attempt, the prosecution appeared to have conceded that there was at least a possibility the jury may not find that the applicant had caused serious harm. In his submission, it was further open to the jury to conclude that, even if serious harm was caused, that was not the applicant's intention.

97 Mr Price, however, was quick to point out that it was not the Crown's concession that led to the leaving of alternative verdicts of attempt to the jury. This was done on the judge's own initiative. Out of an abundance of caution, he chose to leave open to the jury the alternative of an attempt on the basis that the interference with an individual patient's health, whatever might have been intended, was in fact so brief as to be capable of being regarded by the jury as less than really serious harm.

98 The jury rejected the alternatives in every single case in which the applicant was found to have committed the act, in other words they rejected the submission that the harm caused was not really serious bodily harm. Mr Price pointed out that the

applicant has not identified the case of a single patient in which it was said that such a finding was wrong.

99 The Crown reminded the court, with very considerable force in our view, that from the very outset of this period, the applicant, a trained and experienced nurse, knew the possible consequences of injecting his patients in the way alleged. If he injected them, he must have intended respiratory collapse. He must have intended to put his patients' lives at risk. He must have intended to cut-off or seriously inhibit a vital bodily function. As he well knew, artificial ventilation and recovery was not inevitable. Mr Price observed that, in the cases of Mr Bateman and Mrs Jordan, the applicant was present when the doctors took the decision not to resuscitate them both. The fortunate Mrs Jordan revived spontaneously. The unfortunate Mr Bateman did not. He died. It was no leap at all, therefore for the jury to find that a trained nurse who administered drugs to patients in these circumstances intended to cause grievous bodily harm. The applicant himself admitted as much.

100 In answer to prosecution cross-examination, he said this.

> "Q. All of these people were within an ace of dying had it not been for the skill and dedication of your colleagues - is that not right?
>
> A. I do not believe every single one of them, but the majority of patients were in a critical condition when they were in hospital.
>
> Q. And it would be obvious to anybody that causing them to have respiratory arrests of the sort that they each suffered would be desperately dangerous for them?
>
> A. If it was deliberately inflicted."

101 Albeit the question of the applicant's intent and whether it was proved remained one for the jury to answer, this was never a controversial issue in this trial. There was no criticism at trial of the judge's direction that if the applicant knew that it was certain, or virtually certain, that the substance injected would cause really serious bodily harm, it was open to the jury to find that that is what he intended.

102. In our judgment, there was here no viable alternative verdict on the evidence as presented. The evidence was all one way. If the applicant committed the deeds, he intended the consequences, and the jury found the consequences were grievous bodily harm. The whole prosecution case was predicated on the assertion that the applicant wanted the excitement of a major incident that he could only achieve by rendering a patient unconscious, ie by causing them serious bodily harm, even if not lasting or permanent bodily harm.

103 To our mind, Mr McDonald has singularly failed to identify a sensible factual basis on the evidence in this case for a conviction of an alternative lesser offence. Nobody, not expert, advocate or the applicant himself, has put before us an argument as to how a trained nurse could have done what the applicant was proved to have done without intending to cause the patient to stop breathing and thus be incapable

independently of sustaining his own life. The decision of trial counsel not to challenge the assertion that, if the applicant did the deeds, he intended to cause really serious bodily harm was not a tactical decision by counsel, it was, in our view, a realistic assessment of the evidence as called. Accordingly, we reject the assertion that it was incumbent on Crane J to leave to the jury the lesser verdicts in case the jury were satisfied the applicant did the acts, caused the really serious bodily harm, but did not intend to do so.

104 We should add this. We have of course considered the overall state of the evidence to assess the safety of the convictions. In our judgment, nothing has been put before us to undermine the safety of these convictions. There was ample evidence upon which it was open to the jury to find each element of each offence proved. We have not, in the time available, rehearsed the full extent of the prosecution evidence and the circumstances of each patient, though the summaries of those incidents are to be found in the summing up, the prosecution opening and the skeleton arguments before us. But we have considered all those circumstances with great care. As it seems to us, the jury have plainly done so as well. As we have already indicated, their acquittal and majority verdict are indications that they have not fallen into the all or nothing trap. They have followed their directions to the letter.

105 For those reasons, we see nothing in the proposed grounds of appeal. We refuse permission to appeal on all grounds, and we refuse the application for an extension of time.

