THE COURT OF APPEAL

Appeal No. 94/13

83/13

Birmingham J.
Sheehan J.
Mahon J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Eleanor Joel and Jonathan Costen

Appellant

Judgment of the Court delivered on the 4th day of March 2016 by

Mr. Justice Birmingham

1. On the 7th December, 2012, the appellants were each convicted at Wexford Circuit Court of the manslaughter of Evelyn Joel. The verdicts were by a majority of 11 to 1. Both now appeal against their conviction. On the 4th March, 2013, each appellant was sentenced to two years imprisonment which was suspended on condition that they perform 240 hours community service. The Director of Public Prosecutions has sought a review of the sentences imposed on grounds of undue leniency. However, this judgment deals with the conviction aspect only.

2. The background to this case is that the appellants lived together at Cluain Dara, Enniscorthy, with their two children who were aged twelve years and nine years at the date of trial. On or about the 23rd November, 2004, Evelyn Joel, mother of the appellant Eleanor Joel moved in to Cluain Dara. It appears that the expectation initially was that this would not be a long term arrangement, but would last until Evelyn was offered suitable accommodation by the Local Authority. Accommodation was required because Evelyn Joel was suffering from advanced primary progressive multiple sclerosis which had been diagnosed in 2000. Following the diagnosis, the appellant was offered a long term hospital bed in Wexford General Hospital, but she refused this, instead going to live with Alf Joel, her brother in law. She was estranged from her husband Billy Joel and when Alf became ill, Evelyn Joel moved to Cluain Dara. However, any expectation that her stay in Cluain Dara would be short term was not realised and she remained there for some fourteen months.

3. In December 2005, her condition deteriorated and she was admitted by ambulance to hospital in Wexford on the 1st January, 2006. The ambulance personnel who were called to Cluain Dara at the behest of Phyllis Costen, mother of the appellant Jonathan Costen, were greatly disturbed at the condition in which they found their patient. Ms. Eleanor Joel had asked Mr. Costen's mother to come to the house to assist. The ambulance personnel found the patient in very poor condition, the bed that she was lying in was filthy, due the fact that she was doubly incontinent and her lower body was covered in faeces. She had extensive bed sores which were infected. On admission to hospital, she was bathed, her bed sores were attended to, she was provided with antibiotics to which she responded.

4. Following admission, she initially made progress in response to treatment, but unfortunately while in hospital she developed pneumonia. On the 7th January, 2006, Evelyn Joel died in Wexford General Hospital. Following on from the death of Evelyn Joel, both appellants were charged with manslaughter and the case advanced against them was that her death was due to their neglect while she was living in their home.

5. A number of grounds of appeal have been advanced in written and oral submissions. These might be summarised as follows:-

- An issue about the trial venue and the failure to accede to an application to transfer the case.

- An issue arising from the substitution of one juror by another.

- Issues in relation to causation, there are two submissions here, one identifying the threshold that the prosecution must meet and secondly whether the evidence in the case met the identified threshold.

- An issue about the relevance of the negligence of others and how this was dealt with by the trial judge.

- A subsidiary issue relates to the adequacy of the investigation that was carried out.

- A further issue which was specific to the appellant Jonathan Costen relating to the question of whether a duty of care existed.

The failure to transfer

6. On the 2nd October, 2012, the appellants made an application to the judge to whom the case was then assigned, His Honour Judge Hickson. There were a number of aspects to the application to transfer:

(i) That this was a re-trial and that the original trial which ran between October and December 2011, had received massive coverage in the local Wexford media over a seven week period.

(ii) The fact that the coverage of the first trial contained many references to the deceased having been starved and refused water, as well as other coverage that was now highly prejudicial. That evidence had emerged in a situation where both accused had initially faced a charge of reckless endangerment, but those charges were withdrawn from the jury at the close of the prosecution case. These issues were not expected to feature during any re-trial.

(iii) Concerns arising from the fact that it was the appellant's defence that neglect and inadequacies on the part of the HSE, and in particular local HSE services in Wexford, and/or the two local housing authorities involved Wexford County Council and Enniscorthy Town Council, caused the death of Mrs. Joel or contributed to a very substantial extent to it. The actions of many employees of the HSE and of the local authorities would come under scrutiny.

7. The trial judge refused the application to transfer. In the course of this ruling he indicated that the reporting had in general been accurate and that there had been no particular victimisation of the accused by members of the public. He indicated that what concerned him was the media coverage arising from the count of reckless endangerment. He indicated that it occurred to him that it would be:

> "Unwise and unsafe not to advise a jury, be they in Wexford or in Dublin that initially such a count was preferred against both defendants and then directed. It would be a risk to avoid mentioning it all together. That being so it seems to me that whether the trial takes place in Wexford or in Dublin, a judge will be obliged to direct a jury in relation to that issue and of course to properly charge then in relation to that issue."

