
Para 7.21 and n 41 In *Hutchinson v UK* (57592/08), the Grand Chamber of the ECtHR, confirming the view taken by the view taken earlier by a Chamber of the ECtHR in *Hutchinson v UK* (2015) 61 EHRR 13 referred to in the text, held, by 14 votes to 3, that life sentences do not violate the ECHR, Art 3. The Grand Chamber reiterated that the ECHR does not prohibit the imposition of whole life sentences. However, to be compatible with the ECHR, there had to be both a prospect of release and continued review of their sentence. The Grand Chamber recognised that the Court of Appeal had sufficiently clarified the scope and grounds of the review process undertaken by the Secretary of State, and the duty of the Secretary of State to release prisoners serving whole life sentences where continued detention could no longer be justified. The Grand Chamber confirmed that the UK's whole life sentence was now viewed as compatible with Article 3.

[Note; the ECtHR sits in committees, Chambers (of seven judges) and a Grand Chamber (of 17). The Grand Chamber has two roles:

- To determine a case which has been relinquished by a chamber on the ground that it raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the Court. This is an exceptional course of action.
- To determine a case referred to it following a judgment of a Chamber. A party may in exceptional cases request such a reference. A panel of the Grand Chamber decides whether or not the case should be referred. The panel must accept the request if the case raises a serious question affecting the interpretation of the Convention or a serious issue of general importance.]

Para 7.47, n 96 The Court of Appeal in *Wilcocks* [2016] EWCA Crim 2043 reaffirmed, following the decision given by the Court of Appeal in *Foye* [2013] EWCA Crim 475, that the reverse burden of proof in respect to diminished responsibility, contained in the Homicide Act 1957, s 2(2), does not breach a defendant's rights to be presumed innocent under the ECHR, Art 6(2).

Paras 7.49, 7.55 and 7.56 In *Lindo* [2016] EWCA Crim 1940, the Court of Appeal held:

> 'Drug-induced psychosis standing alone would not suffice and a drug induced psychosis combined with a prodromal state [ie early stage or symptoms of disease before characteristic symptoms appear] does not seem to us to be sufficient to trigger the operation of [the Homicide Act 1975, s 2].
>
> There is nothing harsh about such an approach. We endorse a passage from the judgment in *Wood* [2008] EWCA Crim 1305, cited by … [the Court of Appeal in *Dowds* [2012] EWCA Crim 281], to the effect that public policy proceeds on the basis that an offender who voluntarily

> takes alcohol or drugs and behaves a way in which he would not have behaved when sober is not normally excused responsibility' (at [40]-[41]).

Para 7.51 In *Conroy* [2017] EWCA Crim 81, it was argued that the judge had misdirected the jury on whether D had the ability to form a rational judgement. The Court of Appeal held that the phrase 'to form a rational judgment' contained in s 2(1A) did not always mean 'an ability to form a rational judgment as to whether an act is right or wrong' (as was stated by the Court of Criminal Appeal in *Byrne* [1960] 2 QB 396)*,* although in standard cases it was likely to be one element**.** The Court of Appeal recognised (at [33]) that 'the wording [of s 2(1A)] is altogether more open-ended.'

Para 7.52 In *Golds* [2016] UKSC 61, the Supreme Court considered two certified points raised by the Court of Appeal as questions of general importance:

(1) Where D, being tried for murder, seeks to establish that he is not guilty of murder by reason of diminished responsibility, is the Court required to direct the jury as to the definition of the word 'substantial' as in the phrase 'substantially impaired' found in s 2(1)(b) of the Homicide Act 1957 as amended by s 52 of the Coroners and Justice Act 2009?

(2) If the answer to the first question is in the affirmative, or if for some other reason the judge chooses to direct the jury on the meaning of the word 'substantial', is it to be defined as 'something more than merely trivial', or alternatively in a way that connotes more than this, such as 'something whilst short of total impairment that is nevertheless significant and appreciable'?