106 Right, Dr Powers, are you going to deal with whether or not more assistance should have been provided by your instructing solicitors, or is Mr McDonald?

DR POWERS: My Lady, I am going to deal with it, if I may.

LADY JUSTICE HALLETT: Thank you.

DR POWERS: My Lady, in the court's judgment, which has just been delivered, you have invited those representing the applicant to address the court in relation to the circumstances in which ground 2 was brought, and in particular the circumstances considering whether or not this court should entertain fresh evidence from statisticians. My Lady, I accept that, in respect of the requirements which section 23(2)(d) of the Criminal Appeal Act 1968 demands, in considering whether to receive any evidence this court has to have regard to whether there is a reasonable explanation for the failure to adduce the evidence in these proceedings, and in that respect, evidence as to the circumstances in which the matter was considered at trial is plainly relevant. My Lady, there are two approaches to ascertaining what happened at trial, in our submission. One is to invite those that were instructing counsel at the time to make reference to the attendance notes, which of course include not only what happened, but the attendance upon the applicant, and other aspects relating to the decisions which the team then instructed would have had in mind as to how to advance the defence. The other route by which that information can be obtained is by going to defence counsel at trial

themselves. My Lady, may I deal with the latter first? You will be aware of course, because it was placed within the bundle, that an approach had been made to junior counsel, Mr Oke, in respect of this very issue, and yesterday, my Lady, you asked whether or not there was the letter which he was answering. We have copies of that letter which were sent to him. I wonder whether I could pass those up to you.

LADY JUSTICE HALLETT: As they are coming up, Dr Powers, can you help, who paid for Professor Hutton's report?

DR POWERS: It has been paid privately by the family.

LADY JUSTICE HALLETT: Right.

DR POWERS: And you will see, my Lady, that it essentially asks for help in respect of the unusual pattern ground which has been advanced, and already you will have seen in bundle 10, behind tab 13, the letter which was received back from Mr Oke, in which he says:

> "It is a considerable time since the events ... I am unable to recall precisely the matters you are seeking assistance on. However, as your firm were in attendance throughout the trial, as well as at all the hearings before the trial commenced, your own notes are likely to be more reliable than our recollection ..."

So in respect of the efforts that those instructing us made to ascertain from trial counsel what had happened on this issue, I would respectfully submit they had done at that stage what they could from counsel's point of view. There were of course two other avenues, one of which was immediately addressed by Mr Oke in his reply. It is not only the attendance notes of the presently instructing solicitors -- I will come to that -- but also of course the transcripts of the court, and you have heard from both Mr Price and indeed ourselves as to the difficulties of getting any further information on that score.

My Lady, whilst I am dealing with that, there are aspects plainly that the attending solicitor's notes would help with in determining what was taking place by way of tactics, but those matters which were in open court between the Crown and the defence, which were also relevant to aspects of this case in advancing the issue of unusual pattern, what was decided by the court, what submissions were made to the court about whether or not this evidence should be included, is an area which it seems, both from the Crown's point of view and from the defence point of view, was not only not known, but it is not recorded, and during the course of this hearing, we have had discussions about what actually took place, and we know that no attendance note was available on that aspect, separate aspect, from those instructing the Crown as to what took place in the way of judgments. So we have nothing from the court, or if it is on tape, it is not readily obtainable. So that source of information on that single aspect of the case was not available to those instructing me. That then leaves of course the critical issue of the attendance notes. My Lady, the situation appears to have been this: that the partner who was then working for a firm called Franklins, who were the firm instructing our

predecessors, had engaged for the purposes of the trial a solicitor who sat through approximately half the trial in attendance upon counsel making notes. For reasons that I have not explored, and probably are not necessary to be explored for the purposes of this submission, that solicitor was dismissed from the firm of Franklins, and with her dismissal went her notes. For the latter part of the trial, a trainee solicitor was engaged in the role of attending at court. When he came to the end of his traineeship, there seems to have been some difficulties in obtaining copies of his notes, and the upshot of that was, I fear, that no notes were available to the firm, the partner managing the case, Mr Syvil Lloyd-Morris, who has attended court today. No notes were available to him, and consequently, no notes available to us.

LADY JUSTICE HALLETT: Would they not have needed the notes to make their claim for public funds? Are the notes not used by a costs draftsman to make their claim?

DR POWERS: Would you excuse me for a moment? (Pause)

My Lady, it seems that some notes are available, but only for some part of the latter part of the trial, and do not cover this relevant issue.