8. Section 32 of the Courts and Courts Officers Act 1995, deals with the question of transfers. The section so far as material provides:-

> "32(1) Where a person (in this section referred to as 'the accused') has been sent forward for trial to the Circuit Court, sitting other than within the Dublin Circuit, the judge of the Circuit Court before whom the accused is triable may, on the application of the prosecutor or the accused, if satisfied that it would be manifestly unjust not to do so, transfer the trial to the Circuit Court sitting within the Dublin Circuit and the decision to grant or refuse the application shall be final and unappealable."

9. The parties are in disagreement about the significance of the phrase "the decision to grant or refuse the application shall be final and unappealable". The respondent says that the statement is an absolute one and an unqualified one and that it precludes any appeal at this stage from the decision of Judge Hickson. However, the appellants say that the effect of the section is simply to clarify that there is no possibility of a stand alone appeal and to ensure that once a judge has made a decision whether to transfer or to refuse to transfer, that the trial will then proceed.

10. The Court is of the view that the interpretation contended for by the appellants is the correct one. A decision in relation to the venue may be of fundamental importance. It would be unacceptable if a party who felt that they had been adversely affected by a decision in relation to venue were precluded from raising the issue in a post conviction appeal. There are two matters to which the Court will draw attention. The reference to "grant or refuse the application" is suggestive of an approach that precludes stand alone appeals after the decision to transfer or refuse is made. The concern seems to be that matters should proceed to trial without further delay. There is a further point, the section refers to the decision being "final". A literal interpretation of the word "final" would appear to prevent a judicial review, but there have been judicial reviews. (See by way of example the case of *Todd v. Judge Murphy* [1999] 1 ILRM 261). In those circumstances, the Court believes that it has jurisdiction to entertain the appeal on this ground. However, the language of the section and in particular the phrase "the judge may transfer if satisfied that it would be manifestly unjust not to do so", does not mean that transfers will be granted lightly, quite the contrary in the first instance. It is absolutely clear if there is an appeal, the situation is one where very particular regard must be paid to the view of the Circuit Court judge who dealt with the application. It is a situation where it is appropriate to afford a very considerable margin of appreciation.

11. The circumstances of Mrs. Joel's death received significant coverage in both the local media and the national media. The first trial received significant coverage in the national media. However, the coverage of the trial in the Wexford media can properly be described as blanket coverage. The trial was a lengthy one, taking place over a seven week period and throughout the trial each of the Wexford newspapers provided massive coverage. It is undoubtedly the situation that people pay more attention to media stories that are local to them or in some other ways personal to them. The likelihood is that all of the members of the jury panel would have been exposed to the coverage from the time of the original trial. If the evidence on the re-trial was expected to be a repetition of the evidence from the first trial that would not give rise to a major problem, still less an insuperable one. However, in a situation where evidence given at the first trial of a particularly shocking and emotive kind, could not be adduced at the re-trial that did represent a difficulty. The extent of the coverage and the fact that coverage related to events that had occurred in their own area, in their own home county, meant that the scope for the fade factor to operate in respect of Wexford jurors was limited.

12. This was a case where the facts in issue were very unusual, were particularly sensitive, and particularly emotional. As a matter of common sense those who heard about such matters over a prolonged period in an intensive manner were very unlikely to forget. It was a situation where it was likely that views would be formed and where it would not be easy to set those views aside. In these circumstances the application to transfer was a meritorious one. Courts ought to trust jurors to be true to their oath and to decide cases on the evidence that they hear in court. However, jurors are human and jurors and potential jurors should be assisted where necessary and if it is reasonably practical to do so. Recognising this, jurors from the Enniscorthy area were precluded from serving on the first jury. Presumably this was on the basis that they would have learned by word of mouth and by whatever amount of pre-trial publicity there had been about the events at Cluain Dara and might have formed a view in relation to it. Such was the extent of publicity arising from the first trial across the County of Wexford, that jurors from every part of the County would have been placed in a difficult position. In this case, the issues at stake were so emotional and so sensitive and the coverage had been so massive and so intense that the case for a transfer was a truly compelling one. This was a case which should have been transferred from Wexford to Dublin.

