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# England

Natalie Wortley\* and Birju Kotecha\*\*

## 1. Background/contextual introduction (with a focus on the national responses to the Covid-19 pandemic)

Under the UK's constitutional framework, the UK Parliament (Westminster) exercises control over the criminal justice system in England and Wales, whereas legislative authority and oversight of the criminal justice systems of Scotland and Northern Ireland are devolved to the Scottish Parliament and the Northern Ireland Assembly, respectively. Healthcare is also a devolved responsibility and measures implemented in Scotland, Northern Ireland and Wales diverged from those in England throughout the Covid-19 pandemic. This chapter discusses the criminal law of England and Wales but focusses on potential liability arising from decisions affecting England. Readers should therefore be alert to the context in which the terms 'the UK' and 'England and Wales' are used.

By the time the first UK case of Covid-19 was reported on 30 January 2020, the Government's Scientific Advisory Group for Emergencies (SAGE) had advised that Covid-19 was 'now being sustained by human-to-human transmission'.<sup>1</sup> Richard Horton, editor of medical journal *The Lancet*, argues that at this point there was 'a duty immediately put the NHS and British public on high alert'.<sup>2</sup> Instead, the UK's four Chief Medical Officers recommended increasing the UK risk level to 'moderate', adding that although it was likely there would be 'individual cases', the National Health Service (NHS) could 'manage these in a way that protects the public and provides high quality care'.<sup>3</sup>

On 3 February, the Scientific Pandemic Influenza Group on Modelling (SPI-M) expressed concerns that outbreaks might not be capable of containment by isolation and contact-tracing alone.<sup>4</sup> Later that month, SAGE concluded that four non-pharmaceutical interventions – university and school closures, home isolation, household quarantine and social distancing – could 'slow but not halt' the spread of the virus and would 'require implementation for a

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<sup>1</sup> SAGE, *SAGE 2 minutes: Coronavirus (COVID-19) Response*, [www.gov.uk/government/publications/sage-minutes-coronavirus-covid-19-response-28-january-2020](http://www.gov.uk/government/publications/sage-minutes-coronavirus-covid-19-response-28-january-2020).

<sup>2</sup> R Horton, 'COVID-19 and the NHS – "a National Scandal"' (2020) *The Lancet* 1022.

<sup>3</sup> [www.gov.uk/government/news/statement-from-the-four-uk-chief-medical-officers-on-novel-coronavirus](http://www.gov.uk/government/news/statement-from-the-four-uk-chief-medical-officers-on-novel-coronavirus).

<sup>4</sup> Scientific Pandemic Influenza Group on Modelling, Operational Sub-group, *Consensus Statement on 2019 Novel Coronavirus* (SPI-M-O, 3 February 2020).

significant duration in order to be effective’.<sup>5</sup> On 3 March, UK Prime Minister Boris Johnson launched an ‘action plan’ including phased actions to contain, delay and mitigate any outbreak.<sup>6</sup> The contain phase, initiated that day, was supposed to detect early cases and follow up close contacts to ‘prevent the disease taking hold in this country for as long as reasonably possible.’<sup>7</sup> The plan anticipated the majority of those displaying symptoms would have ‘mild-to-moderate, but self-limiting illness – similar to seasonal flu’.<sup>8</sup> Concerns surrounding the likening of Covid-19 to seasonal flu were amplified in the coming weeks by references to ‘herd immunity’.<sup>9</sup>

On 16 March, Imperial College London published a report suggesting the Government’s ‘mitigation strategy’ was unworkable and, even if all patients were treated, there would be around 250,000 deaths in the UK.<sup>10</sup> It appears that government officials were aware of these figures from 3 March. Although the Prime Minister accepted (on 14 March) that a lockdown was necessary, the first national lockdown was not announced until 23 March,<sup>11</sup> accompanied by regulations and guidance imposing severe restrictions on freedom of movement and association.<sup>12</sup> The Government, particularly the Prime Minister, received trenchant criticism regarding both the time taken to formulate policy to tackle Covid-19 risks and the initial decision to pursue a contain and delay strategy despite projected death tolls.<sup>13</sup> Retrospective modelling has suggested that 14,000 people in the UK were infected on 14 March, rising to 1.5 million by 23 March.<sup>14</sup>

Easing of lockdown rules commenced in mid-May and most remaining restrictions were lifted on 4 July 2020. A series of ‘local lockdowns’ followed in an effort to control spikes in infection numbers. Further national restrictions were announced in September 2020, including the ‘rule of six’,<sup>15</sup> followed by a return to working from home. In October, the Prime Minister announced a three-tier system of local restrictions, which failed to contain the spread of the virus.

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<sup>5</sup> SAGE, *Tenth SAGE meeting on Wuban Coronavirus (Covid-19)*, [www.gov.uk/government/publications/sage-minutes-coronavirus-covid-19-response-25-february-2020](http://www.gov.uk/government/publications/sage-minutes-coronavirus-covid-19-response-25-february-2020).

<sup>6</sup> Department of Health and Social Care, *Coronavirus Action Plan: A Guide to What You Can Expect Across the UK* (3 March 2020).

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

<sup>9</sup> *This Morning*, ‘Boris Johnson on Priti Patel, Coronavirus and Changing Nappies’ (5 March 2020) [www.youtube.com/watch?v=vOHiaPwtGl4](http://www.youtube.com/watch?v=vOHiaPwtGl4); A Forrest, ‘Coronavirus: Internal Emails Reveal Herd Immunity Messaging Chaos in Government’ *The Independent* (London, 23 September 2020).

<sup>10</sup> NM Ferguson et al, *Report 9: Impact of Non-pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality and Healthcare Demand* (Imperial College London, 16 March 2020) 1.

<sup>11</sup> *Prime Minister’s Statement on Coronavirus (COVID-19)*, [www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020](http://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020).

<sup>12</sup> Baroness Hale of Richmond, ‘The Pandemic and the Constitution’ in J Brennan et al (eds), *Essays from the Pandemic* (London, LAG 2020) 4.

<sup>13</sup> *ibid.* 16.

<sup>14</sup> J Calvert et al, ‘22 Days of Dither and Delay on Coronavirus that Cost Thousands of British Lives’ *The Times* (London, 23 May 2020).

<sup>15</sup> Cabinet Office, *Coronavirus (COVID-19): What has Changed?* [www.gov.uk/government/news/coronavirus-covid-19-what-has-changed-9-september](http://www.gov.uk/government/news/coronavirus-covid-19-what-has-changed-9-september).

A second national lockdown commenced on 5 November, under which the rules were slightly more lenient, allowing people to meet outdoors with one other person from outside their ‘support bubble’. December 2020 saw the reintroduction of local tiers. A fourth tier entailing similar restrictions to the second national lockdown failed to prevent the spread of new variants. Schools reopened in England in January 2021 but, after just one day, the country was placed under a third national lockdown, with the UK death toll crossing 100,000 on 13 January 2021.<sup>16</sup>

A phased exit from lockdown from 8 March 2021 followed a ‘roadmap’ designed to ‘gradually and safely’ ease restrictions and reopen the economy.<sup>17</sup> The UK’s vaccination programme, which commenced on 8 December 2020 and was widely regarded as successful, enabled the lifting of most remaining Covid-19 restrictions on 19 July 2021. However, concerns were raised that ‘exponential growth will probably continue until millions more people are infected, leaving hundreds of thousands of people with long-term illness and disability.’<sup>18</sup> As of 10 September 2021, the UK had recorded a total of 7,165,200 confirmed cases of Covid-19 and 134,166 deaths, with 270,285 new cases and 922 deaths in the preceding week.<sup>19</sup>

In addition to criticisms of governmental decision-making, it has been alleged that deaths were caused by lack of preparedness and shortages of personal protective equipment (PPE). At an early stage, frontline NHS staff pleaded with the Prime Minister to intervene to ensure they had adequate PPE.<sup>20</sup> The Government has also faced criticism of its approach to ‘test and trace’ and procurement decisions.<sup>21</sup>

In addition to criticisms of incumbent officials, it has been argued that previous administrations should bear their share of the blame for systemic failings. Following cuts to funding for pandemic planning, Public Health England (PHE) declared in 2016 that ‘the UK’s preparedness and response, in terms of its plans, policies and capability, is currently not sufficient to cope with the extreme demands of a severe pandemic’.<sup>22</sup> A recent report concluded that the Government failed to learn key lessons from PHE’s testing of the likely response to a serious

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<sup>16</sup> C Barr et al, ‘UK Coronavirus Deaths Pass 100,000 after 1,564 Reported in One Day’ *The Guardian* (London, 13 January 2021)

<sup>17</sup> Cabinet Office, *COVID-19 Response – Spring 2021 (Roadmap)* [www.gov.uk/government/publications/covid-19-response-spring-2021/covid-19-response-spring-2021](http://www.gov.uk/government/publications/covid-19-response-spring-2021/covid-19-response-spring-2021).

