

**In the Matter of Richard Kaul, M.D.**

I, Barnett E. Hoffman hereby certify:

1. I have been asked by counsel representing Richard Kaul, M.D. to offer an opinion as to whether the criminal conviction of Dr. Kaul in England would be valid in New Jersey.

2. I have been involved in the criminal system as a prosecutor, defense counsel and judge since 1965 (except for two years in the Army). I recently retired from the New Jersey Superior Court as Presiding Judge, Criminal Part, Middlesex County. In over 35 years, I have never seen a prosecution in New Jersey, much less a conviction, for the facts upon which the conviction of Dr. Richard Kaul was based. I have spoken to others in the field and no one has ever heard of criminal charges premised on these facts.

3. I have had an opportunity to review portions of the record. I specifically, have read that part of the record furnished to me relating to the British court's charge to the jury. The charge provided by the English judge to the jury would have been fundamentally and fatally flawed in the State of New Jersey. The judge failed to provide the basic, critical charge addressing the requirements of (1) a unanimous verdict and (2) based on proof beyond a reasonable doubt. These requirements are inextricably interwoven into our system of justice and failure to properly charge these alone would result in a reversal if the matter were heard in this state. To rely upon this verdict as any predicate whatsoever is inconsistent with not only with our Constitution, or system of justice, but our basic notion of fundamental fairness. A criminal verdict absent a unanimous jury and proof beyond a reasonable doubt is null and void and of no effect in this State.

4. The court in England gave instructions to the jury which omitted instructions on the standard of proof being beyond a reasonable doubt. Prior to conviction of an offense, N.J.S.A. 2C:1-

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13 requires each element of the offense must be proved beyond a reasonable doubt. If there is no such proof, the presumption of innocence of the defendant must stand.

5. In the court's charge on page 9, the court charges the jury on the burden of proof. There is no mention of the standard of "beyond a reasonable doubt" only that the jurors must be sure. Moreover, there is no mention that the jurors must make a finding as to each element of the alleged crime "beyond a reasonable doubt." Failure to require such a finding violates the defendant's rights to a fair trial and due process. The court's charge failed to provide a proper explanation of reasonable doubt and this failure constitutes reversible error. Importantly, in this State, the prosecution must prove every element of the offense charged beyond a reasonable doubt, and the burden of proving each and every element cannot be shifted to the defendant.

6. More significantly, the court in England originally required a unanimous verdict. However, the jury, after significant deliberations could not reach a unanimous verdict. In England, apparently there is some mechanism to accept a less than unanimous verdict in criminal cases. So in the case at Bar, the court in England, after the jury reported their inability to reach a unanimous verdict, permitted the jury to reach a non-unanimous verdict of guilt. Such a criminal verdict in this state would be void ab initio. **No legal consequences can flow from such a void verdict.**

7. In addition to the fact that Dr. Kaul's conviction in England is void ab initio because there was not a unanimous verdict, there were numerous additional errors which deprived the defendant a fair trial and which, if the trial had occurred in New Jersey, would be grounds for reversal as a matter of law. Most significantly, there is no equivalent crime in New Jersey for the crime the defendant was charged with and convicted of in England.

a. In New Jersey, a person cannot be guilty of either aggravated or reckless manslaughter unless he acted recklessly as defined by New Jersey law.

In New Jersey, a person acts "recklessly" with respect to a material element of an offense only when he **consciously disregards** a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

In this regard, a key part of the transcript is found in paragraphs D and E on page 89. The court stated "If, on the other hand, you are sure that the cardiac arrest resulted from hypoxia, then you have to ask, **"why did the defendant fail to notice that?"** This is very significant in that N.J.S.A. 2C:2-2 sets forth the definitions of the various levels of culpability. When dealing with **reckless** acts, our statute requires the actor to **consciously disregard** a substantial and unjustifiable risk. . . whereas, an actor acts **negligently** when **he should be aware** of substantial and unjustifiable risk.

With regard to aggravated manslaughter the government must prove additionally that he acted under circumstances manifesting extreme indifference to human life. That is, the risk level is elevated to a probability of death. No such instruction was given by the Judge to the jury.

b. Such an erroneous instruction in a manslaughter case in New Jersey would certainly be grounds for reversal.

c. The model jury charge for reckless conduct in this state defines that term as follows:

"A person who causes another's death does so recklessly when he/she is aware of and **consciously** disregards a substantial and unjustifiable risk that death will result from his/her conduct. The risk must be of such a nature and degree that considering the nature and purpose of defendant's conduct and the circumstances known to the defendant, (his/her) disregard of that risk is a gross deviation from the standard of conduct that a reasonable person would follow in the same situation. In other words, you must find that defendant was aware of and consciously disregarded the risk of causing death. If you find that defendant was aware of and disregarded the risk of causing death, you must determine whether the risk that (he/she) disregarded was substantial and unjustifiable. In doing so, you must consider the nature and purpose of defendant's conduct, and the circumstances known to defendant, and you must determine whether, in light of those factors, defendant's disregard was a gross deviation from the conduct a reasonable person would have observed in defendant's situation." (Emphasis added).

