The evolution of gross negligence manslaughter

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Table of Contents

Journal Article

Archbold Review

Arch. Rev. 2018, 1, 6-9

Subject
Criminal law

Other related subjects
Health; Negligence

Keywords
Breach of duty of care; Clinical negligence; Criminal liability; Health professionals; Manslaughter by gross negligence

Cases cited
R. v Adomako (John Asare) [1995] 1 A.C. 171; [1994] 6 WLUK 393 (HL)
R. v Evans (Gemma) [2009] EWCA Crim 650; [2009] 1 W.L.R. 1999; [2009] 4 WLUK 52 (CA (Crim Div))
R. v Sellu (David) [2016] EWCA Crim 1716; [2017] 4 W.L.R. 64; [2016] 11 WLUK 402 (CA (Crim Div))
R. v Rudling (Joanne) [2016] EWCA Crim 741; (2016) 151 B.M.L.R. 79; [2016] 6 WLUK 513 (CA (Crim Div))
R. v Rose (Honey Maria) [2017] EWCA Crim 1168; [2018] Q.B. 328; [2017] 7 WLUK 789 (CA (Crim Div))
R. v Misra (Amit) [2004] EWCA Crim 2375; [2005] 1 Cr. App. R. 21; [2004] 10 WLUK 232 (CA (Crim Div))

*Arch. Rev. 6 **Introduction**

Like all common law offences, gross negligence manslaughter is the product of incremental judicial development. The House of Lords in *Adomako* restated the essential ingredients of the offence. The elements of the offence did not crystallise, however, but continued to be refined by the Court of Appeal in the years following the judgment in *Adomako.* [1] Eventually, judicial development of the offence plateaued and it underwent a period of relative stability with few developments since *Evans* in 2009. [2] However, gross negligence manslaughter has recently been the subject of significant development by the Court of Appeal. The practical impact of these recent developments has been to reaf-firm and, in some cases, to raise the threshold that must be crossed before all the elements of the offence can be established. The purpose of this brief article is to analyse the judgments that have led to this state of affairs. As will become clear, the Court of Appeal's recent development of the offence has occurred solely with reference to healthcare professionals. How these developments would apply in a case where the defendant is not a healthcare professional has not been considered. It will be argued that it is undesirable that an offence that may potentially be committed by anyone who breaches the duty of care they owe to another now seems to be being developed solely with reference to one category of professional: healthcare professionals.

Indeed, the categories in which a duty of care might arise are very broad. Given the fact that gross negligence manslaughter appears to be in a state of flux, the article will conclude by submitting that an authoritative judgment of the Supreme Court clarifying the elements of the offence is necessary.

The elements of the offence

In what Professor Sir John Smith described as a "welcome decision" [3] the House of Lords in *Adomako* restated the elements of gross negligence manslaughter:

(1) A duty of care owed by the defendant to the victim.

(2) A breach of the duty of care applying the ordinary principles of negligence.

(3) The death of the victim was caused by the negligent breach of the duty of care.

(4) The defendant's conduct departed from the proper standards of care to such an extent, involving as it must have done a risk of death to the victim, that it should be judged by the jury as criminal.

Following *Adomako,* the elements of gross negligence manslaughter were subject to further elucidation by the Court of Appeal. [4] The court's consideration of the offence focused *Arch. Rev. 7 primarily upon two elements. [5] First, the assessment of whether the defendant's conduct fell so far below the requisite standard that it ought to be considered grossly negligent and, secondly, the extent to which the breach of the duty of care must have involved the risk of death. In relation to this first issue, the Court of Appeal in *Misra* [6] confirmed that it is for the jury to assess the extent to which the defendant's behaviour was grossly negligent and consequently criminal. In relation to this second issue, the Court of Appeal in *Singh,* [7] in a refinement of what was said in *Adomako,* approved the trial judge's direction that "the circumstances must be such that a reasonably prudent person would have foreseen a *serious and obvious* risk not merely of serious injury, but of death". The court envisaged this as being a separate element of the offence that had to be satisfied before there could be criminal liability.

Recent developments

Gross negligence manslaughter is a rarely charged offence. In an analysis conducted by the Sentencing Council, 160 offenders were sentenced in 2016 for manslaughter with only a small proportion convicted of gross negligence manslaughter. [8] Despite this fact, since the beginning of 2016 the Court of Appeal has delivered a number of judgments in which it has taken the opportunity to re-evaluate the elements of the offence. This large volume of appeals against conviction could indicate that the offence is being charged more often. Furthermore, the willingness to grant leave in these cases could suggest that there is a view amongst some members of the judiciary that further refinement of the offence is necessary.