The Supreme Court, dismissing D's appeal and upholding the decision of the Court of Appeal, confirmed that ordinarily a judge should not give a direction on the meaning of 'substantially' when addressing 'substantially impaired', as 'substantial' is an ordinary word, unless the jury would misunderstand the meaning of 'substantial' without elucidation being given. Reviewing the use of the word 'substantial' in statutory provisions and the meaning given to 'substantial' in these different contexts, the Supreme Court, like the Court of Appeal (see para 7.52), recognised (at [27]) that 'substantial' could be used in two senses either:

> '(1) "present rather than illusory or fanciful, thus having some substance" [ie more than trivial or minimal] or (2) "important or weighty", as in "a substantial meal" or "a substantial salary" [ie significant or appreciable].' (The words added in the square brackets was the language used by the Court of Appeal when considering the two meanings of 'substantial'.)

The Supreme Court confirmed that the second sense of the word should apply when considering whether the medical condition substantially impaired D's ability

to either understand the nature of his act, form rational judgments or exercise self-control. The Supreme Court reiterated that 'substantial' was a question of degree for the jury to determine. It held that if a direction on the meaning of 'substantial' was needed, which would be in exceptional cases, directing the jury to use a synonym word or directing them in terms of a spectrum (as occurred at the trial in *Lloyd*, see [1967] 1 QB 175, where Ashworth J had directed the jury that 'substantial impairment' was something 'less than total and more than trivial') should be avoided.

The Supreme Court stated at [41]-[42]

> **'**It seems likely that the Ashworth "spectrum" illustration will have been of assistance to juries in some cases, for it helps to explain (a) that the impairment need not be total to suffice and (b) that "substantially" is a question of degree. But, as the experience of *Lloyd, Ramchurn* and the present case teaches, if it is to be used it needs to be combined with making it clear that it is not the law that *any* impairment beyond the merely trivial will suffice. The impairment must of course pass the merely trivial to be considered, just as it need not reach the total, but whether, when it has passed the trivial, it can properly be regarded as substantial, is a matter for the jury in the individual case, aided as it will be by the experts' exposition of the kind of impairment which the condition under consideration may have generated in the accused. Unless the spectrum illustration has been used by someone in the case, it is preferable for the judge not to introduce it. If it has been used, or if, on mature consideration the judge considers that it may help the jury in the particular case on trial, it needs to be coupled with a clear statement that it is not enough that the impairment be merely more than trivial; it must be such as is judged by the jury to be substantial. For the same reason, if an expert witness, or indeed counsel, should introduce into the case the expression "more than merely trivial", the same clear statement should be made to assist the jury.
>
> Once this usage is understood by all concerned with the trial, there ought to be no occasion for the jury to be distracted by debate about the meaning of the word. What matters is what kind of effect the medical condition was likely to have had on the three relevant capacities of the accused. So long as the experts understand the sense in which "substantially" is used in the statute (which should henceforth be clear), and that the decision whether the threshold is met is for the jury rather than for them, it is a matter for individual judgment whether they offer their own opinion on whether the impairment will have been substantial or confine themselves to the kind of practical effect it would have had. If

> they do the former, they will be understood to be using the word in the second sense...'

The Supreme Court answered the two certified questions at [43] as follows:

> '(1) Ordinarily in a murder trial where diminished responsibility is in issue the judge need not direct the jury beyond the terms of the statute and should not attempt to define the meaning of "substantially". Experience has shown that the issue of its correct interpretation is unlikely to arise in many cases. The jury should normally be given to understand that the expression is an ordinary English word, that it imports a question of degree, and that whether in the case before it the impairment can properly be described as substantial is for it to resolve.
>
> (2) If, however, the jury has been introduced to the question of whether *any* impairment beyond the merely trivial will suffice, or if it has been introduced to the concept of a spectrum between the greater than trivial and the total, the judge should explain that whilst the impairment must indeed pass the merely trivial before it need be considered, it is not the law that *any* impairment beyond the trivial will suffice. The judge should likewise make this clear if a risk arises that the jury might misunderstand the import of the expression; whether this risk arises or not is a judgment to be arrived at by the trial judge who is charged with overseeing the dynamics of the trial. Diminished responsibility involves an impairment of one or more of the abilities listed in the statute to an extent which the jury judges to be substantial, and which it is satisfied significantly contributed to his committing the offence. Illustrative expressions of the sense of the word may be employed so long as the jury is given clearly to understand that no single synonym is to be substituted for the statutory word…'

Para 7.52 The Court of Appeal in *Squelch* [2017] EWCA Crim 204 were asked to consider the trial judge's direction on the meaning of 'substantial' impairment contained in the Homicide Act 1957, s 2. The Court held that the trial judge, in stating that 'substantial' was an ordinary word meaning 'less than total and more than trivial,' and that it was a matter for the jury to determine if there was a substantial impairment, had complied with the guidance given in *Golds* [2016] UKSC 61. The Court of Appeal held that the trial judge had not elaborated unduly.

