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PROFESSIONAL NEGLIGENCE AND MANSLAUGHTER

At what degree of negligence should professional conduct resulting in death become criminal? The question has a particular significance for medical and dental practitioners.

Some recent decisions indicate the sort of negligence which is in the domain of the criminal law. In December, 1992 two doctors were convicted of manslaughter at Nottingham Crown Court following the death of Graham Rawlinson at Grimsby police station. Mr. Rawlinson, a former heroin addict, had been prescribed a "lethal cocktail of drugs", some in quantities up to five times the recommended maxima.ⁱ Sallyanne Camp-Richards, an asthma sufferer was given a drug for palpitations but died after taking just one tablet. A doctor had prescribed a betablocker drug that is potentially fatal to asthma sufferers but said he did not know the patient was asthmatic because he could not decipher the handwritten medical notes of another doctor. The doctor who gave the prescription has now been charged with manslaughter.ⁱⁱ Michael Carr, the former MP for Bootle died within an hour of being sent away from Walton Hospital. When Mr. Carr arrived at the hospital he was not seen by a doctor and the nurse who passed information to a doctor over the telephone did not pass on all the details she had about Mr. Carr's condition. The DPP investigated the case with a view to considering manslaughter charges but eventually held that there was insufficient evidence in the case to warrant criminal proceedings. There is, however, for technical reasons, to be a second inquest into Mr. Carr's death.ⁱⁱⁱ

According to one report, about 1000 people die every year in Britain because of mistakes made by surgeons.^{iv} Last month two married dentists were found guilty of serious professional misconduct after a ten year-old patient died while recovering from a general anaesthetic; the anaesthetic machine they used had not been serviced for eight years but the dentists were not struck off nor is any prosecution planned.^v It is vitally important for the law to be clear as to the level of culpability at which the criminal law of manslaughter is applicable to serious occupational misconduct resulting in death.

In *R v. Sulman and others* (The Times, 21 May, 1993), the Court of Appeal has sought to clarify the proper test of involuntary manslaughter by breach of professional duty of care. Some news commentaries^{vi} have stated that the new guidance will discourage the prosecution for manslaughter of professionals whose mistakes result in death. These commentaries seem misguided. The new ruling will arguably facilitate convictions in such cases by widening the scope of the mental element for the offence of involuntary manslaughter.

What are the types and relevant proofs of involuntary manslaughter? Apart from unlawful act manslaughter (sometimes termed "constructive manslaughter") where death has resulted from conduct which is inherently unlawful (like an assault) there was until recently some debate about whether there were two other categories --reckless manslaughter and gross negligence manslaughter-- or whether the latter had been abolished.

In earlier editions of *Criminal Law*, Smith and Hogan stated that there were two distinct categories. Gross negligence manslaughter required gross negligence as to whether death or serious injury was caused, and reckless manslaughter where the recklessness might be as to death or injury (even slight) and possibly, following *Stone and Dobinson* (1977), any injury to "health or welfare". To equalise the difficulty of proof in each case, there operated a sort of trade-off: gross negligence is a harshly objective test so the defendant is given some benefit by keeping the relevant risks limited to death or serious injury. The defendant charged as "reckless", on the other hand, does have a possible escape route through the so-called lacuna^{vii} (i.e. if s/he considered whether there was a risk and concluded wrongly, even unreasonably, that there was none) so the scope of relevant risks can be larger, even extending to risks to "health".

In the current edition of the authoritative *Criminal Law* (1993) the authors took the view that any separate category of gross negligence manslaughter had been effectively closed by the decisions in *Seymour*^{viii} and *Kong Cheuk Kwan*^{ix}. They say that if that is so then the law of manslaughter has been "significantly simplified" although "the courts may not have realised the full significance of that step".^x

Smith and Hogan explain that if gross negligence has been abolished as a type of manslaughter this will amount to a narrowing of the offence: all that would remain would be reckless manslaughter and some defendants could escape conviction by use of the "lacuna".^{xi} It might, therefore, be surprising to learn that given the opportunity to clarify the rules in this notoriously unclear area of law, the Court of Appeal in *Sulman* has decided to add complexity to the system of categories and, arguably, create some potentially awkward difficulties for the courts.