<sup>18</sup> D Gurdasani et al, ‘Mass Infection is not an Option: We Must do More to Protect our Young’ (2021) 398 *The Lancet* 297.

<sup>19</sup> [coronavirus.jhu.edu/region/united-kingdom](https://coronavirus.jhu.edu/region/united-kingdom).

<sup>20</sup> R Parmar et al, ‘Coronavirus Letter to the Editor: Without Protection, NHS Staff are Cannon Fodder’ *The Sunday Times* (London, 22 March 2020); See also [questions-statements.parliament.uk/written-questions/detail/2021-06-29/24136/#](https://questions-statements.parliament.uk/written-questions/detail/2021-06-29/24136/#).

<sup>21</sup> National Audit Office, *Investigation into Government Procurement During the COVID-19 Pandemic* HC 959 (2020); House of Commons Public Accounts Committee, *COVID-19: Test, Track and Trace (Part 1)* HC 932 (2021).

<sup>22</sup> Public Health England, *Exercise Cygnus Report* (13 July 2017).

influenza outbreak, particularly as regards social care capacity.<sup>23</sup> Holding past and present governments to account is complicated, however, by the UK's constitutional framework.

## 2. Constitutional, legal and policy overview

Under the United Kingdom's uncodified Constitution, the activities of the three branches of State—the executive, legislature, and judiciary—are shaped by a combination of legislation, convention, and historical principles.<sup>24</sup> Executive power is concentrated in the hands of the UK's Central Government, which is responsible for the proposal of policy and the day-to-day administration of collective services in England such as education, social welfare and, of course, responses to public health crises.<sup>25</sup>

The UK Parliament (Westminster) holds the executive to account by way of debates, ministerial questions and, in particular, Select Committees which can direct ministers to give oral evidence and issue recommendations.<sup>26</sup> Parliament also exercises supervisory control by authorising the executive's enforcement of law. And yet, the executive sits in Parliament and represents the governing political party with the majority of seats in the House of Commons. Hence, by convention, the executive can enact laws in Parliament when it can be assured, as is often the case, that the governing party will vote as instructed by the Cabinet.<sup>27</sup>

Outside Parliament, the judiciary can review the legality of executive policies and decisions based on principles of administrative law and under the Human Rights Act 1998. During the pandemic several unsuccessful judicial review proceedings sought to challenge the validity of lockdown.<sup>28</sup> Even where successful, the judiciary is unable to declare domestic legislation 'unconstitutional', unlike in the United States.<sup>29</sup> In recent times, this has not prevented the UK Supreme Court from receiving criticism of, allegedly, asserting its jurisdiction and declaring unlawful 'political' activities that are said to be within the exclusive domain of the sovereign and democratically elected Parliament.<sup>30</sup>

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<sup>23</sup> N Davies et al, *How Fit were Public Services for Coronavirus?* (Institute for Government and The Chartered Institute of Public Finance and Accounting, August 2020).

<sup>24</sup> See, indicatively, J Jowell and D Oliver, *The Changing Constitution*, 7th edn (Oxford, Oxford University Press, 2011)

<sup>25</sup> The Government is also responsible for all non-devolved matters across the UK such as national security and foreign affairs. See generally, R Rhodes, 'From Prime Ministerial Power to Core Executive' in R Rhodes and P Dunleavy (eds), *Prime Minister, Cabinet and Core Executive* (London, Palgrave Macmillan, 1995) 12.

<sup>26</sup> See for instance, House of Commons Health and Social Care and Science and Technology Committees, *Coronavirus: Lessons Learned to Date* HC 92 (2021).

<sup>27</sup> See generally, A Le Seur, *The Nature, Powers and Accountability of Central Government* (Oxford, Oxford University Press, 2009).

<sup>28</sup> *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 WLR 2326.

<sup>29</sup> See generally, J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *PL* 671.

<sup>30</sup> J Sumption, *Trials of the State: Law and the Decline of Politics* (London, Profile Books, 2019). See generally, Independent Review of Administrative Law Report (March 2021).

Returning to Covid-19 policy and the imposition of lockdown, the legal basis of the Prime Minister's instruction to 'stay at home' was secondary legislation in the form of regulations passed under the Public Health (Control of Disease) Act 1984 (the 1984 Act).<sup>31</sup> On the 26 of March 2020, the Secretary of State for Health and Social Care introduced those regulations which confirmed that, during the 'emergency period', business premises, as well as places of worship, were to close, public gatherings of more than two people were prohibited and, most notoriously, 'no person may leave the place where they are living without reasonable excuse'.<sup>32</sup> These regulations, and related governmental guidance, were updated at various stages. Notably, the regulations could remain in force for whatever period the Government decided, although in some cases regulations were accompanied by a sunset clause.<sup>33</sup> The reliance on these regulations, including their enactment under an 'urgent' power conferred on ministers under the 1984 Act, has been subject to considerable criticism not least because they could be passed without parliamentary scrutiny or approval.<sup>34</sup>

There were several government officials exercising executive power who were chiefly responsible for the policies that became regulations. Leading the Government was the Prime Minister, and whilst the official status is 'primus inter pares' i.e., first among equals—meaning that he or she is of equivalent rank to other ministers—the Prime Minister enjoys a set of additional powers over the allocation of ministerial functions, appointments, and the overall direction of government policy, as well as enjoying a public profile on the national and international stage.<sup>35</sup> Chief among his ordinary governmental duties is chairing the Cabinet which takes collective decisions on government strategy, policy, and national security.<sup>36</sup> The Cabinet is comprised mainly of Secretaries of State who exercise responsibility for their departments, such as Education, Justice and Health and Social Care. At times of emergency, the Prime Minister usually chairs the Civil Contingencies Committee (COBRA)<sup>37</sup> which is convened to take urgent decisions and to co-ordinate a response that requires multiple agencies to act.

In addition to the Prime Minister, frequently appearing in press conferences to explain scientific data and answer questions were the CMO, Professor Chris Whitty, and the Chief

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<sup>31</sup> Much early attention was given to the Coronavirus Act 2020, a bespoke piece of legislation which, after a fast-tracked passage through Parliament, received Royal Assent on the 25th of March 2020. There was, however, no specific lockdown power in this Act.

<sup>32</sup> The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, regs 4-8.

<sup>33</sup> i.e. a clause confirming they would expire at a particular date in future (if not already revoked): House of Lords Select Committee on the Constitution, *Covid-19 and the Use and Scrutiny of Emergency Powers* (HL Paper 15, 2021) 17-18.

<sup>34</sup> *ibid.*, 15-16.

<sup>35</sup> See A Le Seur, 'The Nature, Powers and Accountability of Central Government' in D Feldman (ed) *English Public Law* (Oxford, Oxford University Press, 2009) para 3.09.

<sup>36</sup> *ibid.*, paras 3.12-3.14. See also *The Cabinet Manual*, 1st edn (London, 2011).

<sup>37</sup> C Haddon, 'Political Decision-Making in a Crisis' (2010) 16 *British Academy Review* 9.

Scientific Adviser (CSA), Sir Patrick Vallance. The CMO acts as an interface between the medical profession and the government and is the principal medical adviser to the Secretary of State for Health and, when necessary, the Prime Minister. The CMO recommends policy changes and has a crucial role during public health emergencies. The CSA is the head of the government's Science and Engineering Profession and provides advice to the Prime Minister and other Cabinet members on science and technology policy, and the use of scientific evidence across government.

The Department of Health and Social Care (DHSC) acts as the 'guardians of the health and care framework including whether the legislative, financial, administrative and policy frameworks are fit for purpose and work together.'<sup>38</sup> It is ultimately responsible in emergency situations where the public and Parliament expect it to resolve crucial and complex issues.<sup>39</sup> In May 2020, the Department established *NHS Test and Trace*, with the aim of breaking chains of transmission and identifying those people potentially carrying the virus in order to instruct them to isolate from others.<sup>40</sup> The executive chair of NHS Test and Trace, Baroness Dido Harding, initially reported directly to the Prime Minister but, in December 2020, began reporting to the Secretary of State for Health who retained ministerial accountability for the programme.<sup>41</sup> The NHS Test and Trace programme, including its Chair, received severe criticism for its very costly failure to deliver on its central promise to avoid a further lockdown and inability to demonstrate a measurable impact on mitigating the progress of the pandemic.<sup>42</sup>

The DHSC exercises operational and financial oversight over various executive non-departmental agencies that fulfil crucial health and care functions. NHS England is responsible for the budget and delivery of commissioned services across the NHS, the Care Quality Commission (CQC) is the independent regulator of health and adult social care in England and, before being replaced by the UK Health Security Agency in October 2021, now led by the former Deputy CMO Jenny Harries, Public Health England had a role in protecting the nation from biohazards and responding to emergencies. These agencies are run by executive boards comprised of senior executives alongside non-executive directors.