Paras 7.55 and 7.56 The Court of Appeal in *Kay* [2017] EWCA Crim 647 confirmed that the law did not debar someone who suffered schizophrenia from raising the partial defence of diminished responsibility where voluntary intoxication had triggered the psychotic state, provided the defendant could establish that he met the four requirements outlined in the Homicide Act 1957, s 2(1). The Court stated that the defendant must establish, on the balance of

probabilities, that his abnormality of mental functioning (in this case a psychotic state) arose from a recognised medical condition that substantially impaired his responsibility. The recognised medical condition might be schizophrenia of such severity that, absent intoxication, it substantially impaired his responsibility, or it might be schizophrenia coupled with drink/drugs dependency syndrome which together substantially impaired responsibility. However, the Court added, if an abnormality of mental functioning arose from voluntary intoxication and not from a recognised medical condition a defendant cannot avail himself of the partial defence.

Para 7.58 The Supreme Court in *Golds* [2016] UKSC 61, at [44]-[51], confirmed, *obiter*, the Court of Appeal's approach in *Brennan* [2014] EWCA Crim 2387 that the option to return the verdict guilty of murder can be removed from the jury in murder cases where diminished responsibility is raised and the medical evidence is undisputed.

***Paras 7.65 and 7.83** In *Martin* [2018] EWCA Crim 1359, the Court of Appeal, dismissing the appeal, held that the trial judge, applying the Coroners and Justice Act 2009, ss 54(5) and (6), had correctly concluded that there was no sufficient evidence arising from the prosecution case to leave the defence of loss of control to the jury. The Court of Appeal, considering the relationship between self-defence and the defence of loss of control, recognised (at [45] and [46]):

> 'We can, of course, accept that where a defence case in a murder trial is run on the footing of self defence that does not preclude, on appropriate facts, the availability also of a defence of loss of control. But equally an issue of self defence by no means necessarily carries with it an issue of loss of control. As stated by a constitution of this court in the case of *R v Skilton* [2014] EWCA Crim 154, there is a clear distinction between the defence of self defence on the one hand and the partial defence of loss of control on the other hand. It was rather pointedly stated in that case that judges should not "clutter up" a jury's deliberations by inviting them to consider issues which, in truth, did not arise on the evidence. An example of a case where, on its facts, the defence was held properly to be confined to one of self defence and where it was adjudged that there was no sufficient evidence adduced to raise in addition an issue of loss of control can be found in the case of *R v Charles* [2013] EWCA Crim 1205. That case is also an illustration of the proposition that the fact that there may, on the evidence, be a qualifying trigger does not necessarily indicate that a loss of control had thereby been caused.
>
> The starting point under the statutory provisions is to consider whether there was any evidence of loss of self control. If there was not, then consideration of whether there was a "qualifying trigger" as defined falls

away. In addition, the requirements of section 54(1)(c) are a further precondition to the availability of the defence. Moreover, section 54(5) is explicit that it is only if sufficient evidence is adduced to raise the issue that the jury must assume that it is satisfied unless disproved by the prosecution. The assessment of whether there is such sufficient evidence is then addressed by the provisions of section 54(6).'

Para 7.77 An example of the Court considering whether the 'thing said or done' caused the defendant to have a 'justified sense of being seriously wronged' can be seen in *Meanza* [2017] EWCA Crim 445. The Court of Appeal held that it was for the defendant to demonstrate an arguable case that the circumstances leading to his loss of control 'caused him to have a justifiable sense of being seriously wronged.' The Court recognised that the emphasis was on the adjective '*justifiable.*' The Court, agreeing with the trial judge's assessment, held that neither the hospital and restriction orders which were lawfully imposed nor the restriction upon his relationship with his girlfriend was capable of being viewed as a '*justifiable*' grievance.