LADY JUSTICE HALLETT: They do not cover the discussion with leading counsel and a partner? Mr Oke said:

> "I discussed with leading counsel, I discussed with the partner from my instructing solicitors and I discussed with Mr Geen, all of us together."

So it is the partner; we are not talking about some trainee solicitor who has been dismissed. According to Mr Oke there was a discussion with the partner present. Is that Mr Bastian Lloyd--Morris; is that who the partner is?

DR POWERS: Syvil Lloyd-Morris, my Lady. Our instructions are that there are no attendance notes from court which are relevant, for the reasons which I have given, although some do exist, but they are not relevant.

LADY JUSTICE HALLETT: Mr Lloyd-Morris does not have any attendance notes?

DR POWERS: That is correct, my Lady. There are no -- I stand to be corrected if someone says to me that there are. It seems that the solicitor who was dismissed who was present took the notes of those conversations, and those notes are also missing. So the upshot of this is that, on my instructions, no notes exist which can help either us or the court as to what tactical decisions were taken in respect of statistical evidence.

LADY JUSTICE HALLETT: Did Mr Lloyd-Morris not have his own recollection, representing a man accused of murder and at a conference where statistical evidence was discussed; did he not have a recollection of it without the benefit of an attendance note?

DR POWERS: My Lady, again I would need to take instructions on whether or not that recollection existed, but given that counsel who were involved at trial and at trial

throughout, whereas Mr Syvil Lloyd-Morris was not present throughout the trial and would have had other responsibilities, that if counsel does not remember, it would scarcely be surprising if the partner that had occasionally been involved in consultations with the defendant had no personal recollection. But that is pure speculation. I have not yet -- if you will forgive me, I will take instructions from him now.

LADY JUSTICE HALLETT: What is concerning me at the moment, and I have not discussed it with my Lords in light of the information you are giving us, is this: as it seems to me we have one possible witness to a discussion about not seeking statistical evidence, which is plainly relevant to section 23. We then have, according to the letter you have now put before us, which I do not think prosecuting counsel have seen -- it is not necessarily in their province -- that suggests there has been a conversation between Mr Oke and Mr McDonald who sits behind you, in which they have discussed what Mr Oke considered about the unusual pattern. That means that, before you stood up and said this is something counsel failed to appreciate at trial, it was known to one or more people representing the applicant that Mr Oke had appreciated it. He had taken exception to the unusual pattern evidence. That is what is worrying me, Dr Powers. The letter says:

> "We understand you have in fact discussed this issue with instructing counsel, Mr Mark McDonald. We would be pleased if you would provide us with a statement addressing the following points: that you raised an issue with the court about the anecdotal evidence; when you raised this issue; what the judge's response was; what undertaking was established by the prosecution; how the prosecution failed to adhere to the undertaking; whether this failure to comply was addressed to the court; any further information you may have."

That leads me to draw an inference that Mr McDonald has discussed with Mr Oke his recollection of objecting to this evidence. He did that before you advanced in his presence the argument that counsel did not take the point and did not understand it. That is what is troubling me at the moment.

DR POWERS: My Lady, that is really a quite separate issue, because that was a matter in respect of which I made submissions after Mr Oke had given his evidence, namely that this is not something which we could possibly appreciate -- this is the point I tried to make before this court -- and was not appreciated before us until such time as people came along and said: look, there is a problem here. So that, in my submission, is more a easily answered point on why it is that no statistician was called at trial. They did not realise the importance of that evidence because no one did until the statistician volunteered it.

LADY JUSTICE HALLETT: Dr Powers, as it seems to me, the proper way to deal with an issue of this kind, if it is known that the matter was considered, is to explain what happened at trial and say either we are going to criticise trial representatives, or with the benefit of hindsight we erred. Neither of which happened here. For my part I am not understanding why it did not. It seems to me that there was enough material

within your instructing solicitor's office, and there was enough in the conversation between Mr McDonald and Mr Oke to have alerted everyone to the fact that the way in which you were advancing the argument was not correct.