Government ministers are bound by constitutional convention: 'individual ministerial responsibility', meaning they are responsible for their departments, including the conduct of the

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<sup>38</sup> [www.gov.uk/government/organisations/department-of-health-and-social-care/about](https://www.gov.uk/government/organisations/department-of-health-and-social-care/about).

<sup>39</sup> *ibid.*

<sup>40</sup> See for example, 'Covid-19: NHS Test and Trace Made No Difference to the Pandemic, Says Report' (2021) *BMJ* 372.

<sup>41</sup> Public Accounts Committee, *Test, Track and Trace* (n 21) 9.

<sup>42</sup> *ibid.*

civil service and their advisers,<sup>43</sup> but ‘advisers advise, ministers decide’.<sup>44</sup> In this light, the extent to which the CMO and the CSA were themselves individually *culpable* for their role in the Government’s response to the pandemic has been a recurring point of debate.<sup>45</sup> Likewise, the extent to which the Government was, as it frequently declared, always ‘following the scientific advice’ obscured the assessment of responsibility for decisions, particularly the timing in implementing lockdowns.<sup>46</sup>

Individual ministerial responsibility has been described as ‘malleable and precarious in practice depending...upon intangible understandings and tradition and upon political circumstances’.<sup>47</sup> In recent years, and precipitated by a suite of modern public management reforms,<sup>48</sup> ministers have often sought to resist responsibility for *operational* failings. Instead, ministers, at times, have sought to maintain a distinction between policy responsibility (i.e., the frameworks, plans and strategies within which executive agencies work) and operational responsibility (i.e., the day-to-day implementation and execution of policies). Whilst ministers are still accountable to Parliament (and thus the public) for operational matters, those holding (greater) responsibility for operations are executives i.e., those in charge. Leaving aside other constitutional concerns, the inextricable working relationship between ministers and such executives, particularly during times of national emergency, renders the division between policy and operation rather artificial.<sup>49</sup>

### *2.1 Overview of and specific constitutional and legal principles regarding criminal liability of high-ranking government officials*

In the absence of a codified Constitution, there are no express rules exempting high-ranking government officials from criminal liability. By convention in the United Kingdom, the starting point is the rule of law. For A.V Dicey, writing in 1885, ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’.<sup>50</sup> Equality before the law is a cornerstone of the rule of law in the UK.<sup>51</sup> The constitutional status of the rule of law has two effects: 1) government officials do not enjoy

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<sup>43</sup> This convention is often accompanied by ‘collective Cabinet responsibility’ i.e., decisions made by Cabinet must be publicly supported irrespective of whether individual ministers’ express dissent in private.

<sup>44</sup> ‘Even in a Pandemic, Politicians Must Decide’ *Financial Times* (London, 1 May 2020).

<sup>45</sup> *ibid.*

<sup>46</sup> C Rovelli, ‘Politics Should Listen to Science, not Hide Behind it’ (2021) 20 *Nature Materials*, 272.

<sup>47</sup> C Turpin, cited in Jowell and Oliver (n 24).

<sup>48</sup> For a recent discussion, see V Lapuente and S Van de Walle, ‘The Effects of New Public Management on the Quality of Public Services’ (2020) 33 *Governance* 461.

<sup>49</sup> G Drewry, ‘The Executive: Towards Accountable Government and Effective Governance?’ in Jowell and Oliver (n 24) 200-05.

<sup>50</sup> AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885) 193.

<sup>51</sup> T Bingham, *The Rule of Law* (London, Penguin Books, 2010) 55-59.



immunity from criminal liability; and 2) the criminal liability of government officials is governed by ordinary criminal procedure relying on the independent exercise of prosecutorial discretion (see below).<sup>52</sup>

### *2.2 Scope of responsibility & area of tolerated risk*

Hence, for the purposes of potential criminal liability of a minister or government official, the Constitution makes no distinctions between ministerial *official* conduct in the discharge of ministerial responsibilities, and *non-official* conduct outside the scope of ministerial responsibilities. Of course, conduct outside of the scope of the ministerial role, i.e. acts in a private capacity, would be subject to possible criminal investigation and sanction. In this case, a minister may be criminally responsible as other private citizens and there is precedent for ministers being subject to police investigations.<sup>53</sup>

Nonetheless, for official conduct, the picture is more uncertain. First, it is important not to forget that ministers are *legally* responsible for political actions e.g., decisions, policies, and strategies and, under judicial review proceedings, can be held to have acted unlawfully.<sup>54</sup> However, leaving aside the barriers outlined below, decisions made in the course of official ministerial functions are likely to attract *de facto* immunity. In other words, prosecuting authorities would tend to afford elected ministers (rather than non-elected public agency officials) deference due to the democratic legitimacy that serving ministers enjoy as well as acknowledge that such prosecutions would likely not be in the public interest, given, the availability of non-criminal sanctions such as intense media scrutiny, being required to resign or losing their mandate at the next election.

### *2.3 Impact of immunities*

For government ministers there is no immunity from criminal jurisdiction for official conduct in the course of their ministerial responsibilities. The only available form of immunity derives from ministers being elected to sit in Parliament, and who engage in legislative activities such as introducing and debating Bills.<sup>55</sup> In a very limited sense, then, parliamentarians enjoy qualified immunity or ‘privilege’. This privilege enables members to undertake parliamentary

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<sup>52</sup> See European Commission for Democracy, *Report on the Relationship Between Political and Criminal Ministerial Responsibility* (11 March 2013).

<sup>53</sup> ‘MP’s Expenses: Tony McNulty May Face Police Investigation Over Claims’ *The Guardian* (8 May 2009); D King ‘Alex Salmond Claimed £116k Expenses for just Six Westminster Visits’ *Daily Record* (Glasgow, 27 March 2008).

<sup>54</sup> e.g. to have breached natural justice requirements or to have breached duties under the Human Rights Act 1998 See for example, *R (Good Law Project and others) v Secretary of State for Health and Social Care* [2021] EWHC 346.

<sup>55</sup> Lord Burnett of Maldon, ‘Parliamentary Privilege—Liberty and Due Limitation’ 21<sup>st</sup> Commonwealth Law Conference (9 April 2019).

duties without fear or favour and free from external interference, and the privilege accords respect to the traditional right of both the Commons and House to regulate their own affairs.<sup>56</sup>

## 2.4 Prosecutorial matters

In England and Wales, the majority of criminal prosecutions are brought by the Crown Prosecution Service (CPS), an independent State agency headed by the Director of Public Prosecutions (DPP) responsible for instigating and overseeing the prosecution of offences.<sup>57</sup> Several other public agencies retain statutory powers to prosecute and individuals may bring private prosecutions.<sup>58</sup> Private prosecutions for certain offences require the consent of the Attorney-General or the DPP. Of the offences considered below, only a prosecution for corporate manslaughter requires the DPP's agreement.<sup>59</sup>

CPS prosecutors must follow the Code for Crown Prosecutors and must first consider whether there is sufficient reliable, credible and admissible evidence to provide a 'realistic prospect of conviction'.<sup>60</sup> If this 'evidential test' is satisfied, the next question is whether a prosecution is required in the public interest.<sup>61</sup> Factors to be considered at the second stage include the seriousness of the offence, culpability of the alleged offender and harm caused to the victim(s).<sup>62</sup>

The DPP has the power to take over and conduct prosecutions instigated by another organisation or individual, and may take over proceedings to discontinue them.<sup>63</sup> In deciding whether to take over a prosecution, the DPP will have regard to the seriousness of the offence and whether the case is of a type that would typically be investigated by the police and prosecuted by the CPS. The offences considered in this chapter are likely to fall into this category. In addition to the barriers outlined above and below, it is therefore unlikely that a private prosecution could either be brought or sustained.

## 3. Causation

### 3.1 Causation (general principles)

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<sup>56</sup> See House of Lords, House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* HC 100 (2013).

<sup>57</sup> Prosecution of Offences Act 1985 (POA 1985) s 3.

<sup>58</sup> POA 1985, s 6(1).

<sup>59</sup> Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007) s 17(a).

<sup>60</sup> Director of Public Prosecutions, *Code for Crown Prosecutors* (2018) paras 4.6-4.8.