The substitution of a juror

13. The sequence of events that have given rise to this issue would seem to be that after twelve jurors had been selected, the judge told the jury about the need to select a foreman. He told them that it would be an hour or so before the case was ready to start and that as soon as they were ready, they should let him know because he was proposing to keep the jury panel until he knew that the jury was ready to start. The judge then addressed counsel and told them of his intention to send the jury for an early lunch and proceed to deal in the absence of the jury with a defence motion. He then said that he was rising for a short while. Sometime later the judge returned to court and observed to those present that an unforeseen problem had arisen and that he might have to release one of the jurors. The judge inquired where was senior counsel for Eleanor Joel and was told by junior counsel for Jonathan Costen that she had stepped out for a moment as had Ms. Joel's junior counsel and instructing solicitor. The judge then explained to junior

counsel for Mr. Costen that one of the jurors apparently had become unwell, so that he proposed to release that juror and swear in another juror. Junior counsel for Mr. Costen commented that he did not see a difficulty with that and senior counsel for the prosecution also confirmed that he did not have a difficulty. The jury were then brought into court and the judge addressed the jury and one juror in particular, commenting that he understood that juror was not feeling well and that he was releasing that juror. Junior counsel for Mr. Costen then said to the judge that his instructing solicitor was not in court at present. There was then an exchange between judge and counsel with the judge commenting: "Well if you think I am going to hold up the matter because your instructing solicitor is not here, you are wrong". Counsel replied, "I appreciate that." The judge then instructing "do it yourself" to which counsel replied "may it please the court".

14. While some doubt has been cast over this in the submissions on behalf of Jonathan Costen it appears very likely both appellants were present for this exchange and for the selection of the twelfth juror. What is clear is that the discharge of a juror and the selection of a replacement took place in the absence of the legal advisers of Eleanor Joel. That a judge, who was about to start what was obviously going to be a long and difficult case, would be anxious to get the case started and to ensure that no time was lost is understandable, indeed more than that admirable. Nonetheless, the Court is concerned that a significant step in the trial was taken in the absence of Ms. Joel's legal advisers and without notice to them. Whatever the situation in other jurisdictions, peremptory challenges are very much part of the Irish legal system and are exercised by both prosecution and defence on a daily basis. It is true that the right to challenge is a right that is personal to an accused person, but in practice, accused persons will leave it to their lawyers to exercise peremptory challenges or indeed challenges for cause on their behalf.

15. The respondents in opposing this ground of appeal lays emphasis on the fact that the conviction was by an 11 to 1 majority, thereby it seems implicitly accepting that the appellant would have a ground of complaint had the verdict been a 10 to 2 majority. In the view of the Court, the distinction between an 11 to 1 majority and a 10 to 2 one is not really valid. Every juror has, of course, an opportunity to vote on the outcome of a case, but the capacity of a juror to influence the outcome is not limited to casting their own individual vote at the conclusion of the jury's deliberation. During deliberation a juror may seek to persuade other jurors to their point of view. There is no way of knowing what role the juror who was selected in the absence of and without the knowledge of Ms. Joel's lawyers played in the jury deliberations. It is possible that the juror was a powerful and persuasive advocate for a conviction and influenced the outcome to a decisive extent. This is an unsatisfactory state of affairs and the ground of appeal relating to Ms. Joel succeeds.

16. The position in relation to Mr. Costen is somewhat different. His junior counsel was in court and explained to the judge that his instructing solicitor was not present, to which, as we have seen, the judge responded "do it yourself". Ordinarily, the challenging of jurors is undertaken by the solicitors on either side who have the jury list before them. While it was less than ideal that counsel should be asked to take on the responsibility of challenging a juror in the absence of an instructing solicitor, the position is distinguishable from that of Ms. Joel where no lawyer was present or knew of what was happening. So far as Mr. Costen is concerned, had this been the only point which was open to him the Court would not have been prepared to quash the conviction.

Ineffective investigation

17. The appellants have complained that their right to a fair trial has been comprised by an inefficient and inadequate investigation. They point out that their response to the allegations against them and their defence is in part based on a contention that others, including healthcare professionals and local authority officials, were responsible for such negligence as occurred. They say that no private individual and certainly not the appellants could have the resources to mount an investigation into the neglect of others. Accordingly, if their trial is to be a fair one it is essential that the possible responsibility of others should be thoroughly and fairly investigated by the various bodies having statutory responsibility on the area. There is no doubt that the fairness of trial may be compromised by what has happened prior to it. See in that regard the observations of O'Flaherty J. in *Heaney v. Ireland* [1996] 1 I.R. 580.

18. In any case, it is desirable that those tasked with the investigation should approach it with an open mind. However, if the investigation is not to be directionless, there will come a stage in most inquiries where there has to be a working hypothesis. Looking back retrospectively it may not always be easy to identify where one begins and the other ends. It may indeed be the case that the gardaí were entitled to take the view that there was no indication of criminal conduct on the part of either the HSE or local authorities or any officials of those bodies. However, what is surprising is that the gardaí asked an independent review committee established by the HSE tasked to review the scope, range and level of services provided to Mrs. Costen by the HSE during the two years before her death having regard to the medical conditions and circumstances and to review the delivery and coordination of these services, to review existing protocols and procedures for the delivery of these services and to make recommendations for the future as appropriate "to desist". No doubt, the concern of the gardaí was that an ongoing parallel inquiry could prejudice their investigation. However, it is understandable if the targets of an investigation will feel aggrieved if alternative theories are not explored to a conclusion.