***Para 7.81** The Court of Appeal in *Wilcocks* [2016] EWCA Crim 2043 held that the trial judge had directed the jury accurately on the relevance of D's alleged personality disorder to the objective requirement under the Coroners and Justice Act 2009, s 54(1)(c) when he stated that, for the personality disorder to be relevant, it had to go further than simply reducing D's general capacity for tolerance and self-restraint. In his direction, the trial judge had given the jury only one example, although he did not exclude other possibilities, of how the personality disorder might be relevant to the requirement under s 54(1)(c), saying: 'If you thought that [D] suffered from a personality disorder which made him unusually likely to become angry and aggressive at the slightest provocation, that would of course be relevant to diminished responsibility but it could not assist him in relation to loss of control. But if you thought that a personality disorder had caused him to attempt suicide, then you would be entitled to take into account as one of his circumstances the effect on him of being taunted that he should have killed himself.'

The Court of Appeal in *Rejmanski* [2017] EWCA Crim 2061 considered again to what the extent a mental disorder is relevant to an assessment of 'the circumstances of the defendant,' as defined in the Coroners and Justice Act 2009, s 54(3), when considering the third requirement under the Coroners and Justice Act 2009, s 54(1)(c). The Court of Appeal stated (at [24]) that the three requirements contained in s 54(1) (set out in para 7.65 of the text) were distinct and required separate consideration. The relevance of a mental disorder to each requirement was fact specific, and depended on the nature of the disorder, the effect the disorder had on the defendant and the facts of the case. The Court of Appeal, following *Wilcocks* (above) and other decisions, held that a mental disorder should not be taken into account as on one of D's circumstances under

s 54(1)(c) unless it can be shown that the mental disorder is relevant to D's conduct other than having a bearing on D's general capacity for tolerance or self-restraint. The Court of Appeal recognised that caution would need to be exerted when determining if the mental disorder was relevant to D's conduct other than his general capacity for tolerance or self-restraint. The Court of Appeal recognised (at [25] – [27]) that:

> '…the wording of s 54(1)(c) is clear: in assessing the third component, the defendant is to be judged against the standard of a person with a normal degree, and not an abnormal degree, of tolerance and self-restraint. If, and in so far as, a personality disorder reduced the defendant's general capacity for tolerance or self-restraint, that would not be a relevant consideration. Moreover, it would not be a relevant consideration even if the personality disorder was one of the "circumstances" of the defendant because it was relevant to the gravity of the trigger (for which, see *Wilcocks*). Expert evidence about the impact of the disorder would be irrelevant and inadmissible on the issue of whether it would have reduced the capacity for tolerance and self-restraint of the hypothetical "person of D's sex and age, with a normal degree of tolerance and self-restraint".
>
> … if a mental disorder has a relevance to the defendant's conduct other than a bearing on his general capacity for tolerance or self-restraint, it is not excluded by subsection (3), and the jury will be entitled to take it into account as one of the defendant's circumstances under s 54(1)(c). However, it is necessary to identify with some care how the mental disorder is said to be relevant as one of the defendant's circumstances. It must not be relied upon to undermine the principle that the conduct of the defendant is to be judged against "normal" standards, rather than the abnormal standard of an individual defendant. It follows that we reject Mr Griffiths' argument that, if a disorder is relevant to, say, the gravity of the qualifying trigger, and evidence of the disorder is admitted in relation to the gravity of the trigger, the jury would also be entitled to take it into account in so far as it bore on the defendant's general capacity for tolerance and self-restraint. The disorder would be a relevant circumstance of the defendant, but would not be relevant to the question of the degree of tolerance and self-restraint which would be exercised by the hypothetical person referred to in section 54(1)(c).
>
> As we have indicated, the most obvious example of when evidence of a mental disorder may be relevant to the defendant's circumstances is the one mentioned in *Holley* [*A-G for Jersey v Holley* [2005] UKPC 23, decided in relation to the abolished common law defence of provocation] and *Wilcocks*, where the disorder was relevant to the gravity of the qualifying trigger. In *Holley*, the Board accepted that in the case of a

> woman suffering from 'Battered Woman's Syndrome' or a personality disorder, who killed her abuser, evidence of her condition may be relevant to both the loss of self control and to the gravity of the provocation for her. In *Wilcocks*, the trial judge, and this Court, accepted that, if a personality disorder had caused the defendant to attempt suicide and he had been taunted by the deceased about committing suicide, then the jury was entitled to take it into account as one of his circumstances in considering the third stage of the defence.'