<sup>61</sup> *ibid*, paras 4.9-4.13.

<sup>62</sup> *ibid*, para 4.14.

<sup>63</sup> POA 1985, s 6(2).

Where causation is disputed, the prosecution must make the jury sure the defendant (D) caused the relevant consequence. Causation is approached in two stages. First, D must be a factual cause of the prohibited result such that, ‘but for’ D’s act or omission, the result would not have occurred.<sup>64</sup> The second question is whether D’s conduct made a ‘significant contribution’ to V’s death.<sup>65</sup> A contribution is significant if it is ‘more than minimal’;<sup>66</sup> it ‘need not be the sole cause, or even the main cause’.<sup>67</sup>

Although there is no general duty to act in English criminal law<sup>68</sup> many offences may be committed by omission, including murder, most forms of manslaughter and offences involving causing or inflicting grievous bodily harm.<sup>69</sup> Omissions liability is contingent upon a pre-existing duty to act.<sup>70</sup> Four main categories of duty have been identified at common law: duty arising out of a relationship;<sup>71</sup> contractual duty;<sup>72</sup> duty arising from assumption of responsibility;<sup>73</sup> and duty arising from the creation of a dangerous situation.<sup>74</sup> Case law exploring the existence and scope of the latter three categories, which are of particular relevance to this chapter, frequently involves consideration of whether D was under a duty to preserve V’s life.<sup>75</sup>

The extent to which the scope of a contractual duty depends upon the terms of the applicable contract is unclear.<sup>76</sup> Indeed, contractual duty is sometimes framed as a subcategory of a more general duty arising from the voluntary assumption of care for another, which is a similarly nebulous concept.<sup>77</sup> The common law neither delineates the circumstances in which a person will be deemed to have assumed a legal duty to care for another, nor the steps they must take to discharge such a duty.<sup>78</sup> Indeed, in a number of cases the courts have upheld convictions for manslaughter by omission without articulating the basis upon which a duty was owed.<sup>79</sup>

Where D’s conduct creates a dangerous situation which risks harm to V or to her property, D is under a duty to take reasonable steps to address the peril she has created.<sup>80</sup> Unlike

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<sup>64</sup> See *R v White* [1910] 2 KB 124.

<sup>65</sup> *R v Pagett* (1983) 76 Cr App R 279 (CA) 288.

<sup>66</sup> *R v Hughes* [2013] UKSC 56, [2013] 1 WLR 2461 [22].

<sup>67</sup> *Pagett* (n 65).

<sup>68</sup> *R v Khan & Khan* [1998] EWCA Crim 971, [1998] Crim LR 830.

<sup>69</sup> *R v Gibbins & Proctor* (1918) 13 Cr App R 134, CA.

<sup>70</sup> *Khan & Khan* (n 68).

<sup>71</sup> *Gibbins & Proctor* (n 69); *R v Smith* [1979] Crim LR 251; *R v Hood* [2003] EWCA Crim 2772.

<sup>72</sup> *R v Pittwood* (1902) 19 TLR 37; *R v Adomako* [1995] 1 AC 171.

<sup>73</sup> *R v Nicholls* (1874) 13 Cox CC 75; *R v Instan* [1893] 1 QB 450; *Gibbins & Proctor* (n 69); *R v Broadhurst* [2019] EWCA Crim 2026.

<sup>74</sup> *R v Miller* [1983] 2 AC 161 (HL); *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999.

<sup>75</sup> *Khan & Khan* (n 68).

<sup>76</sup> *R v Dytham* [1979] QB 922 (CA).

<sup>77</sup> *R v Stone & Dobinson* [1977] QB 354.

<sup>78</sup> See A Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 105 *LQR* 424.

<sup>79</sup> For example, *Stone & Dobinson* (n 77); *R v Ruffell* [2003] EWCA Crim 122.

<sup>80</sup> *R v Miller* [1983] 2 AC 161. See Michael Bohlander, *Principles of German Law* (London, Hart, 2009).

voluntarily assumed duties, this principle of supervening fault applies because D is ‘causally responsible’ for the original event ‘and so ought to bear the duty to take action to minimise further harm’, even where the initial conduct was faultless or accidental.<sup>81</sup>

In the context of Covid-19 it would be necessary to identify the precise omission relied upon to found criminal charges. Who failed to act, when and how? What was the basis of their duty of care and what actions could have discharged that duty? It might be argued that members of the Government owe a duty of care to all British citizens arising out of their office. This duty could be framed as: (i) a contractual duty, since ministers are paid officials; (ii) an assumed duty, since they assumed responsibility for tackling Covid-19; or (iii) a duty arising from the creation of a dangerous situation based upon early policy decisions that allowed the virus to spread. However, while it has been suggested that the Government failed to take the virus sufficiently seriously in early 2020, a general attitude of complacency is not something to which the criminal law’s duty situations are likely to attach.

If a duty of care could be established, failures or delays in tackling Covid-19 could conceivably constitute a breach of that duty. For example, deaths would have been 50% lower if the first lockdown had been introduced one week earlier.<sup>82</sup> Similarly, delaying the second lockdown until November 2020 deviated from scientific advice: ‘a circuit-breaker in September and an earlier, more stringent lockdown, would likely have reduced deaths’.<sup>83</sup> However, even if decision-making delays could be regarded as a breach of duty, it would be difficult to prove to the criminal standard that an omission to lock down sooner was a ‘but for’ cause and/or made a more than minimal contribution to the death of a specific individual(s). In the case of *Broughton*, the Court of Appeal held that where liability rested on D’s failure to summon medical assistance, D could only be a substantial cause of death if the prosecution could prove to the criminal standard that V would have lived if medical attention had been provided.<sup>84</sup> If the ratio of *Broughton* were to be applied to the failure to lockdown sooner, the prosecution would have to prove that each alleged victim would otherwise have lived. A general claim that locking down earlier could have prevented 21,000 first wave deaths<sup>85</sup> lacks the degree of specificity and detail that a criminal court would require.<sup>86</sup>

### 3.2 Causation & ‘thin skull’ scenarios

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<sup>81</sup> A Ashworth, *Positive Obligations in Criminal Law* (London, Hart, 2013) 53.

<sup>82</sup> Science and Technology Committee, *Oral evidence: UK Science, Research and Technology Capability and Influence in Global Disease Outbreaks* HC 136 (2020) Q883.

<sup>83</sup> Health and Social Care and Science and Technology Committees, *Lessons Learned* (n 26) 137.

<sup>84</sup> *R v Broughton* [2020] EWCA Crim 1093, [2021] 1 WLR 543.

<sup>85</sup> ED Knock et al, *Report 41: The 2020 SARS-CoV-2 Epidemic in England: Key Epidemiological Drivers and Impact of Interventions* (Imperial College London, 22 December 2020) 10.

<sup>86</sup> A Norrie, ‘Legal and Social Murder: What’s the Difference?’ [2018] *Crim LR* 531.

Criminal defendants ‘must take their victims as they find them’;<sup>87</sup> it is ‘perfectly immaterial’ that V was already in poor health before D’s act or omission because, ‘if [D] was so unfortunate as to accelerate her death, he must answer for it’.<sup>88</sup> The presence of comorbidities is associated with increased risk/severity of Covid-19 infections. Legal causation will be established if D’s act or omission resulted in Covid-19 infection, which was an ‘operating and substantial cause’ of death.<sup>89</sup> This might sometimes be difficult to evidence given apparent inconsistencies in approaches to recording Covid-19 as the cause of death, particularly in the early stages of the pandemic when access to testing was scarce.<sup>90</sup>

Causation may also be established where, for example, V died as a result of being unable to undergo an operation due to injuries inflicted by D.<sup>91</sup> There is uncertainty as to how many ‘non-Covid-19 deaths’ have been indirectly caused by the virus. In June 2020, the Office for National Statistics posited that excess deaths not involving coronavirus may be attributable to pressure on the healthcare system resulting from Covid-19 and/or delays by individuals in accessing healthcare due to fearing exposure to the virus or being reluctant to burden the NHS.<sup>92</sup> Again, difficulties would be likely to arise in identifying a specific defendant(s) and victim(s), as well as evidencing factual and legal causation.

### *3.3 Restricting causality: policy and doctrinal issues*

It is usually assumed that an unforeseeable natural event will break the chain of causation between D’s actions and V’s death.<sup>93</sup> This rule would not obstruct liability in the scenarios posited above for two reasons. First, Covid-19 is a precursor to the conduct potentially giving rise to liability and not a supervening event. Secondly, Covid-19 was not unforeseeable, as evidenced by the existence of the UK Government’s Pandemic Preparedness Strategy.<sup>94</sup>

Similarly, a free, deliberate and informed act by a capacitous adult will break the causal chain.<sup>95</sup> However, recent case law indicates that, where V is vulnerable, a different perspective on individual autonomy and voluntariness may be warranted.<sup>96</sup> If the appellate courts were willing to

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<sup>87</sup> *R v Blaue* [1975] WLR 1411 (CA).