The central question posed by the appeal in *Sulman* was that posed in *Archbold Criminal Pleading, Evidence and Practice* (1992, para.19-97): whether gross negligence manslaughter had survived *R v. Caldwell* and *R v. Lawrence*.^{xii}

Evolution of a Dilemma

It is important to look at how the Court of Appeal came to be addressing the choice between gross negligence and reckless manslaughter in 1993. A classic statement of gross negligence manslaughter is that given by Lord Hewart CJ in *R v. Bateman*, a case involving negligent medical treatment causing death. He observed that whatever epithet is used by the trial judge to direct the jury as to when negligence becomes criminal, (eg. gross, wicked etc.):

"in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment."^{xiii}

In *Andrews v. DPP*^{xiv}, a case involving a death from a road traffic incident, Lord Atkin quoted the passage from *Bateman* (above) and introduced the word "reckless" to denote the degree of negligence required. He conceded, however, that the word would not cover all cases and that there was still scope for

manslaughter by a high degree of negligence. He excluded "mere inadvertence" (p.582) but said that some forms of inadvertence might suffice. Conviction for manslaughter should follow if the defendant was proved to have had a "criminal disregard" for the safety of others (p.582).

In *Stone and Dobinson*^{xv}, a ghastly case involving an anorexic woman who was allowed to degenerate to death (she died of toxæmia from infected bed sores) by two relatives with whom she lived, the modern formula for reckless manslaughter emerged in embryonic form. Lord Justice Lane quoted from *Andrews* and then stated:

"It is clear from that passage that indifference to an obvious risk and appreciation of such risk, coupled with a determination nevertheless to run it are both examples of recklessness...Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it."^{xvi}

The law seemed to have become relatively settled after the decisions in *Caldwell* and *Lawrence*. The actus reus consisted of the defendant creating an obvious and serious risk. The mens rea entailed someone proceeding with a course of action "without having given any thought to the possibility of there having been any such risk or, having recognised that there was some risk involved, [to have] nevertheless gone on to take it". That this was the appropriate test was recently confirmed by the Court of Appeal in *R v. Reid*.^{xvii}

Like partly concealed broken glass on a beach, however, aspects of the decisions in *R v. Seymour* and *Kong Cheuk Kwan* were potentially serious latent problems. First, Lord Roskill had said in *Seymour* that "reckless" was to be given the same meaning in relation to all offences which involved recklessness as one of the elements unless Parliament had otherwise ordained. How far should that test be applied? Some crimes to which the new test was technically applicable were exempted on an *ad hoc* basis, for example rape (*R v. Satnam S* (1983) 78 Cr App Rep 149) and assault (*R v. Parmenter* [1991] 4 All ER 698). The true extent of the test was difficult to ascertain.

Second, in *Seymour*, the trial judge had given the *Lawrence* direction on recklessness but omitted the reference made in that case (one concerning causing death by reckless driving) to "an obvious and serious risk of doing substantial damage to property". Lord Roskill agreed with such a direction saying such a reference to property would have been "irrelevant". Are Lord Roskill's opinions limited to what he termed "motor manslaughter" cases, a descriptive rather than a legal category? Are there any circumstances where, on a manslaughter charge, a jury could properly be directed with a formula which includes a reference to the risk of "substantial damage to property"? There are grounds for such an argument: in the Court of Appeal in *Seymour* Lord Justice Watkins stated that "The *Lawrence* direction on recklessness is comprehensive and of general application to all offences...and should be given to juries without in any way being diluted"; he did not say that the 'substantial risk to property' element should be omitted in any cases, yet his dicta were approved, unqualified, by Lord Roskill in *Kong Cheuk Kwan*. The jury direction suggested by Lord Roskill in that case also alludes to creating an obvious and serious risk of "causing physical damage to some other ship and thus to other persons...".^{xviii} How far this direction is to be regarded as suitable specifically to such cases involving sea vessels is unclear. In *Seymour*, Lord Roskill thought the trial judge had been "entirely right" to omit reference to property damage; why should the scenario at sea be treated so differently from the high street?