19. While it may be that there was no indication of criminal conduct on the part of the HSE or its employees, the nature of the HSE interaction with Mrs. Joel while in Cluain Dara gave rise to concern and disquiet. The late Mrs. Joel lived in Cluain Dara with her daughter for fourteen months. During the first ten months of her stay she was seen on fifteen occasions by a public health nurse or one of her team of registered general nurses. In contrast between the 6th September, 2005, and the 1st January, 2006, she was not visited by any HSE nurse and this notwithstanding that Mrs. Joel's condition had been seen to be deteriorating up to that point. During the final four months of her life the HSE involvement with her was limited to leaving nappies outside the house where she resided. One would have to say that there were sufficient indications of possible failings on the part of statutory agencies, the then Minister for Health spoke of huge failings, that the matter required investigation.

20. The approach of the gardaí to the various healthcare professionals who featured in the case and were interviewed by gardaí was in marked contrast to the garda approach to the appellants. No nurse or indeed other HSE official was contacted directly by members of the garda investigation team: instead all of the nurses who had dealt with Mrs. Joel since her discharge from Wexford Hospital five years earlier went to the offices of the solicitors for the HSE. With the assistance of the solicitor, nurses prepared statements which were then "reviewed by" their Director of Nursing. However, notwithstanding that this may not seem entirely balanced, the Court is not persuaded by the arguments that the nature of the garda investigation rendered a fair trial impossible. As has already been said, looking back on an investigation it will not be easy to see how the balance between keeping an open mind and having a focused inquiry is to be struck. However, right from the time when the ambulance was called on the 2nd January, 2006, there had to be serious concerns as to the contribution to the deteriorating condition of Mrs. Joel made by the acts and omissions of the appellants. It was entirely proper that the gardaí should investigate the circumstances surrounding Mrs. Joel's death and the gardaí cannot be criticised for focusing on the role of Ms. Joel and Mr. Costen.

Negligence of others

21. A central element of the defence case was that there was gross negligence on the part of others. The defence contend that in

these circumstances it was not appropriate for the judge to tell the jury, as he did, that they "were not here on an inquiry into whether or not the Health Board was negligent, right? That is not the focus".

22. There can be absolutely no doubt that the defence was fully entitled to run the defence that there was gross negligence on the part of the HSE and that substantial responsibility for the death of Mrs. Joel rested with the HSE and its employees. Had the judge prohibited the defence from pursuing the issue that would have been a serious matter. However, he did not do that. Rather what he did, and what he was fully entitled to do, was to instruct the jury that the focus of their consideration should be the question of whether the two accused were guilty or not guilty of the offences with which they had been charged. The oath that each juror had taken was to well and truly try the issue whether the accused were guilty or not guilty of the offences with which they had been charged and the judge was doing no more than reminding jurors of that fact.

23. However, that is not the end of the matter. Those healthcare professionals who dealt with Mrs. Joel while she was in Cluain Dara were material witnesses. Even if the nature of the defence that was going to be mounted had not been obvious that would still have been the case. However, given that the nature of the defence that was being advanced these individuals were potentially very significant witnesses indeed, and in the view of the Court ought to have been included in the book of evidence and called as witnesses or at the very least tendered so as to be made available for cross examination.

24. The question of whether the health professionals would be called by the prosecution or indeed by the trial judge was an issue at both the original trial and on the re-trial. Prior to the first trial, the appellants sought to have six public health nurses as well as the General Practitioner of the late Mrs. Joel and two occupational therapists added to the book of evidence. That application was opposed by the prosecution and refused by the trial judge. In these circumstances the appellants adopted a stratagem at trial which involved the witnesses in question being called by one accused and cross examined by the other.

25. In advance of the re-trial an application was made to the judge of the Circuit Court who was expected to be the trial judge. He indicated that if he was in fact the trial judge, he would direct the prosecution to call a number of the witnesses in question, failing which he would call the witnesses himself. However, he added that if he was not the trial judge that his ruling would not bind whoever was. In the event the judge who gave this indication was not in fact the trial judge and so the issue was revisited on the first day of the re-trial before His Honour Judge O'Donnabháin to whom the case was assigned. After hearing argument, at that stage Judge O'Donnabháin indicated that he did not see the need for Mrs. Joel's general practitioner to be called as any failings on his part could be established through other witnesses. The judge was of the view that there was no need for any nurse other than Monique Crean, the public health nurse, who had dealings with Mrs. Joel to be called. However, in her case the judge said that he was disposed "at the moment" to call her. In response to this Ms. Crean attended court on the afternoon of the second day and the prosecution indicated that it would tender her then. The defence, who it seems, had not been told that Ms. Crean was coming to court that afternoon and were somewhat surprised at being asked to cross examine her at that point, were reluctant to proceed with the cross examination in a situation where transcripts of interviews that had been conducted with her line manager, which Judge Hickson had directed should be disclosed, had still not been made available. Accordingly, the evidence of Ms. Crean was deferred on foot of an application by the defence.