The Court of Appeal held (at [29]) that the 'the exclusionary effect of s.54(3) was consistent with, and reinforced by, the availability and scope of the partial defence of diminished responsibility in s.2 of the 1957 Act.' The defence of diminished responsibility could be applied where a mental disorder substantially impaired the ability of the defendant to exercise self-control. As the two defences could be raised together as alternative, 'the law does not therefore ignore a mental disorder that, through no fault of a defendant, rendered them unable to exercise the degree of self-control of a "normal" person.'

***Para 7.109** In *Zaman* [2017] EWCA Crim 1783 D was convicted of gross negligent manslaughter. It was accepted by D, the restaurant owner, that he had owed V, a customer of the restaurant, a duty of care to take reasonable steps to ensure the safety of all customer, and in particular to provide food that was not harmful to customers who made it clear that they had a food allergy. V, who had a nut allergy, ordered a 'nut free' meal from D's restaurant. However, the meal received contained nuts and V suffered an anaphylactic shock and died. D appealed against his conviction mainly on the basis that the judge erred in his direction to the jury with regard to breach of duty and causation. On the issue of breach of duty, D argued that the jury needed to identify and determine the individual acts which amounted to a breach of duty so they could properly determine whether any proven breach satisfied the other elements of gross negligent manslaughter. D argued, as outlined at [37], that the prosecution's case was based on three distinct allegations of breach of duty, namely:

i) Having ordered peanut instead of almond as an ingredient, D failed to take such steps as were reasonable to alert customers to the risk of presence of peanut in meals.

ii) D had failed to ensure that staff had been properly trained or instructed in food allergens.

iii) D has failed to provide a system to prevent cross-contamination of food products.

D argued, as outlined at [38]:

> 'that it was vital that the judge assisted the jury by identifying these distinct ways in which the prosecution said that [D] had breached his duty of care to [V]; and directed them (i) that they were required to be unanimous as to the manner in which [D] had breached his duty of care...; and (ii) given them directions as to how, in respect of any proven breach of duty, they needed to go on to consider whether *that particular* breach of duty satisfied the other elements of the crime such as causation and risk.'

The Court of Appeal, rejecting D's arguments, held that the judge had correctly directed the jury on the question of whether D had breached his duty of care. The Court of Appeal concluded (at [58]) that 'Given the nature of the breach of duty upon which the prosecution relied, the jury were required to consider, on the evidence as a whole, what steps, if any, [D] had taken to avoid the risk of harm to [V]; and then to consider whether those steps were reasonable in all the circumstances.'

Para 7.116 The Court of Appeal in *Sellu* [2016] EWCA Crim 1716, allowed an appeal by a surgeon against conviction for manslaughter by gross negligence, on the ground that the trial judge's direction to the jury on 'gross negligence' was inadequate, because the trial judge had failed to provide the jury with the necessary assistance to enable them to identify the line between even serious or very serious mistakes or lapses from conduct which, as stated in *Misra* [2004] EWCA Crim 2375*,* was 'truly exceptionally bad and was such a departure from the standard [of a reasonably competent doctor] that it consequently amounted to being criminal.' The Court of Appeal confirmed that no specific words were required provided sufficient assistance was given to the jury.

Para 7.117, bullet point 1 In *Rudling* [2016] EWCA Crim 741, two doctors were charged with gross negligence manslaughter after V, who one week before his thirteenth birthday, died of Addison's disease, an autoimmune disease which affects 10-15 per 100000, and was even rarer in children, after D, his GP, had failed to visit him. Addison's disease was not something any GP could be expected to recognise, but the prosecution argued that the symptoms described to D by V's mother were so alarming that D ought have visited V and seen that V should go to hospital where he would have received lifesaving treatment. After assessing the evidence, the Crown Court ruled that there was no case to answer as there was insufficient evidence before the court for the jury to conclude that there was an obvious risk of death. The Court of Appeal dismissed the prosecution's appeal against this ruling. The thrust of the prosecution's case was that a reasonably competent GP would have said to himself 'I cannot eliminate the possibility that the child may be suffering from a rare risk to life without the child being seen urgently', and that this equated to an obvious and serious risk of death. According to the Court of Appeal, however (at [39]-[41]):