DR POWERS: My Lady, I recognise immediately that there should have been before this court evidence of what took place in order to be able to enable the court to consider the matters which section 23(2)(d) required the court to consider. There should have been evidence to that effect and there was not. The mitigation for there being no evidence to that effect is that none was believed to exist by virtue of the problems which were had. There was some thought that there might have been an application to exclude this evidence, but whether it was made, what grounds it was made on, who were involved in what decisions, was completely unclear and undocumented. For those reasons, albeit that there was fault in not putting that before the court in the form of evidence, though in fact, in our submission, there still is no evidence which could have assisted on this point in any event, and even if there were, my Lady, our argument would be that this court still needed to consider the admission of that expert evidence because it gave rise to a line of enquiry which could not have been considered by those who did not have the expertise, and it arose, as I repeat, not as a consequence of any insight that the present team had as to, if I may put it this way, what was seen by those experts to be zero probative value, it did not arise until spontaneously that was drawn to our attention. So on the one ground we failed procedurally to evidence that. There in fact was no evidence, and even if there had been, we still would have wished to advance the argument because the team would not have been able to entertain -- partly, as we heard through Mr Oke's own evidence -- the significance of whether or not the statistician would have helped them. They plainly took the view in the end, as we heard, that it would not be of advantage to them -- the tactical decision not to entertain that evidence. But they had no concept of the strength, in our submission, of what that evidence would have given, which would have enabled them, we would say, if that evidence had been accepted by them, and indeed by the court, to make a submission that that evidence simply should not have been admitted, and they then at that stage plainly could have said to the Crown: "Well, you can call as many people as you want to say the same thing here; it is all ineffective evidence because it is a statistical basis". They could not do that before because they were anxious about it. They thought perhaps there is something in this.

My Lady, my really great concern is the distinction between the recognition of rarity and the importance of an overall pattern, and it is the overall pattern that this ground is concerned with, not the issue of rarity. The overall pattern is the issue which the two experts were concerned with. So, in my submission, despite the failings I have recognised --

LADY JUSTICE HALLETT: Well, it is a series of failings, is it not? We have apparently a failing to ensure the retention of important attendance notes -- one lot of important attendance notes -- another failure to ensure the retention of the attendance notes of the assistant solicitor who was dismissed. We then have the failure to provide the appropriate documentation for a section 23 application. We have the failure to consider with you the grounds of appeal that could properly be advanced, because if they had been considered with you, I assume that your instructing solicitor would have

told you: "Well, we did consider this at trial, but for reasons X, Y and Z we did not pursue it". Did you not at one stage put to Mr Oke that your solicitor did not agree with the advice?

DR POWERS: My Lady, it is true that there was, as one would understand amongst a team of people, including the applicant himself, there were differing views about whether or not a statistician should be obtained.

LADY JUSTICE HALLETT: On what basis did you put to Mr Oke that your instructing solicitor did not agree with your advice? Where did you get that from?

DR POWERS: I got that information from the instructing solicitor.

LADY JUSTICE HALLETT: He had a memory of the conversation?

DR POWERS: He had a memory of that evidently, although I have no idea over how much time and how long this went on for, but evidently there was an issue over whether or not a statistical advice should be obtained. In the end both he and the applicant -- as was recognised through the questions which I asked of Mr Oke -- a decision was made that statistical advice would not be called. That is just about the extent of it. I mean, to my knowledge, the information which was available does not go beyond that point.

My Lady also addressed the issue of section 23 fresh evidence. Form Ws are plainly required and mandatory. A Form W, as we know, was served in respect of Dr Pumphrey very early on, a year or so ago. Regrettably, Form Ws were not completed and served on this court until three days before the hearing on Friday 30 October.

LADY JUSTICE HALLETT: Because the court office kept pressing where the documentation was; because my Lords and I were looking at the papers and could not find the relevant documentation.

DR POWERS: Yes, those additional documents were not served upon the court and they related to the fresh live evidence. I accept that. They did not relate to the new sets of medical records. They did not relate to the report which came after the conclusion of the trial, but they did relate to the fresh oral evidence which we were inviting the court to listen to, together with of course the supporting affidavits of the solicitor who is present.

Your Ladyship will appreciate that a lot of things happened towards the end, as perhaps is almost inevitable, and particularly without directions from the court.

LADY JUSTICE HALLETT: There were directions from the court, repeated directions.

DR POWERS: There were no directions. This is not a criticism, my Lady. I could not possibly be in a position to make it. But there were no directions from the court as to, for example, exchange of skeletons before this hearing. That in the end was left to the parties, if I can put it that way, to agree. We did our best to serve our skeleton within time.

LADY JUSTICE HALLETT: Are we going off point here?