In *Sellu* [9] the Court of Appeal considered how the jury ought to be directed when they are assessing whether the defendant's breach of duty was grossly negligent. The trial judge directed the jury that their task was not just "to decide whether [the defendant] fell below the standard of a reasonably competent consultant colorectal surgeon, but whether he did so in a way that was gross or severe". The Court of Appeal, in a judgment delivered by Sir Brian Leveson P, held that this direction was inadequate. Whilst his lordship accepted that no particular formulation is mandatory, he emphasised that the trial judge must assist the jury to understand how to approach their task of identifying the line that separates serious or even very serious errors, from conduct which was "truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal". The court quashed the defendant's conviction on the basis that he did not have the benefit of a sufficiently detailed instruction to the jury in relation to the concept of gross negligence. In the subsequent case of *Bawa-Garba,* [10] the conviction of the defendant - a paediatric registrar - was upheld. Sir Brian Leveson P observed that the judge accurately brought to the jury's attention the fact that the prosecution had to make them sure that the defendant's conduct was "truly, exceptionally bad" before they could find her guilty of gross negligence manslaughter.

The requirement that the breach of duty must pose a risk of death was specifically considered by the Court of Appeal in two further cases. In *Rudling* [11] the Crown appealed against a finding that the defendant, a GP, had no case to answer following the death of a child in her care. The victim's mother telephoned the defendant's GP practice describing his symptoms, but the defendant failed to conduct a home visit. The next day, the victim died of Addison's disease, a very rare condition in children. The judge agreed with the submission made on behalf of the defendant that there was insufficient evidence of an obvious and serious risk of death at the time of the telephone call (which was the breach of duty alleged against the defendant). Such a risk would only have become obvious had the defendant visited the victim. The Crown appealed against the judge's ruling, which was upheld by the Court of Appeal. Sir Brian Leveson P stated that at the time of the breach of duty, there must be a serious and obvious risk of death. It was held that a recognisable risk of something serious is not the same as a recognisable risk of death. The court made the following observations about this element of the offence:

What does not follow is that if a reasonably competent GP requires an urgent assessment of a worrying and undiagnosed condition, it is necessarily reasonably foreseeable that there is a risk of death. Still less does it demonstrate a serious risk of death, which is not to be equated with an "inability to eliminate a possibility". There may be numerous remote possibilities of very rare conditions which cannot be eliminated but which do not present a serious risk of death. Further, and perhaps most importantly, a mere possibility that an assessment might reveal something lifethreatening is not the same as an obvious risk of death. An obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation. [12]

His lordship stated that these distinctions were not merely a matter of semantics, but rather "represent real differences in the practical assessments which fall to be made by doctors". [13] The requirement for the risk of death to be obvious and serious at the time of the breach of duty was considered more extensively by the Court of Appeal in *Rose.* [14] The defendant was an optometrist who failed to examine the back of the victim's eyes during the course of a routine sight test. Had she examined the back of his eyes, as she was required to do by statute, she would have noticed the symptoms of acute hydrocephalus, which would have been treatable by surgical intervention. The defendant's failure properly to conduct the sight test meant that the victim's condition went undiagnosed and he died some five months later. The trial judge ruled that an optometrist who is so negligent that she does not even attempt an internal investigation cannot rely on that breach to escape liability for gross negligence manslaughter. The judge held that the test is objective and, as such, relies on what is reasonably foreseeable by reference to the reasonably prudent optometrist who would have complied with their statutory duty to examine the internal eye. [15] The defendant was convicted ***Arch. Rev. 8*** of gross negligence manslaughter and appealed. The Court of Appeal, in a judgment delivered by Sir Brian Leveson P, quashed the defendant's conviction. His lordship stated that the objective nature of the test of reasonable foreseeability does not turn it from a prospective test into a retrospective one. He added that, "the question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, not but for the breach". [16] The failure to examine the back of the victim's eyes meant that there was the possibility that signs of a potentially lifethreatening condition or abnormality might be missed, but it was held that this was insufficient to form the basis of a conviction for gross negligence manslaughter since there must be a "serious and obvious risk of death" at the time of the breach of duty. The court concluded that in cases of gross negligence manslaughter, it is not appropriate to take into account what the defendant would have known but for his or her breach of duty. Were the court to conclude otherwise, Sir Brian Leveson P stated that dire consequences would follow for healthcare professionals:

the implications for medical and other professions would be serious because people would be guilty of gross negligence manslaughter by reason of negligent omissions to carry out routine eye, blood and other tests which in fact would have revealed

fatal conditions notwithstanding that the circumstances were such that it was not reasonably foreseeable that failure to carry out such tests would carry an obvious and serious risk of death. [17]

