



Judges hear senior surgeon's appeal against manslaughter conviction

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A senior surgeon jailed for manslaughter after a delay in operating on a patient with a perforated bowel should not have been convicted of causing or significantly contributing to the patient's death, three judges at the Court of Appeal were told this week.

The patient, James Hughes, was taking an anticoagulant that could have caused him to bleed to death if David Sellu had operated on him earlier, Mark Ellison QC, for Sellu, told the court in the surgeon's appeal against his conviction.

Sellu, a senior consultant colorectal surgeon, was sentenced to two and a half years in prison in November 2013 for contributing to Hughes's death in February 2010 at the Clementine Churchill Hospital in Harrow, north London.¹ The conviction and sentence, of which Sellu served half in prison and half on licence, has caused widespread alarm among doctors.^{2,3}

Hughes, a 66 year old builder, had knee replacement surgery at the hospital, run by BMI Healthcare, on 5 February 2010. Sellu, 69, who did private operations at the hospital alongside his NHS job at Ealing Hospital NHS Trust, was asked to step in when Hughes fell unexpectedly ill with abdominal pains six days later.

Hughes was first seen by Sellu just after 9 pm on 11 February and was taken to theatre just after 10 pm on 12 February. He died on 14 February 2010, nine days after his knee operation.

Ellison said that it had been overlooked at Sellu's trial that Hughes was taking the anticoagulant dabigatran, which at the time had no antidote. No one had factored in the risk that Hughes might have bled to death if the operation had been performed earlier while the drug was still in his system, said Ellison.

If Hughes had been operated on during the period when Sellu was accused of being grossly negligent for not operating, the presence of dabigatran created a high risk of surgical haemorrhage, carrying a significant risk of death, the QC added.

The new evidence is crucial because, for a manslaughter conviction, the prosecution must prove not only that the doctor was grossly negligent but that this negligence caused or significantly contributed to the patient's death.

In addition, new expert evidence casts serious doubt on the prosecution's estimates of Hughes's mortality risk at various

times while under Sellu's care, the court heard. The prosecution experts' use of the POSSUM (Physiological and Operative Severity Score for the Enumeration of Mortality and Morbidity) system, to give an increasing percentage risk of death over the period that Hughes was in Sellu's care, was flawed and unreliable, Ellison said.

He said that the prosecution witnesses who put it forward were not experts in the system's use and that, as a scoring system for surgical audit that produces a single percentage score, it was inappropriately used in a criminal trial as expert evidence of a steeply increasing risk of death.

The POSSUM system is subject to many limitations and qualifications, all of which affect its accuracy and reliability, and in this case the experts' POSSUM scores for Hughes's risk of dying at various stages were wrong, Ellison said. New expert evidence has estimated that Hughes's real risk of dying was significantly higher at the time Sellu took over his care than the jury had been told.

Ellison also told the judges, headed by Brian Leveson, president of the Queen's Bench Division, that the trial judge had misdirected the jury in several ways, including not adequately explaining the meaning of "gross negligence."

Leveson questioned whether it was ever appropriate for expert witnesses to give an opinion that particular conduct was grossly negligent, as they had done during Sellu's trial, since that was what the jury had to decide.

He said that the judges would reserve their judgment until a later date, since the case involved "some important issues both of law and fact, particularly of law."

- 1 Dyer C. Surgeon jailed for manslaughter after postponing surgery on man with perforated bowel. *BMJ* 2013;347:f6722. doi:10.1136/bmj.f6722 pmid:24200981.
- 2 Boseley S. Doctors sign letter expressing worry over criminalisation of surgeon. *Guardian* 2015 Aug 6. www.theguardian.com/society/2015/aug/06/doctors-sign-letter-expressing-worry-over-criminalisation-of-surgeon.
- 3 Franklin I. Doctors, manslaughter, and avoidable harm. *BMJ* blog 2015 Mar. <http://blogs.bmj.com/bmj/2015/03/06/doctors-manslaughter-and-avoidable-harm/>.

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