DR POWERS: It is going off point only to this extent: that many things were done in this case towards the end of the period of time as both sides began to focus their mind upon the issues. Regrettable though it is, I have to accept that, those Form Ws were not before the court until 30 October, and they should have been before the court at a much earlier stage, although, with respect, I doubt if it would have made any difference to the court's ability to consider the issues.

MR JUSTICE HOLROYD: Well, Dr Powers, forgive me for interrupting you, but speaking entirely for myself, had the paperwork been in proper order, it would have made this difference: that we would have known before the hearing began the aspects of the history of the matter which we now know. In the absence of proper documentation, we have been left in a position which, for my part, I am bound to say I find a troubled one: that it was only by the adventitious presence of Mr Oke that we now know what we do know. But although it was Mr Oke's adventitious presence which communicated the relevant matters to us, speaking for myself I am left with the feeling that all that could have been ascertained and put before us well in advance of the hearing. So I cannot for myself at this stage accept the submission that, even if the paperwork had been done earlier, it would not have made any difference. If you want to develop that, then by all means do.

DR POWERS: Yes, my Lord, if the paperwork about which we are talking is the Form Ws, I maintain the submission it would not have helped any further. If it relates to the evidence necessary for 23(2)(d), then of course it could have been done earlier, and an apology is made to this court for not having done it. The submission in respect of that, however, is that it would have produced nothing of any assistance. Such enquiries as were made were brought to a halt as a consequence of the written reply from Mr Oke. My Lord, I suppose it could have been possible to have got a statement from my junior counsel to the effect of precisely what it was that Mr Oke had said to him which he was not prepared to put in writing. I would submit that might have been a length which counsel could not reasonably have been expected to go once there had been a written statement from counsel involved. As I say, in any event, and we dealt with this upon this basis: that if there had been a tactical decision that it was not going to be of advantage -- very conscious as I am because it was put within our skeleton, we identified the reluctance of this court to entertain further evidence and the consciousness of trying another tactic before this court, we were very conscious of it -- that nevertheless our argument would be this was not really a matter of tactics, because they were unaware and had to be unaware of the danger of the admission of that evidence.

MR JUSTICE HOLROYD: I have that point, thank you.

LADY JUSTICE HALLETT: Do you wish to address the subject of the fact we have ten lever arch files, and we have referred to three of them? Why have we got so much documentation? How much money has been wasted preparing ten lever arch files?

DR POWERS: My Lady, I should say this. As your Ladyship will perhaps appreciate, this is not my normal hunting ground, and I found it to be quite astonishing that the preparation of these files effectively had to be done by counsel and by volunteers, unpaid volunteers, in gathering together documents, and when these files were to have been served, we received from your Ladyship a direction that they should be served I think it was by Tuesday the 27th -- if I am wrong about the date it can be corrected -- and I was present when they were being produced and being put together, even though at that time of course we did not have the advantage of the skeleton from the respondent. It was intended to leave just yet another day such that that could go before the court in the bundles as well, then to find that all the photocopying had to be done at the expense of counsel and counsel's own chambers, and that there was no funding for any copies to be produced for this court. I continue to express my complete astonishment -- this is perhaps a customary problem for this court -- that somehow there is going to be no money for any bundles to go before the court, and right at the last hour some order or provision was made whereby money was found for bundles to be produced. It does not quite answer my Lady's point --

LADY JUSTICE HALLETT: Dr Powers, this application has been ongoing for years now, and I just do not understand why, with solicitors and counsel instructed for the applicant and in discussions with Mr Price and Mr Austin-Smith, arrangements could not have been made to reduce this documentation down to, I suspect, possibly two lever arch files months ago. You could have inserted the respondent's document and, if necessary, you could have had an additional bundle with additional documents. But ten lever arch files? My Lords and I were presented with this and we had to find our way through all of it. I had to ask for a reading list -- essential reading.

DR POWERS: My Lady, each of those documents, each of these files that we have -- in our submission, the Court of Appeal office summary, the skeleton, the response, the original advice and grounds, that deals with volume 1. In my submission, I cannot see how the court could not have had that information. Volume 2 deals with the issue relating to ground 1, which is all of the evidence which was given at trial by the experts, and the prosecution opening, which the prosecution wanted in, and the transcripts. It there is dissent -- we could go right the way through each of those bundles.