> 'In our judgment, that proposition simply does not follow, as is apparent when one focuses on each of the three aspects of this ingredient of the offence of gross negligence manslaughter. At the time of the breach of duty, there must be a risk of death, not merely serious illness; the risk must be serious; and the risk must be obvious. A GP faced with an unusual presentation which is worrying and undiagnosed may need to ensure a face to face assessment urgently in order to investigate further. That may be in order to assess whether it is something serious... which may or may not be so serious as to be life-threatening. A recognisable risk of something serious is not the same as a recognisable risk of death.
>
> What does not follow is that if a reasonably competent GP requires an urgent assessment of a worrying and undiagnosed condition, it is necessarily reasonably foreseeable that there is a risk of death. Still less does it demonstrate a serious risk of death, which is not to be equated with an 'inability to eliminate a possibility'. There may be numerous remote possibilities of very rare conditions which cannot be eliminated but which do not present a serious risk of death. Further, and perhaps most importantly, a mere possibility that an assessment might reveal something life-threatening is not the same as an obvious risk of death. An obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation.
>
> These distinctions are not a matter of semantics but represent real differences in the practical assessments which fall to be made by doctors...'

In *Rose* [2017] EWCA Crim 1168, D, an optometrist, conducted a routine eye test and examination on V. In doing so, she breached her statutory duty of care under the Opticians Act 1989, s 26(1): (1) by failing, without good cause, to properly examine the back of V's eyes during his sight test as required by reason of her statutory duty of care, and (2) by failing to refer V for urgent medical treatment as a result of the significant findings (i.e. swelling of the optic nerve) shown on the retina images which D should have viewed. At D's trial for the manslaughter of V by gross negligence, it was argued that if D had not breached her duty of care then V could have been successfully treated in hospital and would not have died from the pre-existing condition. The judge rejected a submission of no case to answer, determining that D had failed to conduct a full internal examination of V's eyes, there was no good reason for that failure, and thus she had breached her duty of care. He further found that the risk of death caused by the breach of duty was reasonably foreseeable. He directed the jury to consider whether that risk would have been obvious to a reasonably competent optometrist with the knowledge that the appellant would have had '*if she had not acted in breach of her duty to investigate the true position*'; and in addition, whether her conduct

was so bad as to amount to a criminal omission. D was convicted and appealed successfully to the Court of Appeal against conviction.

Applying *Rudling* (above), the Court held that, in assessing reasonable foreseeability of serious and obvious risk of death in cases of gross negligence manslaughter, it is not appropriate to take into account what D would have known but for his or her breach of duty. Were the answer otherwise, this would fundamentally undermine the established legal test of foreseeability in gross negligence manslaughter which requires proof of a 'serious and obvious risk of death' at the time of breach. The implications for medical and other professions would be serious because people would be guilty of gross negligence manslaughter by reason of negligent omissions to carry out routine eye, blood and other tests which in fact would have revealed fatal conditions notwithstanding that the circumstances were such that it was not reasonably foreseeable that failure to carry out such tests would carry an obvious and serious risk of death.

The Court stated that the trial judge appeared to have confused two separate matters: (a) the actual knowledge of D at the time of the breach and (b) the putative knowledge of the reasonably prudent optometrist in the position of D at the time. It continued (at [84]-[86]):

> 'The two are quite different concepts: the former is subjective; the latter is objective. The test of reasonable foreseeability is, of course, resolutely objective and there is no question of it being decided by reference to the subjective knowledge of the person whose conduct is under scrutiny. The test of reasonable foreseeability simply requires the notional objective exercise of putting a reasonably prudent professional in the shoes of the person whose conduct is under scrutiny and asking whether, at the moment of breach of the duty on which the prosecution rely, that person ought reasonably (*i.e.* objectively) to have foreseen an obvious and serious risk of death.
>
> In that regard, the factual matrix is critical. In this case, the purpose of an examination of the back of a person's eyes with an ophthalmoscope or a 'slit lamp' is to fulfil an optometrist's statutory duty under s.26(1) of the 1989 Act to detect "…signs of injury, disease or abnormality in the eye or elsewhere". The fact that an intra-ocular examination *might* reveal a serious abnormality, or even in some cases serious life-threatening problems, does not mean that there is a "serious and obvious risk of death" if such an examination is not carried out. It might be different if the patient presented with symptoms which themselves either pointed to the risk of a potentially life threatening condition or provided a flag that alerted a competent optometrist to that risk but that