A third area of difficulty was the proper meaning to be attributed to the word "obvious" in the phrase "obvious and serious risk". The meaning attributed to that word by some trial judges has been highly contentious. An example would be the ruling of Mr. Justice Turner in the prosecution of *P & O European Ferries (Dover) Ltd.* after the Zeebrugge disaster.^{xix}

These problems could have been resolved by clear guidance on each area of difficulty. Having rejected the applicability of the gross negligence test, arguably since *Kong Cheuk Kwan* in 1985, all that remained was for the courts to tidy up the rules relating to reckless manslaughter. Instead, the Court of Appeal in *Sulman* has resurrected the gross negligence test but only in cases where death has resulted from "a breach of duty". This has not been a notion traditionally employed in this area of law and it will no doubt take a number of test cases to establish the nature of this duty and its similarities to the concept in the law of tort.

The new guidance states that Lord Roskill's statement in *Seymour* that "reckless" was to be given the same meaning in relation to all offences was in fact *obiter* and should not be followed in the class of manslaughter involved in the cases under appeal (three doctors and an electrician whose working practices had resulted in death). How far this "class of manslaughter" extends also remains to be seen. On a corporate manslaughter charge, for example, would it apply where a defendant company was charged with the killing of worker who had been engaged as an independent contractor?^{xx} More strangely, the Court decided to retain the old *Caldwell/Lawrence* test for cases of "motor manslaughter". Why this should be treated as a jurisprudentially distinct category has nowhere been made clear. Why treat deaths resulting from criminal risk-taking on the roads differently from those which occur on the railways or at sea? One can speculate about reasons associated with public policy but these are not articulated by the Court.

The Court stated that ingredients of involuntary manslaughter by breach of duty which need to be proved were (1) the existence of a duty; (2) a breach of the duty causing death; and (3) gross negligence which the jury consider justifies a criminal conviction. Significant problems are likely to be raised by the Court's claim that it is not possible to prescribe a standard jury direction appropriate in all cases. It stated simply that proof of any of the following states of mind in the defendant might properly lead to a conviction: (a) indifference to an obvious risk of injury to health; (b) actual foresight of the risk coupled with the determination nevertheless to run it; (c) an appreciation of the risk coupled with an intention to avoid it, but also coupled with such a high degree of negligence in the attempted avoidance as the jury considered justified conviction; (d) inattention or failure to advert to a serious risk which went beyond "mere inadvertence" in respect of an obvious and important matter which the defendant's duty demanded he should address.

The gist of the new test is to leave it to the jury to decide whether the risk that the defendant took in the course of his or her duty was one which they (the jury) consider justifies a criminal conviction. Juries will now, therefore, be more responsible for determining the boundaries of the crime. The public attitude to defendants who have, through indifference or gross negligence, caused death in the course of their professional duties is not notably sympathetic, especially where commercial considerations have led to fault. A London magistrate recently observed to the writer that the middle-class definition of "crime" is "conduct that I do not commit". It may be that in an age of increasing public awareness of "white collar

crime", there is a sinking level of tolerance afforded to professionals who accidentally kill.

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NOTES

- i. *The Independent*, 5 December, 1992, p.3
- ii. *The Independent*, 11 May, 1993, p.2
- iii. *The Independent*, 29 May, 1993, p.2
- iv. *Confidential Enquiry into perioperative Deaths*, 1987, NPH Trust. The report analysed the deaths of 2,784 people who had operations in three health service regions.
- v. *The Independent*, 21 May, 1993, p. 3. There is some evidence that the bereaved parents did not blame the dentists in this case.
- vi. eg. *The Independent*, 21 May, 1993
- vii. see *Chief Constable of Avon and Somerset Constabulary v. Shimmen* (1986) 84 Cr App Rep 7
- viii. [1982] AC 510
- ix. (1985) 82 Cr App Rep 18
- x. at p. 373
- xi. *Ibid.* p.374
- xii. [1982] AC 341 and 510 respectively
- xiii. (1925) 19 Cr App Rep 8 at 11
- xiv. [1937] AC 576
- xv. [1977] QB 354
- xvi. *Ibid.* at 363
- xvii.[1992] All ER 673
- xviii. (1985) 82 Cr App Rep 18 at 25
- xix. see Celia Wells, *Corporations and Criminal Responsibility*, 1993, Clarendon Press
- xx. *New Law Journal*, Vol. 142, No. 6539, p.192