26. On day three, the court was told that Ms. Crean would be made available the following day. However, at the same time the prosecution re-opened the issue whether in fact Ms. Crean should be tendered at all. The other event of significance on day three was that the appellant obtained an extension of the legal aid certificate to cover the attendance at trial of Prof. Patrick Carr, a retired professor of nursing from Manchester University. Prof. Carr had given evidence at the first trial in relation to the needs of an individual with MS and whether those needs had in fact been met by the nursing professionals who dealt with Mrs. Joel. The application in relation to the certificate was made and acceded to in a situation where there had been a controversy about a fee note submitted by the Professor after the first trial, notwithstanding that the trial judge, Judge O'Donabhain agreed with counsel for Mr. Costen that the fee was perhaps the most reasonable that he had seen. The appellants were anxious that the jury should have the evidence of the public health nurses, before hearing from the professor. The court, however, felt that the professor could offer his opinion by reference to the nursing records and the judge was clear that he "would not get involved in calling the nurse until after hearing from the professor. The relevance of this is that when the court sat on day four, the judge commented that he had considered the matter overnight and had concluded that in the light of the fact that the defence would be calling an expert witness that he was not going to call Nurse Crean.

27. This Court has already indicated that these witnesses were material. As they clearly had material evidence to offer, they ought to have been called by the prosecution. The appellants did not carry through on the stratagem that had been adopted at the first trial. In part it would seem to have been because counsel for Mr. Costen attached significance to certain comments made by the trial judge which seemed to indicate the significance of the evidence of the nursing professor was very considerable indeed and that there was a risk of diminishing or undermining that significant evidence by calling other witnesses. Whatever the reason the defence did not in fact have an opportunity to cross examine the witnesses that they had wished to. In the view of the Court, the fact that these witnesses were not called to give evidence nor were they even tendered and thus were not available for cross examination rendered the trial unsatisfactory.

Causation

28. In a situation where Ms. Joel had a significant and complicated background medical history, had been hospitalised in the circumstances described and had contracted pneumonia while in hospital, causation was always likely to feature as a significant issue. It is necessary to determine first where the threshold is to be laid. Both sides made submissions to the trial judge on this topic. The prosecution contended that the test was that set out in People v. Davis [2001] 1 I.R. 146. That was an appeal against a conviction for murder. The conviction had been recorded in a situation where there was evidence that the deceased had been savagely assaulted, especially by kicks by the appellant shortly before she met her death. While alternative causes of injury were canvassed, they were regarded by the Court of Criminal Appeal as utterly lacking in credibility as a possible source of any significant part of the multiple injuries which the deceased lady sustained. The Court of Criminal Appeal was of the view that the injuries observed by Dr. John Harbison, State Pathologist were absolutely consistent with the applicant's own description of the appalling assault he perpetrated on the deceased. There, Hardiman J. delivering the judgment of the Court of Criminal Appeal dismissing an appeal against murder conviction had commented:-

> "It seems overwhelmingly probable the applicant's attack was the sole cause of all significant injury. **In point of law, however, it is unnecessary to go so far: it is sufficient if the injuries caused by the applicant were related to the death in more than a minimal way**. There was ample evidence on which the jury could be satisfied beyond reasonable doubt that these injuries were the sole or principal cause of death and it is clear from the verdict that they were so satisfied." (Emphasis added).

29. The appellants for their part contended that the test was as set out in *People v. Dunleavey* [1948] 1 I.R. 95. There, in a case

where the appellant had been convicted of gross negligent manslaughter, having knocked down a cyclist while driving a taxi, the Court of Criminal Appeal, in a judgment delivered by Davitt J., offered a model charge for manslaughter by negligence cases. While the appeal was primarily concerned with the degree of negligence that was required to be established, the Court, in relation to causation, said that whatever words were used by the trial judge, the jury should be given clearly to understand: "that they must be satisfied that negligence on the part of the accused was responsible for the death in question". The appellants go on to interpret "responsible for" with assistance from the Oxford Dictionary Online as meaning "being the primary cause of something" and so able to be blamed or credited for it".