<sup>88</sup> *R v Martin* (1832) 5 C & P 128.

<sup>89</sup> *R v Smith* [1959] 2 QB 35 (CMAC).

<sup>90</sup> See, for example, D Oliver, ‘Mistruths and Misunderstandings about Covid-19 Death Numbers’ (2021) 8279 *BMJ* 352.

<sup>91</sup> *R v McKechnie* (1992) 4 Cr App R 51.

<sup>92</sup> Office for National Statistics, *Analysis of Death Registrations not Involving Coronavirus (COVID-19), England and Wales: 28 December 2019 to 1 May 2020* (ONS, 5 June 2020).

<sup>93</sup> RM Perkins, ‘The Law of Homicide’ (1946) 36 *J Crim L & Criminology* 393.

<sup>94</sup> Department of Health, *UK Influenza Pandemic Preparedness Strategy 2011*, [www.gov.uk/government/publications/responding-to-a-uk-flu-pandemic](http://www.gov.uk/government/publications/responding-to-a-uk-flu-pandemic).

<sup>95</sup> *R v Kennedy* [2007] UKHL 38, [2008] 1 AC 269.

<sup>96</sup> *R v Rebelo* [2021] EWCA Crim 306, [2021] 4 WLR 52; *R v Field* [2021] [EWCA Crim 380, [2021] 1 WLR 3543.

develop this somewhat paternalistic approach, causation might be easier to satisfy in the context of particularly vulnerable sets of Covid-19 victims e.g., the elderly in care homes, or those with comorbidities.

#### **4. The structure of homicide offences and assault/aggravated assault/serious bodily harm offences**

##### *4.1 Murder*

The common law offence of murder is a crime ‘whose central definition connects it with the core ideal at the heart of the view that life is sacrosanct’.<sup>97</sup> The ‘separate status of the crime of murder’, along with the ‘uniqueness’ of the mandatory life sentence that follows upon conviction, ‘reflect[s] the “sanctity of life” ideal’.<sup>98</sup> It is, then, highly problematic that a conviction of murder does not depend upon proof of either direct intention or foresight of death as a consequence of one’s actions. Rather, murder is committed when D unlawfully kills V, intending either to kill V or to cause V serious bodily harm.<sup>99</sup>

Murder is distinguished from manslaughter by the requirement of express malice (intention to kill) or implied malice (intention to cause serious bodily harm).<sup>100</sup> Direct intention exists if the prohibited result was D’s aim or purpose; would D regard his action as a failure if he did not achieve the result?<sup>101</sup> Whatever level of responsibility government ministers, officials or corporations may bear for Covid-19 related deaths, it cannot plausibly be contended that anyone directly intended death or serious harm. Oblique (or indirect) intent is a rule of evidence rather than a rule of law.<sup>102</sup> In the context of murder, a jury may find intent if satisfied that death or serious harm was a virtually certain consequence of D’s actions and that D had appreciated such was the case.<sup>103</sup> If it is right that ‘tens of thousands died who didn’t need to die’ as a result of government decisions and delays,<sup>104</sup> the question would be whether officials who were in a position to act differently (or earlier) realised that death(s) were virtually certain to occur as a result of their (in)actions.

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<sup>97</sup> Law Commission, *A New Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 2.30.

<sup>98</sup> *ibid.*

<sup>99</sup> Sir Edward (Chief Justice) Coke, *Institutes of the Law of England, Pt III* (Clarke, 1797) Ch 7, [47].

<sup>100</sup> *R v Moloney* [1985] AC 906 (HL).

<sup>101</sup> RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (New Jersey, Wiley-Blackwell, 1990).

<sup>102</sup> *R v Matthews* [2003] EWCA Crim 192, [2003] 2 Cr App R 30.

<sup>103</sup> *R v Woollin* [1999] 1 AC 82 (HL).

<sup>104</sup> Health and Social Care Committee and Science and Technology Committee, *Oral evidence: Coronavirus: Lessons Learnt* HC 95 (2021) Q1133 (Dominic Cummings, former Chief Adviser to the Prime Minister).

In May 2021, former adviser Dominic Cummings told the BBC that the Prime Minister initially refused to impose a second lockdown in the autumn of 2020 because those dying from Covid-19 were ‘essentially all over 80’.<sup>105</sup> Cummings’ allegations to a parliamentary committee chimed with contemporaneous statements suggesting that the Prime Minister was pursuing a herd immunity strategy. Deliberately deciding to allow people to become infected, knowing that some would die as a result, appears to be capable of satisfying the threshold for oblique intent. However, even if charges could be brought on the basis that a particular individual(s) omitted to act in the knowledge that preventable deaths would result, it would be for the jury to decide whether to infer that D intended death or serious harm. Because there is no rule of law that foresight of a virtually certain consequence *is* intention, the jury retains some ‘moral elbow-room within which to decide whether the defendant’s indifference to the death of the victim was so callous that she deserves to be labelled as a murderer’.<sup>106</sup> The courts have not sought to circumscribe factors a jury may consider in making this evaluative decision.<sup>107</sup> When considering murder liability arising from Covid-19 deaths it would therefore be open to individual jurors to bring their own moral, ethical and political values to bear in deciding the question of intent.

#### 4.2 Manslaughter

The ‘catch-all’ category of involuntary manslaughter encompasses homicide offences that do not require proof of intention to kill or cause serious harm,<sup>108</sup> of which there are three forms at common law.<sup>109</sup> The breadth of these offences and their blurred boundaries have attracted criticism,<sup>110</sup> but their continued existence contributes towards fulfilment of the State’s duty to ensure that effective criminal law measures are in place to protect the lives of its citizens from threats by the State or third parties.<sup>111</sup>

All three non-statutory forms of involuntary manslaughter require proof that D caused the death of a human being. Constructive manslaughter is made out where D intentionally commits an unlawful and dangerous act, which causes V’s death.<sup>112</sup> It is necessary to identify a specific, criminally unlawful act upon which to base liability for this form of manslaughter.<sup>113</sup> Criticisms of ministers and officials’ handling of Covid-19 more commonly relate to failures or

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<sup>105</sup> *BBC News* ‘Covid: Boris Johnson Resisted Autumn Lockdown as Only Over-80s Dying – Dominic Cummings’ (20 July 2021), [www.bbc.co.uk/news/uk-politics-57854811](http://www.bbc.co.uk/news/uk-politics-57854811).

<sup>106</sup> J Horder, ‘Intention in the Criminal Law – A Rejoinder’ (1995) 58 *MLR* 678, 687.

<sup>107</sup> V Tadros, ‘The Homicide Ladder’ (2006) 69 *MLR* 601, 605.

<sup>108</sup> Law Commission, *Murder Manslaughter and Infanticide* (Law Com No 304, 2006) para 2.9.

<sup>109</sup> Constructive manslaughter, gross negligence manslaughter and reckless manslaughter.

<sup>110</sup> See *Andrews v DPP* [1937] AC 576 (HL) 581 (Lord Atkin); Law Commission, *Murder, Manslaughter and Infanticide* (n 108) para 2.9.

<sup>111</sup> European Convention on Human Rights, Art 2; *Osman v UK* (2000) 29 EHRR 245 [115].

<sup>112</sup> *Attorney-General’s Reference (No. 3 of 1994)* [1998] AC 245 (HL) 274 (Lord Hope).

<sup>113</sup> *R v Franklin* (1883) 15 Cox CC 163; *R v Kennedy (No 2)* [2007] UKHL 38, [2008] 1 AC 269 [7].

delays in acting. Accordingly, the remainder of this section will focus on gross negligence manslaughter and reckless manslaughter, both of which may be committed by omission.