The current state of the law

Given that gross negligence is the hallmark of the offence, the court's conclusion in *Sellu* that the jury must be given a direction that assists them to distinguish an error that is grossly negligent from other, less egregious errors, is unimpeachable. There is one further aspect of the judgment that is worthy of note. The direction to the jury given by the trial judge in *Sellu* was similar to the direction in both *Adomako* and *Misra.* The trial judge did not, however, emphasise to the jury how bad the defendant's breach of duty had to be before they could conclude that it was grossly negligent. It was this failure to convey to the jury the exceptional nature of gross negligence that led to Dr Sellu's conviction being quashed. Whilst the court's analysis in *Sellu* accords with principle, it is respectfully submitted that its analyses of the offence in *Rudling* and *Rose* are more problematic. In *Adomako* the House of Lords made clear that the defendant's conduct ought to be evaluated against the standard of a reasonably competent anaesthetist, colorectal surgeon, GP, optometrist etc. The Court of Appeal in *Rose,* in concluding that the judge should not have directed the jury to take into account what the defendant would have known but for her breach of duty, undermined the objective nature of this test. The defendant's state of knowledge is irrelevant to his or her criminal liability. As the Court of Appeal confirmed in *Attorney General's Reference (No. 2 of 1999),* [18] evidence of the defendant's state of mind, "is not a prerequisite to a conviction for manslaughter by gross negligence". [19] In *Rose,* if a reasonably competent optometrist would have performed a proper examination of the victim's internal eye, have noticed the symptoms of hydrocephalus and referred him for urgent treatment, why should the defendant avoid liability on the basis that she fell so far below the standard required of her that she did not even attempt to conduct an examination of the internal eye? As a result of the court's analysis in *Rose,* the more egregious the defendant's breach of duty, the less likely it is that he or she will be guilty of gross negligence manslaughter. To put the point another way, the optometrist who carries out an examination of the internal eye, but fails to perceive the obvious symptoms of hydrocephalus may be guilty, but the optometrist who fails even to attempt an examination of the internal eye will not commit the offence. All things being equal, surely the latter is more culpable than the former?

The Court of Appeal's narrow focus

All of the recent cases that are disucssed here in which the Court of Appeal has considered the elements of gross negligence manslaughter have concerned healthcare professionals. The court's interpretation of gross negligence manslaughter applies with equal force to anyone whose breach of the duty of care they owe to another causes death. Recognition of this fact has been lacking in the Court of Appeal's recent analyses of the offence, however. On the contrary, in both *Rudling* and *Rose* the court explicitly expressed concerns about the adverse impact the Crown's preferred interpretation of the offence would have on doctors. There is no separate offence of "medical manslaughter", which makes it necessary to consider how the court's interpretation of the elements of gross negligent manslaughter would apply in a case not involving a healthcare professional. Consider a case involving a train conductor who gives the all clear to the driver to pull away from the station without first checking whether a passenger is leaning against the side of a carriage. As the train leaves the platform, the passenger loses his balance, falls between the platform and the train and is killed. [20] A reasonably competent conductor would have checked whether there was anyone on the platform before giving the driver the all clear to leave the station. Had he done so, he would have noticed the passenger leaning against the train and would not have given the driver the all clear. If the defendant complies with his duty, but fails to notice the passenger because he is distracted, it seems safe to assume that he would be guilty of gross negligence manslaughter, because there was a serious and obvious risk of death to the passenger. If the conductor does not bother to check whether there was anyone on the platform before giving the driver the all clear, applying the court's approach in *Rose,* his criminal liability is less clear. Without checking whether there was anyone on the platform, there was no way to know that a passenger was leaning perilously against the side of a carriage. Applying *Rose,* a court could conclude that the serious and obvious risk of death remained speculative, as such a risk would only have crystalised had the conductor checked the platform. As a result of the Court of Appeal's interpretation of the offence, there is a perverse incentive for those who owe a duty of care to another to do as little as possible to discharge it and in so doing avoid potential criminal liability. Whilst this may be unlikely to ***Arch. Rev. 9*** impact the high standard of care that doctors provide to their patients, it is not inconceivable that a landlord might decide not to provide his tenants with a carbon monoxide detector so that he remains ignorant should gas ever leak from the boiler.