30. Insofar as *Dunleavy* and *Davis* appear to lean in different directions it has to be said that in neither cases did the observations in relation to the causation threshold form part of the ratio of the case. In *Dunleavy*, while the Court was offering general assistance, the question of causation cannot have been to the fore in the minds of the members of the Court given that this was really a degree of negligence case. In Davis the language of the judgment makes it clear that the observations in relation to de minimis being sufficient was not required as the evidence in the case went well beyond that. More fundamentally the remarks were in the context of a savage fatal assault and do not necessarily apply to a gross negligence manslaughter.

31. The trial judge was firmly of the view that the "more than minimal" test represented the law in Ireland. However, despite the firmness with which he expressed that view, his charge was in fact somewhat more equivocal. In the course of his charge, he commented:-

> "Are you satisfied on all of the evidence you have heard that the gross neglect caused her death? Now by cause it is - does that neglect have a more than minimal involvement in causing her death. In other words did their action or their lack of action, their omissions, did it have a substantive cause in her contracting the pneumonia."

32. The debate between the "more than minimal" versus "substantial cause" has arisen in a number of jurisdictions. Really there are three possible approaches. One that a jury should be told they had to consider whether the actions of the accused were responsible for, in the sense of the primary cause of the death. Two whether the jury should be told that the question was whether the actions of the accused were a substantial cause or a substantial contributing cause. Three whether the jury should be told that the question was whether the accused's actions, contributed to the death in more than a minimal way.

33. The issue is the subject of a very helpful discussion in McCauley and McCutcheon on *Criminal Liability*. They correctly point out that the difference between the *de minimis* test and the substantive cause test is largely one of degree. The former is liable to cast the net wider than the latter – something which fails to satisfy the substantial cause test might still be more than minimal. The authors opine that in cases of what Glanville Williams describes as "incomplete *mens rea*", such as manslaughter, there is an argument that the *de minimis* test sets the threshold too low. This Court agrees with that view and is of the view that in cases of manslaughter, the jury should be told that the issue is whether the actions or omissions of the accused was a substantial cause of the death. Such an approach is consistent with fundamental constitutional principles. If the situation was otherwise, it would mean that someone who had contributed to the death only minimally and whose contribution was dwarfed by the contribution of others could be solely made account.

34. In the Court's view, this blurring of the distinction between the tests, however well intentioned, may have caused confusion on the part of the jury which will in any event have heard the reference to "a more than a minimal involvement". There will probably be many cases where in truth the issue of causation is very clear cut, the *Davis* case was just one such case. In those circumstances any infelicity or inexactitude of language may well be capable of being overlooked. However, in this case the medical history of Mrs. Joel was a very complex one and identifying the exact cause of death was not altogether straightforward. In these circumstances the blurring of the test was unfortunate and for that reason this ground of appeal succeeds.

Sufficient evidence to be considered?

35. There remains for consideration the question of whether there was sufficient evidence in relation to causation to be left to a jury for consideration irrespective of where the threshold was set. The indictment laid against the appellants had charged them with the unlawful killing of Evelyn Joel by neglect, causing her to die of pneumonia, complicating sepsis syndrome, due to infected pressure sores, due to immobilisation, due to multiple sclerosis. That formulation reflected the opinion of Dr. Marie Cassidy, the State pathologist, as set out in her post mortem report of the 9th January, 2006. At later stages, two supplemental reports were provided by Dr. Cassidy. In a report dated the 17th July, 2006, she opined:-

> "This lady ultimately died because she had bedsores which had become infected".

That report continued:-

> "Her carer(s) should have been aware of the severity of the ulcers. Had treatment been sought earlier it is possible that the ulcers could have been treated and she may not have died from infectious complications."

36. A second supplemental report of the 14th May, 2008, saw Dr. Cassidy observe:-

> "While in hospital she developed pneumonia, ultimately responsible for her death. This is not unusual in elderly bedridden patients particularly if they are generally unwell. The lung infection, however, would not be due to the same organisms as those found in the bedsores."

37. The issue of causation was to the forefront of the appellants' minds. They had issued a motion seeking an order pursuant to s. 4(e) of the Criminal Procedure Act 1967, as amended, on the grounds that there was insufficient evidence for them to be required to stand trial and seeking instead that the charges against them should be dismissed. The appellants say that the high watermark of the case against them is to be found in the report of Dr. Cassidy of the 17th July, 2006. That report said that they should have sought treatment earlier. Had they done so, it was a *possibility* that the ulcers could have been treated and, had they been treated Mrs. Joel *might not have* died. (Emphasis added, emphasis that of the appellants).