Gross negligence manslaughter liability arises where death was caused by the negligent breach of a duty of care, when it was reasonably foreseeable that the breach would give rise to a serious and obvious risk of death.<sup>114</sup> A duty is breached if D fails to exercise a fair and reasonable standard of care and competence.<sup>115</sup> The breach must give rise to a serious and obvious risk of death to V or to a class of people to which V belongs.<sup>116</sup> Risk is assessed objectively and prospectively, based on the information available to D at the time of the breach.<sup>117</sup> The circumstances of the breach must have been ‘truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction’.<sup>118</sup>

If it were possible to identify precise acts or omissions that caused specific victims to contract Covid-19 from which they died, then given the state of knowledge from at least March 2020, it seems likely jurors would conclude there was a serious and obvious risk of death. A jury would then need to determine whether the failures were so bad that they ought to attract a criminal sanction and the label ‘manslaughter’. This is an objective test, and ‘indifference to an obvious risk of injury to health’ may suffice.<sup>119</sup>

Determining whether conduct was grossly negligent invites the jury to make a value judgement.<sup>120</sup> As the relevant CPS guidance notes, ‘a course of conduct by an individual’, ‘a series of serious breaches’ and ‘ignoring warnings’ all mean ‘the test of grossness is more likely to be met’.<sup>121</sup> All of the circumstances in which D was working will be relevant, but where death is a result of (in)action by several people, their conduct cannot be aggregated when considering whether an individual’s negligence was so bad as to amount to a criminal act.<sup>122</sup>

The final form of common law involuntary manslaughter is reckless manslaughter, which is generally understood to apply where D kills with awareness of a risk of death or serious harm.<sup>123</sup> Stark contends that reckless manslaughter charges are rare because most situations in which it might apply are adequately captured by the better established offences of either

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<sup>114</sup> *R v Adomako* (n 72); *R v Misra* [2004] EWCA Crim 2375, [2005] 1 Cr App R 21; *R v Rose* [2017] EWCA Crim 1168, [2018] QB 328.

<sup>115</sup> *R v Bateman* (1927) 19 Cr App R 8 (CCA).

<sup>116</sup> *R v Kuddus* [2019] EWCA Crim 837, [2019] 1 WLR 5199

<sup>117</sup> *Rose* (n 114) [77].

<sup>118</sup> *ibid.*

<sup>119</sup> *R v Stone* [1977] QB 354 (CA) 363; *Attorney-General’s Reference (No.2 of 1999)* [2000] QB 796 (CA) 809.

<sup>120</sup> A Lodge, ‘Gross Negligence Manslaughter on the Cusp: the Unprincipled Privileging of Harm over Culpability’ (2017) 81 *Journal of Criminal Law* 125.

<sup>121</sup> Crown Prosecution Service, *Gross Negligence Manslaughter – Legal Guidance* (CPS, 14 March 2019).

<sup>122</sup> *ibid.*

<sup>123</sup> *R v Lidar* [2017] Crim LR 763.



constructive manslaughter or gross negligence manslaughter.<sup>124</sup> Where advertent risk-taking is alleged but there is doubt as to whether a jury would view D's act or omission as deserving of criminal punishment, reckless manslaughter may be a more appropriate charge because its model of culpability more clearly links D's risk-taking with her blameworthiness.<sup>125</sup>

#### *4.3 Offences related to actions that cause serious bodily harm (assault; grievous assault; assault with intent to cause serious bodily harm)*

Non-fatal offences against the person form a loose hierarchy, according to the severity of injury and the intention/foresight of the perpetrator. At the top of the hierarchy is the offence of causing grievous bodily harm (or wounding) with intent contrary to s 18 of the Offences Against the Person Act (OAPA 1861), which carries a maximum sentence of life imprisonment. Both factual and legal causation must be proved (see 3.1, above) and the offence encompasses harm caused by omission and/or indirectly,<sup>126</sup> including via the transmission of a virus.<sup>127</sup> Grievous bodily harm (GBH) means really serious harm,<sup>128</sup> which includes psychiatric harm (although not 'psychological disturbance').<sup>129</sup> Whether harm is serious is determined objectively and not from V's standpoint,<sup>130</sup> although the effect on the particular victim may be taken into account.<sup>131</sup> Accordingly, viral symptoms that might not be serious for a healthy adult may be so regarded if V was physically vulnerable.<sup>132</sup> Infection with Covid-19 may therefore result in GBH, depending upon the nature and degree of symptoms and the infected person's characteristics, including their age. The symptoms of 'long Covid' might also constitute GBH, particularly given their indefinite prognosis and lack of an effective cure.<sup>133</sup> If harm suffered by any individual were not deemed to be sufficiently serious, liability for assault occasioning actual bodily harm would be an available alternative.<sup>134</sup>

Liability under s 18 OAPA 1861 also requires proof of ulterior intent which, for our purposes, means intent to do GBH; no lesser *mens rea* will suffice.<sup>135</sup> As with the mental element

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<sup>124</sup> F Stark, 'Reckless Manslaughter' [2017] *Crim LR* 763, 768-69.

<sup>125</sup> JC Smith, 'R v DPP *ex p Jones* – Case Comment – Prosecution: Director of Public Prosecutions – decision not to prosecute' [2000] *Crim LR* 858; F Stark, 'Reckless Manslaughter' *ibid*, 779-80.

<sup>126</sup> *DPP v K* [1990] 1 WLR 1067.

<sup>127</sup> *R v Golding* [2014] EWCA Crim 889, [2014] *Crim LR* 686.

<sup>128</sup> *DPP v Smith* [1961] AC 290; *R v Janjua* [1999] 1 Cr App R 91.

<sup>129</sup> *R v Golding* (n 127).

<sup>130</sup> *R v Brown (Damien)* [1998] *Crim LR* 485.

<sup>131</sup> *R v Bollom* [2004] EWCA Crim 2846, [2004] 2 Cr App R 6.

<sup>132</sup> *ibid*.

<sup>133</sup> *R v Golding* (n 127).

<sup>134</sup> Offences Against the Person Act 1861, s 47.

<sup>135</sup> *R v Taylor* [2009] EWCA Crim 544.

of murder, a jury may find intent if satisfied that a defendant foresaw GBH as a virtually certain consequence of their actions. On this basis, those responsible for decisions to delay lockdown and to pursue a herd immunity strategy, for example, could theoretically be said to have intended GBH. The less serious offence of maliciously inflicting GBH contrary to s 20 OAPA 1861 merely requires proof that D foresaw that her conduct might result in some harm, and this reduced level of culpability is reflected in a lower maximum sentence of five years' imprisonment. For the reasons discussed above, it is hardly controversial to suggest that decision-makers foresaw, at the very least, that some harm might result from their acts and omissions in tackling Covid-19. In autumn of 2020, the impact of delaying the first lockdown on Covid-19 infection rates was known, yet the idea of a 'circuit-breaker' was rejected and the second lockdown was delayed, resulting in the virus spreading. However, any attempt to prosecute for non-fatal offences would likely be thwarted by the impracticality of proving to the criminal standard that a specific individual(s) would not have contracted the virus if different decisions had been taken.

#### *4.4 Offences regarding unborn foetuses; interrupting the course of a (viable) pregnancy*

An unborn foetus is not regarded as a human being for the purposes of the law of homicide. Separate statutory offences of child destruction and attempting to procure a miscarriage may be applicable, subject to the Abortion Act 1967. The former offence criminalises the intentional killing of any child that is capable of being born alive. The latter offence encompasses attempting to procure a miscarriage at any stage from conception until the child's birth. Liability for both offences depends upon proof of intent to destroy the foetus, so it is difficult to imagine that destruction via the mother's infection with Covid-19 could fall within their scope.

#### *4.5 Failure to render assistance*

There is no distinct offence of failing to render assistance in England and Wales but the majority of offences discussed in this chapter may be committed by omission provided D was under a duty to act. In addition, the offence of misconduct in public office may be committed where an office holder acts (or fails to act) in a manner that constitutes a breach of the duties of that office.<sup>136</sup>

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<sup>136</sup> *Dytham* (n 76).

Misconduct in public office is a common law offence and is comprised of four elements. The first is that the defendant is a public officer. The second is wilful neglect in the performance of a duty, or wilful misconduct which, third, is of such a degree so as to amount to an abuse of the public's trust in the officer. Finally, the public officer must not have a reasonable excuse or justification for the conduct.<sup>137</sup>

Government officials are, of course, public officers, but they would be unlikely to be liable for misconduct arising from management of the pandemic response.<sup>138</sup> *Wilful* neglect requires proof that the official deliberately did something which was wrong, knowing it to be wrong or with reckless indifference as to whether it is wrong or not.<sup>139</sup> Incompetence does not meet the required threshold. In respect of Covid-19 decision making, although there were strong objective indications of risk e.g., the lives that would be lost as a result of failing to impose lockdown earlier than eventually implemented, particularly in respect of the second and third lockdowns, it is unlikely that any official exhibited the required degree of deliberate or reckless wrongdoing because decisions were both morally and politically contestable. Against the backdrop of intense public debate, it could not be said that decision-makers *knowingly* took the wrong decisions given that the boundaries between 'right' and 'wrong' were often blurred and determining the 'right' approach was subject to a wide range of opinion, including from SAGE.