> was not this case (this being an entirely routine examination with no material pre-existing history).
>
> Put at its highest, what a reasonably prudent optometrist would or should have known at the time of the breach was that, if he or she did not carry out a proper examination of the back of [V's] eyes, there remained the possibility that signs of potentially life-threatening disease or abnormality might be missed. This is not enough to found a case of gross negligence manslaughter since there must be a "serious and obvious risk of death" at the time of breach.'

***Para 7.120** On the issue of causation, the Court of Appeal, in *Zaman* (discussed above), held that D had tactically not raised a distinct argument that legal causation had not been satisfied. The Court of Appeal recognised that D's defence was that he had taken reasonable steps to ensure V's safety, and therefore, if the jury concluded that he did not, then legal causation would be found as D's breach would, at the very least, be a contributory to V's death.

***Para 7.126** In *Borowiec* [2016] SCC 11, the Supreme Court of Canada considered the meaning of 'her mind is then disturbed…'(which is part of the infanticide provisions under the Canadian Criminal Code and is similarly found in the Infanticide Act 1938, s 1(2)). At [35], the Supreme Court, refusing to agree with the dissenting judgement in the Court of Appeal where it was argued that a woman would only have a disturbed mind if there was 'a substantial psychological problem' which substantially impaired the mother's ability to make rational decisions, concluded that:

> 'the phrase 'mind is then disturbed' (which the Canadian Supreme Court at [30] recognised that there was no meaningful difference between "the mind is then disturbed" and "the balance of the mind was disturbed", the latter being the language used in English law) should be applied as follows:
>
> (α) The word "disturbed" is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense.
>
> (β) In the context of whether a mind is disturbed, the term can mean "mentally agitated", "mentally unstable" or "mentally discomposure".
>
> (χ) The disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder…or amount to a significant impairment of the accused's reasoning faculties.
>
> (δ) The disturbance must be present at the time of the act or omission causing the "newly-born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation.

(ε) There is no requirement to prove that the act or omission was caused by the disturbance....

(ϕ) The disturbance must be "by reason of" the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child.'

In *Tunstill* [2018] EWCA Crim 1696 the Court of Appeal held that the Infanticide Act 1938, s 1(1) does not require the disturbance of the balance of the mind to be caused solely by a failure to fully recover from the effect of giving birth. In reaching this conclusion, the Court of Appeal stated (at [30]-[32] and [35]):

> 'We are conscious that the purpose of the Infanticide Act was to ameliorate the potential harshness of the law of murder by recognising that in a period after birth a mother's balance of mind may be affected. Whilst at the time of the introduction of this provision the diminished responsibility provisions introduced by the Homicide Act 1957 did not exist, it is nonetheless clear that the intention behind the legislation was to be merciful. Since the passing of the Homicide Act, Parliament has not withdrawn the infanticide provisions and, as observed above, has extended them to the crime of manslaughter…
>
> The phrase "by reason of" in s.1(1) does not in our judgment necessarily need to be read as if it said "solely by reason of". It seems to us that as long as a failure to recover from the effects of birth is an operative or substantial cause of the disturbance of balance of mind that should be sufficient, even if there are other underlying mental problems (perhaps falling short of diminished responsibility) which are part of the overall picture.
>
> The words "by reason of" import a consideration of causation. As the wording of s.1(1) shows, the relevant causation is that the balance of a mother's mind is disturbed as a result of not having fully recovered from the effect of giving birth to her child: there is no required causal link between the disturbance of balance of mind and the act or omission causing death. Our law is familiar with the notion that in considering causation a person's conduct need not be the sole or main cause of the prohibited harm. It is sufficient if a person's conduct is a contributory cause…
>
> The issue of causation is a matter of fact for a jury after appropriate direction from a judge as to what can constitute a legally effective cause.'