It is respectfully submitted that the concerns expressed by the Court of Appeal in both *Rudling* and *Rose* about the impact the Crown's preferred interpretation of the offence would have on doctors are overstated. In both cases, the court expressed concern

that doctors would be liable for gross negligence manslaughter for failing to carry out routine tests that may have revealed that the victim was suffering from an ultimately fatal medical condition. As confirmed by the House of Lords in *Adomako,* one of the elements of gross negligence manslaughter is that there is a breach of the duty of care the defendant owed to the victim applying the ordinary principles of negligence. Doctors obviously owe their patients a duty of care, but an error of diagnosis is not necessarily negligent. Whether a doctor's failure to diagnose a condition is negligent depends upon whether he or she acted as a reasonable doctor in all the circumstances. According to Jones, this will to a large extent depend upon "the difficulty of making the diagnosis given the symptoms presented, the diagnostic techniques available such as tests or instruments and the dangers associated with the alternative diagnoses". [21] Therefore, had the Court of Appeal accepted the proposition that the jury should be directed to take into consideration what the defendant would have known but for his or her breach of duty, that would not lead to doctors being guilty of gross negligence manslaughter "by reason of negligent omissions to carry out routine eye, blood and other tests which in fact would have revealed fatal conditions". [22] The court assumed that such omissions are negligent, but this will not necessarily be the case.

Conclusion

The Court of Appeal's recent consideration of gross negligence manslaughter seems to have been influenced by concerns about the disproportionate impact certain interpretations of the offence would have on healthcare professionals. To avoid such an impact, the court has taken a counterintuitive approach to interpreting the elements of the offence, as it is one that seems to reward egregious degrees of negligence. It is undesirable that an offence that can potentially be committed by anyone now appears to be being developed solely by reference to its impact upon healthcare professionals. Given the nature of their profession, doctors and other healthcare professionals are at greater risk of committing gross negligence manslaughter than most other members of society. [23] If there is the view that the elements of the offence need to be reconsidered in light of this fact, then the impact of doing so needs to be considered in a holistic manner. As an alternative to gross negligence manslaughter, it would be possible for Parliament to enact an offence that applies only to medical professionals and which takes account of the perilous nature of treating the sick. There is precedent for creating an offence that can be committed only by those with a certain occupation. For example, the offence in s.20 of the Criminal Justice and Courts Act 2015 can only be committed by care workers. [24] Alternatively, as others have argued, [25] the threshold for committing the offence could be raised to subjective recklessness. On the assumption that legislative intervention is unlikely, it will be for the courts to determine the contours and boundaries of gross negligence manslaughter. Given that this is the case, it is respectfully submitted that an authoritative judgment of the Supreme Court would be preferable to the piecemeal approach currently being taken by the Court of Appeal. This would help bring clarity not only for prosecutors, but also for those duty holders who may commit the offence. The Court of Appeal in *Rose* declined to certify a point of law of general public importance. Hopefully the court will have the opportunity to reconsider its decision not to certify a point of law in the not too distant future.

Law Tutor, St Hilda's College, Oxford. I would like to thank Oliver Quick and John Spencer for their comments on a previous draft.

Footnotes

1 [1995] 1 AC 171.
2 [2009] EWCA Crim 650.
3 [1994] Crim LR 757.
4 For general discussion, see D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (2015), pp 636-644.
5 There were further developments, for example in *Evans* [2009] EWCA Crim 650 the Court of Appeal confirmed that it is a question of law whether the defendant owed the victim a duty of care.
6 [2004] EWCA Crim 2375; [2005] 1 Cr.App.R. 21.
7 [1999] Crim LR 582.

8 *https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-statistical-bulletin.pdf.* The figures relating to gross negligence manslaughter take account of years other than 2016, but the proportion of convictions for the offence is consistently small.
9 [2016] EWCA Crim 1716.
10 [2016] EWCA Crim 1841.
11 [2016] EWCA Crim 741.
12 *Rudling* [2016] EWCA Crim 741, [40].
13 Ibid, [41].
14 [2017] EWCA Crim 1168.
15 As required by s.26(1) of the Opticians Act 1989 and reg.3(1) of the Sight Test (Examination and Prescription) (No2) Regulations 1989.
16 *Rose* [2017] EWCA Crim 1168, [80].
17 Ibid, [94].
18 [2000] QB 796.
19 Ibid, p.809.
20 *http://www.liverpoolecho.co.uk/news/liverpool-news/merseyrail-guard-christopher-mcgee-fails-4066878*.
21 M Jones, *Medical Negligence* (2017), para. 4-018.
22 *Rose* [2017] EWCA Crim 1168, [80].
23 For discussion, see O Quick "Medical manslaughter - Time for a rethink?" (2017) Medico-Legal Journal 1 and C Dyer, "Where should the buck stop? Doctors, medical errors and the justice system" (2016) BMJ 1.
24 For discussion, see K Laird, "Filling a lacuna: the care worker and care provider offences in the Criminal Justice and Courts Act 2015" (2016) 37 Stat L Rev 1.
25 O Quick, "Medicine, mistakes and manslaughter: a criminal combination?" (2010) CLJ 186.