With respect to an abuse of the public's trust, the threshold is high, such that the misconduct injures the public interest so as to call for condemnation and punishment.<sup>140</sup> The misconduct must be an affront to the public conscience.<sup>141</sup> Ultimately this test is subjective and, to a degree, influenced by the consequences of the conduct and the motive from which it proceeded, 'whether from a dishonest, oppressive or corrupt motive...or from mistake or error.'<sup>142</sup> Whether government officials 'abused' public trust remains open to question, especially as public narratives have since cast key decisions as poor, sometimes incompetent, mistaken, and taken under insurmountable pressure in response to an emergency during which, particularly in the early days, information was imperfect and limited. Equally, errors such as the timing of lockdown decisions are viewed as being motivated by benevolent reasons e.g., keeping children in school, preserving mental health, and avoiding more damage to people's livelihoods. It is in that

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<sup>137</sup> *Attorney-General's Reference (No 3 of 2003)* [2004] EWCA Crim 868.

<sup>138</sup> *R v Friar* 1 Chit. Rep (1819) (KB) 702; See *R v Cosford* [2013] EWCA Crim 466.

<sup>139</sup> *ibid.*

<sup>140</sup> *Dytham* (n 76).

<sup>141</sup> *A-G's Ref (No 3 of 2003)* (n 137).

<sup>142</sup> *R v Borron* [1820] 3 B & Ald 432, 434.

sense that the Government has drawn retrospective sympathy, especially taking into account the successful distribution of vaccinations.<sup>143</sup>

Finally, and in light of the above, it is very likely there would be a reasonable excuse or justification in response to any alleged misconduct. There is evidence that official decisions and policies were based on fine, complex discretionary judgments which were informed by a wide range of stakeholders and influenced by imperfect scientific opinion.<sup>144</sup> The fact that these decisions and policies, at a later time, proved to be errors would not mean they amounted to misconduct at the time they were made. Indeed, it is in the nature of government policy-making that errors can occur and, when they do, they result in an opportunity to heed lessons, however stark.<sup>145</sup>

## 5. Defences / Justifications / Excuses

### 5.1 Necessity

It has been alleged on a number of occasions that the Prime Minister prioritised saving the economy over saving lives when formulating his Covid-19 strategy.<sup>146</sup> Leaving aside the argument that presenting these alternatives as a binary choice is a false premise, it is necessary to consider whether avoiding lockdown on the basis that the resultant economic damage will also cost lives engages the doctrine of necessity.<sup>147</sup>

Concerns have long been expressed about the uncertain theoretical basis, scope and form of the doctrine of necessity in England and Wales.<sup>148</sup> While the notorious case of *Dudley v Stephens*<sup>149</sup> is often said to hold that necessity can never be a defence to murder, it may be permissible to take a human life in certain circumstances.<sup>150</sup> The Court of Appeal has suggested that the doctrine of necessity will apply provided: (1) D's act was necessary to avoid inevitable

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<sup>143</sup> Opinion poll data on Government support e.g. relative to opposition.

<sup>144</sup> See generally, House of Commons Health and Social Care, and Science and Technology Committees, Coronavirus: lessons learned to date, *Sixth Report of the Health and Social Care Committee and Third Report of the Science and Technology Committee of Sessions 2021-22*.

<sup>145</sup> *ibid*.

<sup>146</sup> See, for example, Health and Social Care Committee and Science and Technology Committee *Lessons Learnt* (n 104) Q1092; D Parsley, 'Boris Johnson "Privately Accepts" up to 50,000 Annual Covid Deaths as an Acceptable Level' *inews* (27 August 2021), [inews.co.uk/news/boris-johnson-privately-accepts-up-to-50000-annual-covid-deaths-as-an-acceptable-level-1170069](https://inews.co.uk/news/boris-johnson-privately-accepts-up-to-50000-annual-covid-deaths-as-an-acceptable-level-1170069).

<sup>147</sup> K Proctor, 'Saving Lives or UK Economy from Covid a "False Choice", MPs Warn' *The Guardian* (London 26 August 2020).

<sup>148</sup> See B Kotecha, 'Necessity as a Defence to Murder: an Anglo-Canadian Perspective' (2014) 78 *Journal of Criminal Law* 341.

<sup>149</sup> *Dudley v Stephens* (1884) 14 QBD 273.

<sup>150</sup> See M Bohlander, 'Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes – Taking Human Life and the Defence of Necessity' (2006) 70 *Journal of Criminal Law* 147.

and irreparable evil; (2) no more was done than reasonably necessary for the purpose to be achieved; and (3) the evil inflicted was not disproportionate to the evil avoided.<sup>151</sup> More recently, however, the appellate courts have made clear that they are not prepared to clearly define the boundaries of a necessity defence in the ‘complex and controversial field’ of voluntary euthanasia.<sup>152</sup> It therefore seems highly unlikely that the criminal courts would be willing to fashion a defence of necessity capable of applying in the context of complex and controversial decisions taken in the course of responding to an unprecedented pandemic.

## 6. Corporate criminal liability

### 6.1 Overview of corporate criminal liability

A corporation cannot be liable for murder but may be liable for manslaughter and/or non-fatal offences against the person.<sup>153</sup> Corporate liability requires proof that an individual with sufficient seniority to be regarded as the ‘directing mind and will’ of the company acted (or failed to act) with *mens rea*.<sup>154</sup> The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007) was introduced to address the particular problems inherent in satisfying this ‘identification principle’ in homicide cases.

Section 1 of the CMCHA 2007 provides that an ‘organisation’ (O) will be liable for manslaughter if the way in which its activities are managed caused V’s death and amounted to a gross breach of a relevant duty of care owed by O to V. ‘Organisations’ are defined widely to include specified government departments, including the DHSC, the Home Office and the Cabinet Office.<sup>155</sup> In deciding whether there has been a ‘gross breach’ of duty, the jury may consider the extent to which attitudes, policies, systems or accepted practices encouraged any failure to comply with health and safety legislation.

In July 2020 the House of Commons’ Public Accounts Committee found that the fragmented nature of the adult social care system led by the DHSC contributed to inadequate provision of Personal Protective Equipment for staff,<sup>156</sup> and deaths of health care workers from

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<sup>151</sup> *Re A (Conjoined Twins: Medical Treatment) (No.1)* [2001] Fam 147.

<sup>152</sup> *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961 [56].

<sup>153</sup> Criminal Justice Act 1925, s 33(3); *P & O European Ferries (Dover) Ltd* (1990) 93 Cr App R 72.

<sup>154</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL); *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC); *Attorney-General's Reference (No.2 of 1999)* (unreported, 15 February 2000) (CA).

<sup>155</sup> CMCHA 2007, Sch 1.

<sup>156</sup> House of Commons Public Accounts Committee, *Readying the NHS and Social Care for the COVID-19 Peak* HC 405 (2020).

Covid-19 have been ‘linked to’ occupational exposure.<sup>157</sup> The policy of releasing hospital patients into the adult care system is also thought to have seeded outbreaks of Covid-19 in care homes, leading to deaths. Proving that a governmental organisation caused the death of a specific individual is likely to be problematic for the reasons discussed at 3.1, above, although recent case law may presage a more protective attitude towards vulnerable victims (see 3.3, above). This might effectively lower the causal threshold given that hospitals, and not patients, had the primary care responsibility of weighing up clinical risks involved in placing residents in care homes. In addition, the CMCHA 2007 contains a number of broad exemptions from liability relating to public policy decisions, the exercise of public functions and conduct in response to emergency circumstances.<sup>158</sup>

Conduct by public sector agencies and private companies relating to Covid-19 may fall within the scope of the CMCHA 2017 or the OAPA 1861. For example, failure to plan properly and assess the risk to staff required to physically attend their workplace may breach the basic duty owed by employers towards their employees.<sup>159</sup> Again, it is likely to be difficult to prove that harm or death from Covid-19 infection was the result of an employee contracting the virus in the workplace. While prosecutions for health and safety offences could potentially be brought in appropriate circumstances, there is unlikely to be sufficient evidence to provide a realistic prospect of conviction for offences of either corporate manslaughter or causing/inflicting grievous bodily harm upon individuals.

## 6.2 *Accessory or perpetrator*

The term ‘person’ includes both corporations and unincorporated bodies, so either may be liable for statutory offences as principal. Secondary liability is itself a statutory offence, so an organisation that aids or abets a statutory offence may be liable as an accessory, subject to the requirement to prove that someone with sufficient seniority in the company both intended to assist and had knowledge of the substantive offence.