38. The appellants say that there was no evidence to support the proposition that any failure on the part of the appellants to call timely medical attention or other failure could be said to *be responsible* for the death of Mrs. Joel, as that phrase is used in *Dunleavy*, or to be a substantial cause, the alternative test that has found favour. Indeed they say that even if, contrary to their submissions, the *de minimis* test was to be applied that the evidence, with its reference to the fact that it was possible that Mrs. Joel might not have died had treatment been sought earlier, was so vague that even that test could not be met.

39. The appellants are very critical of the approach of the trial judge to the s. 4(e) application which had been adjourned by the

judge who had sesin of the case originally to the first day of the trial. Then it is said that the trial judge did not fully engage with the arguments and instead allowed himself to be over influenced by the prosecution contention that the time to consider the application was at the close of the prosecution case in the ordinary way. The appellants say that this unsatisfactory state of affairs is compounded by the fact that when the issue was recanvassed in the context of an application for a direction at the close of the prosecution case that considerable significance was attached to what Dr. Cassidy had said in re-examination.

40. Clearly Mrs. Joel's medical history was a very complex one. Shortly after she had moved in with her brother in law, Mr. Alf Joel, she had contracted a neurological disease. In a situation where she could no longer stand or walk she was hospitalised for one month in Wexford General Hospital in October 2000. There she was diagnosed as having primary progressive multiple sclerosis. This form of disease was likely to steadily worsen and there would be a severe decline at the end.

41. On the 22nd November, 2004, she moved into Cluain Dara. This was in a situation where Mr. Alf Joel had developed a severe respiratory condition for which he was hospitalised and had informed the HSE that he could no longer cope with Mrs. Joel when discharged home, because of her smoking habit. It is noteworthy that in Cluain Dara items such as a bathing hoist and pressure relieving cushions which had been available through the HSE to Mrs. Joel when staying with Mr. Alf Joel were no longer available to her while staying with the appellants.

42. Even on the day that she moved into Cluain Dara Mrs. Joel was very far from being a well woman. A nurse who visited her some eight months later on the 22nd July, 2005 found that her physical condition had deteriorated. At the risk of seriously understating the situation, the care that she received in Cluain Dara was seriously suboptimal. It could not really have been in dispute that professional support and medical attention should have been sought and obtained much earlier. However, the question is did that ground criminal liability?

43. In this case, the DPP was not contending that the appellants had directly caused the deceased to contract pneumonia. Rather the case for the prosecution was that the appellants had more than a minimal involvement in the series of events that culminated in Mrs. Joel's death. Even on the basis of a requirement that the prosecution had to establish that the actions and omissions of the appellants contributed substantially to the death, it is the view of the Court that there was sufficient evidence both at the time of the s. 4(e) application and at the time of the application for a direction for the case to proceed. It is of course the case that at the time of the direction application the issue was whether there was evidence that a jury properly directed could, not necessarily would have been satisfied on this point. A jury so deciding would not necessarily be deciding that there were not others who bore responsibility or indeed deciding that the culpability of others was not considerably greater, than these somewhat pathetic appellants who were not even aware of the existence of the carers allowance but simply deciding that their failures contributed substantially. Obviously, if contrary to the view of the Court, the jury merely had to be satisfied that a contribution was made which was more than *de minimis* it would be easier for the jury to be so satisfied. In these circumstances this ground of appeal does not succeed.

The existence of a duty of care

44. This ground of appeal is specific to Jonathon Costen. A number of grounds of appeal have been formulated in this regard. In summary those grounds were:

> 1. failing to tell the jury that they would have to be satisfied that the appellant had voluntarily assumed the duty of looking after the late Evelyn Joel and/or that his prior conduct gave rise to a duty to look after the late Evelyn Joel:
>
> 2. failing to grant an application for a direction:
>
> 3. failing to redirect the jury that there was no general duty on the appellant to act in the circumstances of the case and
>
> 4. the learned trial judge erred and/or misdirected himself in law and/or in fact and/or in principle in that he determined that there was a legal duty on the appellant to act in circumstances where:
>
> (a) that appellant was not a blood relative of Evelyn Joel;
>
> (b) there was no contractual or statutory obligation on the appellant to act;
>
> (c) the appellant had repeatedly demanded that Evelyn Joel leave the house;
>
> (d) the appellant was not involved in attending to the sanitary or hygienic needs of the late Evelyn Joel and
>
> (e) that the evidence before the court made clear that the appellant had not voluntarily assumed a duty of care towards the late Evelyn Joel nor had a duty arisen by virtue of his prior conduct.

45. The question of when a duty to act can be said to exist is considered by McCauley and McCutcheon in *Criminal Liability*. The point is made that traditionally there has been a judicial reluctance to create omission liability, the view being that such duties should be confined to a limited number of circumstances. Nevertheless the authors make the point that over the years the trend has been towards extending omissions liability.