LADY JUSTICE HALLETT: We will retire so I can discuss with my Lords whether we are going to say anything. There is nothing really you can say on this subject, Mr Price, is there?

MR PRICE: On the subject of bundles?

LADY JUSTICE HALLETT: On the subject generally of the way the ground of appeal in relation to statistics was advanced, and whether or not we should make any comment to the taxing office.

MR PRICE: All I can say on the subject is that we received Dr Hutton's report for the first time on 5 October. Beyond that, there is nothing more that I can really say.

LADY JUSTICE HALLETT: Right.

DR POWERS: My Lady, just before you retire, my learned junior would wish to make an observation directly to you. I wonder whether you would permit that?

LADY JUSTICE HALLETT: Very well.

MR MCDONALD: My Lady, I thought I should just refer to the letter and let the court know what took place as pursuant to the Practice Direction of this court in relation to previous counsel. I spoke on a counsel to counsel basis with trial counsel, and asked him whether or not he would be happy to make a statement, and that was the extent of the discussion. A letter was written to him. I did not draft this letter. This was from my instructing solicitors. I let my instructing solicitors know that I talked to him and could they contact him and ask them to make a statement, and that is this letter that you see.

LADY JUSTICE HALLETT: So you discussed with him on a counsel to counsel basis what steps had been taken at court to stop the evidence of unusual pattern being put before the jury?

MR MCDONALD: Whether they would be happy to make a statement. We did not go into detail as to the extent, because I did not want to because of course that prejudices myself. It would be wrong to do so. It would be more whether or not he would be happy to make a statement on this basis, and (inaudible) was happy to make a statement at that stage. But I think he then had a discussion with his leading counsel.

LADY JUSTICE HALLETT: So you did not discuss with Mr Oke whether he had taken exception to this evidence and considered excluding it?

MR MCDONALD: Not the ins and outs of it. I touched briefly with him on the issue, but he wanted to consult his leading counsel before he did it. He then replied with the letter that we have before us. It would have been wrong to have gone into a discussion, because of course I could then actually find myself having to give evidence, and I was not going to put myself in that position. What I wanted to know was whether he would be happy to comment on it. The difficulty here is that I know Mr Oke socially. We both live practically next-door to each other, and so we often saw each other around. So I asked him a couple of times, and we had not got around to writing this letter to him, whether or not he was happy to make the statement, but the letter was written, and you will see the reply to the statement here. When he came to court actually, and I saw him at the back of court, I asked him then whether or not he would be happy to make a further statement, and that is the statement -- your Lordship obviously commented on the concerns that you have, rightly so, as to what was taking place at the trial, so I asked him again outside whether or not he would be happy to make a statement.

LADY JUSTICE HALLETT: My Lord has a question.

MR JUSTICE KENNETH PARKER: Were you involved in the drafting of this letter, or did you see a draft of this letter?

MR MCDONALD: The first time I saw this letter --

MR JUSTICE KENNETH PARKER: It is simply the language I find difficult to reconcile with your explanation because if you see the way that it is phrased, "... that you raised an issue, when you raised this issue; what the judge's response was ..." If what you are saying is correct, I would have expected the phrasing to be "whether you raised an issue, and if you did so, when did you do so, and if so, what was the judge's --"

MR MCDONALD: My instructions to the solicitor was simply to write and ask for a statement, and I think these bullet points were not from me. I certainly did not draft an advice or a note to my solicitor as to the nature of the discussion that took place between myself and Mr Oke. It was a letter that was sent, I think, from the solicitors to -- on my request, as is right with the Practice Direction of this court, that if there is something that needs to be raised, trial counsel should see it, and that was this, and that was what this letter was obviously asking for.

The reply obviously on 23 September -- I know Mr Hussain had been spoken to -- and this is the reply that we received, and then during this appeal hearing we got a statement.

LADY JUSTICE HALLETT: We will retire.

(Short Adjournment)

LADY JUSTICE HALLETT: Dr Powers, I am not sure what our powers are in this respect. All we will say is this. We do feel that, given the way the papers were presented to us for this hearing, we have wasted a considerable amount of our time getting to the essential issues. One of the areas where we feel there is very real reason for concern is the area in relation to ground 2 and the fresh statistical evidence. We recommend that any taxing officer considers with great care any claim made in obtaining and preparing and presenting the argument on ground 2.

DR POWERS: Very well, my Lady.

LADY JUSTICE HALLETT: Very well, thank you for your help.