## 7. Forms of participation

The liability of the perpetrator of a criminal offence depends upon proof that they performed the *actus reus* of the offence with the required *mens rea*. Alternatively, a person may be liable as a secondary party (or ‘accessory’) if she aided, abetted, counselled or procured the

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<sup>157</sup> National Audit Office, *The Supply of PPE during the COVID-19 Pandemic* HC 961 (2020)

<sup>158</sup> See CMCHA 2007, s 3 and s 6.

<sup>159</sup> Health and Safety at Work Act 1974, s 2.

offence.<sup>160</sup> An accessory may be tried and punished in the same way as a principal offender, but the liability of the accessory depends upon proof that the principal committed the offence or, at least, the *actus reus* of that offence. For the reasons discussed hitherto, difficulties in establishing causation are likely to impede the prosecution of any individual or corporation as principals for any offences arising out of the national response to Covid-19.

Conspiracy is essentially now a statutory offence involving the making of an agreement to commit a crime, regardless of whether that agreement is put into effect.<sup>161</sup> D and at least one other person must agree that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, will necessarily result in the commission of an offence by one of the parties. There is a need to identify the nature of the agreement with a degree of precision.<sup>162</sup> Even if it could be established that ministers, MPs or advisers agreed upon a particular policy knowing that it would result in the deaths of citizens, it is submitted this would not be evidence of conspiracy to murder; an agreement to delay lockdown, for example, is not an agreement to cause death.<sup>163</sup>

## 8. Attempt

An attempt occurs when D does an act that is more than merely preparatory to the commission of an indictable offence<sup>164</sup> with intent to commit that offence.<sup>165</sup> Where D embarked upon the substantive crime of murder with intent to kill but it cannot be established that her actions in fact contributed to V's death, D may be liable for an attempt.<sup>166</sup> Liability requires proof of a positive act, so omissions or delays by public officials in relation to Covid-19 would not be covered. While some corporations have committed positive acts that may be regarded as reprehensible, such as supplying unusable masks,<sup>167</sup> in practice, it would be impossible to attribute

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<sup>160</sup> Ordinary principles of secondary liability are also now applicable where one party commits an offence in the course of a 'joint criminal venture': *R v Jogee* [2016] UKSC 8, [2017] AC 387.

<sup>161</sup> Criminal Law Act 1977, s 1.

<sup>162</sup> P Jarvis and M Bisgrove, 'The Use and Abuse of Conspiracy' [2014] *Crim LR* 261.

<sup>163</sup> D Ormerod and K Laird, *Smith, Hogan & Ormerod's Criminal Law*, 16th edn (Oxford, Oxford University Press, 2021).

<sup>164</sup> An indictable offence is one that either may or must be tried by a judge and jury in the Crown Court (i.e. generally those offences that are more serious).

<sup>165</sup> Criminal Attempts Act 1981, s 1.

<sup>166</sup> See, for example, *R v White* (n 64).

<sup>167</sup> K Rawlinson, 'Labour Calls for Inquiry into Purchase of 50m Unusable Face Masks' *The Guardian* (London, 6 August 2020).

any specific death(s) to such acts and it would likely also be difficult to establish any intention to kill.<sup>168</sup>

## **9. Sanctions / sentencing / punishment / reparations / restorative justice (?)**

### *9.1 General sentencing framework for the crimes under discussion (i.e. homicide & serious bodily harm-offences)*

Courts must have regard to the following non-hierarchical purposes of sentencing: punishment; crime reduction; reform and rehabilitation; public protection; and reparation.<sup>169</sup> Guidelines issued by the Sentencing Council are designed to promote consistency and may be general (such as the guideline on reduction in sentence for a guilty plea) or offence-specific (such as the gross negligence manslaughter guideline). Offence-specific guidelines require judges to consider the offender's culpability and the harm caused by the offence in order to identify a sentencing category. Each category has a suggested starting point and a category range within which the judge should normally sentence the offender.

The mandatory sentence for murder is life imprisonment, although the court will usually set a minimum term after which the offender may be considered for release on licence. Parliament has laid down various starting points for judges to apply when fixing the minimum term, the lowest of which is 15 years for a murder with no aggravating features. A 'whole life order' may be appropriate if the seriousness of the offence is exceptionally high, such as the murder of two or more persons with a substantial degree of premeditation, or a murder done to advance a political, religious, racial or ideological cause.<sup>170</sup>

Life imprisonment is available for all forms of manslaughter except corporate manslaughter, but the relevant guidelines identify ranges of fixed term sentences. The harm caused by manslaughter 'will inevitably be of the utmost seriousness'<sup>171</sup> and the focus of any plea in mitigation will be the offender's culpability. For gross negligence manslaughter, the lowest starting point is two years' imprisonment for cases involving a momentary lapse in an offender's otherwise satisfactory standard of care, with a category range of 1-4 years' custody. At the opposite end of the scale, an offender whose negligence was of an extreme character and

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<sup>168</sup> While murder may be satisfied by an attempt to kill or cause serious harm, only an intention to kill will suffice for attempted murder: *R v Whybrow* (1951) 35 Cr App R 141 (CCA)

<sup>169</sup> Sentencing Act 2020, s 57.

<sup>170</sup> *ibid*, Sch 21.

<sup>171</sup> Sentencing Council, *Guideline: Gross Negligence Manslaughter* [www.sentencingcouncil.org.uk/offences/crown-court/item/gross-negligence-manslaughter/](http://www.sentencingcouncil.org.uk/offences/crown-court/item/gross-negligence-manslaughter/).



involved continued or repeated conduct in the face of obvious suffering may face a starting point of 12 years imprisonment and would be appropriately sentenced within a range of 10-18 years.

The maximum sentence for causing grievous bodily harm with intent is life imprisonment but the usual sentencing range is 2-16 years imprisonment for an offence involving a single victim. The lesser offence of maliciously inflicting grievous bodily harm has a maximum sentence of five years' custody. In all cases, the existence of multiple victims will result in either an uplift to the sentence for the main offence and concurrent sentences for the remainder, or consecutive sentences, depending on the circumstances.<sup>172</sup>

### *9.2 Sanctions specifically for senior government officials? (constitutional measures?)*

The convention of individual ministerial responsibility shapes the various 'political' ways in which a minister is held responsible for official acts, omissions and departmental failures, and that is irrespective of whether there are objective grounds for critique.<sup>173</sup> Ministerial responsibility takes the shape of being *held to account* i.e., to publicly inform, explain, justify and if needed demonstrate change to various audiences and stakeholders.<sup>174</sup> This may take the form of answering to Parliament, being interviewed by the media, being subject to detailed scrutiny via a formalised select committee, and otherwise called to give evidence to independent public inquiries (such as the one that is being planned for the pandemic due to commence work in 2022).<sup>175</sup> Although not without exception, the ultimate censure for a minister is to be asked to tender their resignation.<sup>176</sup> Leaving aside the option of the Prime Minister dismissing a minister from post, in other cases, the prospect of resignation depends on the individual's minister political ability to resist responsibility for the failings.<sup>177</sup>

### *9.3 Corporations and sentencing*

Where an organisation is successfully prosecuted (as opposed to an individual within the organisation), the only available sanctions are fines and ancillary orders. There is usually no limit to the amount of any fine, but guidelines lay down starting points based on the seriousness of the offence and the organisation's annual turnover. Factors increasing seriousness (and therefore

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<sup>172</sup> Sentencing Council, *Guideline: Totality* [www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/totality/](http://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/totality/).

<sup>173</sup> European Commission for Democracy, *Report on the Relationship Between Political and Criminal Ministerial Responsibility* (11 March 2013).

<sup>174</sup> Institute For Government, *Accountability in Modern Government: What are the Issues* (2018).

<sup>175</sup> See the Inquiries Act 2005.

<sup>176</sup> Often, individuals are asked to tender their resignation to avoid the public embarrassment of a minister being dismissed.

<sup>177</sup> See, for example *BBC News*, 'Foreign Secretary Dominic Raab Rejects Calls to Quit over Afghan Interpreters' (19 August 2021) [www.bbc.co.uk/news/uk-58265160](http://www.bbc.co.uk/news/uk-58265160).

increasing the level of fine) include cost-cutting at the expense of safety, whereas a sentence may be mitigated if death(s) were contributed to by external events beyond the organisation's control.<sup>178</sup> The court may additionally impose ancillary orders including: a publicity order, whose object is deterrence and punishment; a remedial order, requiring the organisation to remedy any specific failings involved in the offence; and/or the payment of compensation where this is not being dealt with separately in the civil courts.<sup>179</sup>

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<sup>178</sup> Sentencing Council, *Guideline: Corporate Manslaughter* [www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/](http://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/).

<sup>179</sup> CMCHA 2007, ss.9-10