46. The obligation to act or assist will in some cases be imposed by statute. Sometimes the law provides that a failure to act in the prescribed manner is an offence itself, but the law will sometimes go further and convict the offender of homicide if the victim dies. Some child neglect cases where parents were found guilty of homicide involved a duty to care and to act imposed by statute.

47. Again, a failure to perform a contractual obligation which results in death will sometimes be the basis of a liability. This, it was pointed out, is the explanation for a series of decisions which have held neglectful railway gate keepers guilty of manslaughter. More directly relevant, the authors point out that in some circumstances the relationship between an accused and victim is held to give rise to a duty to act. Examples are the duty of parents to a child or of children towards a dependent parent. More directly relevant still is the recognition that a duty to act might be derived from the assumption of a responsibility to act by an accused. Wherever an accused has voluntarily assumed a duty to act by reason of having undertaken the responsibility to care for that person he/she may be subject to criminal liability if he/she then subsequently fails to carry through on the responsibility that has been voluntarily undertaken.

48. The appellant says that he does not fall into any of the four categories that have been identified. There is no question here of a statutory responsibility. Nor, is there any question of contractual duty and there is no blood relationship between the deceased and

this appellant. So far as the question of voluntary assumption of responsibility is concerned, the appellant says that far from undertaking to care for Mrs. Joel that he had made it clear at all times and right from the outset that he wanted her to leave the house.

49. It is necessary to see how this issue was dealt with by the trial judge in the course of his charge. He did so in these terms:

> "Remember, you must look at the evidence individually, what is the case against each separately. And to establish this unlawful killing, the State are seeking to prove that each had a duty to care for Eleanor. Now how they had that duty, the State says, arises differently. For Eleanor is it because she was the daughter. It is because she invited her into the house, refused, as it were, to put her out or put her into a home and undertook her care. So that's, the State says, where the duty arises. It's different in relation to Jonathan Costen. He is the boyfriend or the partner, whatever you call it and he gets into the situation because of that relationship and because he is in the house and does he – the States says he undertakes the caring. Now, in relation to Jonathan, the defence say specifically in relation to his duty of care that, look, I'm the boyfriend there was constant trouble between me and my partner about how we would get her out of the house. I could not put her out. I asked the woman myself to go and I though I couldn't do anymore. So, he says that even if there was a duty on me I did the best I could to get out of it. Now, the State says that is not true. So, first of all, are you satisfied in relation to both of them beyond a reasonable doubt that they had a duty of care, a duty to care in this case."

50. The appellant submits that by reference to the judge's charge the jury might well have concluded that Mr. Costen had voluntarily undertaken the care of Evelyn Joel and thereby assumed responsibility by the mere fact that he did not put her out of the house. It seems to the Court that there is some substance in that criticism. It would have been preferable if the charge had directed the attention of the jury to the question of whether Mr. Costen had involved himself actively in the care of his partner's mother whether by checking on her or tending to her needs or whatever. Another possible way of approaching the case would be to say that Mr. Costen and Ms. Joel were a couple, a household and that they as a couple had voluntarily assumed responsibility for caring for Mrs. Joel. If the case had been put before the jury on that basis then obviously his efforts to exclude her from the house would be a relevant consideration.

51. There is a further point. The defence says that the trial judge misstated the defence case. The trial judge summarised the position of the defence as being "so, he (Mr. Costen) says even if there was a duty on me I did the best I could to get out of it". Counsel for Mr. Costen says that was not the defence. Rather the defence was that Mr. Costen was not under a duty to Evelyn Joel. The defence case was that he had never assumed a duty to care for her and that throughout the time that she was in his house he repeatedly asked her to leave and asked his partner to get Mrs. Joel to leave.

52. The distinction between the defence that was actually presented and how the judge characterised the defence is a fine one but nonetheless a real one. It is true that this issue was not the subject of a specific requisition. But the question of what the judge had to say on the existence of a duty to care was the subject of a requisition. Counsel asked that the judge would tell the jury that there was no general duty of care. The judge felt that to go down that road would potentially give rise to confusion. The question of whether or not Mr. Costen owed a duty of care is a very significant issue indeed seen from the perspective of his legal team. It seems to the Court that it was understandable that the defence would have wanted it made clear to the jury that Mr. Costen could only be convicted if the prosecution had established beyond reasonable doubt that as an exception to the general situation, Mr. Costen had assumed a responsibility. It was desirable that it be made clear to the jury at the starting point, the general position, is that there is no obligation to care for another, but that there are exceptions to that and it was for the prosecution to establish beyond reasonable doubt that Mr. Costen came within one of those exceptional categories. Accordingly, on this ground Mr. Costen's appeal succeeds.

53. In summary then, as each appellant has succeeded on a number of grounds the Court will quash both convictions.