d. The definition of negligence under the Criminal Code, on the other hand, states:

"A person acts negligently with respect to a material element of an offense when he **should be aware** of a substantial and unjustifiable risk that the material element exists or will result from this conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. 'Negligently' or 'negligence' when used in this code, shall refer to the standard set forth in this section and not to the standard applied in civil cases." (Emphasis added)

e. In the comment to the definition of negligence under the Code, it states:

**"There does not appear to be any New Jersey case which would find criminal liability based upon negligence as defined by the Code. Our cases stress the fact of the defendant's consciousness or**

awareness as being the element giving culpability to his conduct."  
(Emphasis added)

f. An example of how the manslaughter charge in the U.K. differs from the crime of manslaughter in New Jersey is found on page 38 of the court's charge. There, the court allows a finding of inadvertence with regard to the issue of how far the patient was put under. In fact, on page 40, the court refers to the expert from the Crown who opined that what Dr. Kaul did was not deliberate. See also on page 51 E. The court referred to the testimony of the Crown's experts in stating that Dr. Kaul departed from good practice. See page 68F. These are instructions based on civil negligence rather than reckless conduct.

g. In criminal cases in New Jersey, the jury must be given accurate and understandable jury instruction. The standard of recklessness should not be given in the context of an abstract definition; rather, it should be compared with other mental states such as purposely, knowingly and negligently. I have tried numerous manslaughter cases over the years. If applicable, I would also charge negligence or accident in contradistinction to reckless conduct. The significance was that reckless conduct was a crime and negligent conduct was not. Accordingly, even if Dr. Kaul had been careless or negligent (which has not been established in New Jersey), his actions would not rise to the criminally culpable level in New Jersey, even if it was the proximate cause of the accident.

h. Additionally, the recklessness must have proximately caused the death for the defendant to be held criminally beyond responsible doubt. Causation has a special

meaning under New Jersey law. To establish causation, the State must prove two elements, each beyond a reasonable doubt. First, that "but for" the defendant's conduct, Mrs. Bangura would not have died. Second, her death must have been within the risk of which defendant was aware. If not, it must involve the same kind of injury or harm as the probable result of the defendant's conduct, and must not be too remote, too accidental in its occurrence, or too dependent on another's volitional act to have a just bearing on the defendant's liability or the gravity of the offense.

i. In New Jersey, it is required that a judge clearly define other culpability requirements in accordance with the Code. A proper explanation of the elements of a crime is especially crucial to the satisfaction of a criminal defendant's due process rights. There is reversible error when the court fails, whether or not requested, to instruct fully, clearly and accurately as to the fundamental and essential issues before the jury including each of the elements of the offense and the standard of culpability.

j. The court in England did not provide a charge that would substantiate a conviction for manslaughter or any other crime in New Jersey.

k. Even if it is assumed that the conduct on part of Dr. Kaul might have been "reckless" so as to justify the court's instruction regarding this element of the offense, under New Jersey law, the "recklessness" must have proximately caused the death of Mrs. Bangura for the defendant to be held criminally responsible for her death. Error in failing to provide the jury in Dr. Kaul's prosecution with the proper, even though unrequested, instructions on causation, was prejudicial. The charge given by the court tracked the prosecution's theory of the case. Instructions that were consistent

with the defendant's and defendant's expert version of the facts were essential to the jury's proper consideration of that version. The trial court's failure to define the statutory element of causation in instruction to the jury would require reversal in the State of New Jersey.

8. The factual basis underpinning the United Kingdom conviction would not be a crime in New Jersey. If there were a proceeding instituted, it would at best be a medical malpractice suit. The court in the U.K. did not require a jury to find that Dr. Kaul acted recklessly, as N.J.S.A. 2C:2-2 requires. Rather, the court permitted a non-unanimous conviction based on what is our equivalent of civil negligence.

9. It is my opinion that to enforce this conviction would be against the public policy of New Jersey and would violate the doctrine of fundamental fairness. The Supreme Court of New Jersey, as recently as State v. Cruz, 171 N.J. 419, 430 (2002), has acknowledged the judiciary's inherent authority, based, in part, on principles of fundamental fairness, to create appropriate and just remedies. In the instant case, the lack of a unanimous verdict, and the lack of proof beyond a reasonable doubt, both of which are bedrock requirements in the American system of justice, render any decision of the United Kingdom court null and void. The erasure of the license in the United Kingdom was predicated on the conviction for manslaughter, which, in my opinion, was null and void ab initio. Certainly, New Jersey courts cannot give comity in a situation where the laws are so diametrically opposite to our notion of fair play, justice and due process requirements. Comity must "cut both ways." It is my opinion that comity would not be appropriate to a conviction that is so offensive to the public policy of this State as evinced by our Constitution and Criminal Code. To suggest that New Jersey courts subsume into our system of justice, a foreign conviction that would

be null and void ab initio, is contrary to our doctrine of fundamental fairness, and, indeed, against the public policy of New Jersey.

10. The proceeding before the General Medical Council was predicated upon a foreign conviction that in my opinion would be null and void in New Jersey.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

  
Barnett E. Hoffman, Esq