Medical manslaughter in Hong Kong: what now?

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Healthcare professionals are not above the law. In the event of substandard medical care that resulted in patient death, it is only right that society and families be provided opportunities to seek explanation, redress, justice, and closure. Civil proceedings and professional regulatory mechanisms are commonly pursued avenues recognised by healthcare professionals as proportionate; criminal law intervention is justified in some circumstances, but it is a more unsettling approach.[1]

Criminal law intervention is unsettling not so much because of the actual imposition of criminal penalty where deserved but because of the very thought that one could be a single mistake away from being charged for a crime, as well as the adverse effects that such fear may have on professional culture, clinical practice, and patient welfare. It is also unsettling because of uncertainties regarding the threshold for prosecution.

Despite criticisms concerning its circularity, vagueness, and the arguable lack of requirement for a clearly culpable *mens rea*, the offence of gross negligence manslaughter (GNM) has survived repeated calls for legal reform, and it continues to be applied in 'medical manslaughter' cases.[1] As for other crimes, the decision to prosecute must consider two factors: first, whether there is a reasonable chance of securing a conviction, and second, whether the public interest requires a prosecution to be pursued.[2]

The first factor is related to the determination of whether there is sufficient evidence to prove all ingredients of the offence. As established in the British case of *R v Rose*, a conviction of GNM requires the court to be satisfied that (in addition to the basic elements of civil negligence) it was reasonably foreseeable to the suspect that the breach of duty would give rise to a 'serious and obvious risk of death', and that the circumstances of the breach were 'truly exceptionally bad and so reprehensible… that [the breach] amounted to gross negligence and required criminal sanction'. An 'obvious' risk must be clear and unambiguous based on knowledge available at the time of the breach, rather than one which might become apparent on further investigation. Importantly, a recognisable risk of something serious is not the same as a recognisable risk of death.[3] Whether and how these principles might have been followed in other common law jurisdictions remain to be discovered. A hypothetical question to ask could be whether the circumstances of an inadvertent omission of drug prescription are truly exceptionally bad and so reprehensible as to warrant prosecution.

The second factor is related to the fundamental principle that not all offences for which there is sufficient evidence should automatically be prosecuted; the public interest must require such an approach. When evaluating the public interest balance, an inexhaustive list of factors are considered, subject to the circumstances of the case. The exercise of this discretionary power is complex and demanding; even experienced prosecutors may have difficulty agreeing on a consistent approach to GNM cases.[4] It is of note that whilst the public interest is unlikely to allow of a disposal less than prosecution when the victim has suffered significant harm, the suspect's level of culpability should also be considered. The problem is that an 'honest' mistake—made without intent to cause harm or recklessness as to the risk of harm—is exactly what might be caught (or not) under the arguably elastic and arbitrary scope of GNM.

Because GNM is not an offence specific to medical cases, there is no reason to expect routine consideration regarding the impact of criminalising medical error on the broader public interest. However, poor morale, staff attrition, loss of trust, the rise of defensive medicine, and the suppression of a learning culture are highly plausible consequences of over-criminalisation with serious implications for quality of care and patient safety.[1] In the United Kingdom, a series of high-profile cases caused sufficient public outcry that the Secretary of State for Health and Social Care instigated a rapid policy review into the application of GNM in healthcare[5]; another review was later commissioned by the General Medical Council.[6] Neither review was intended to recommend changes in the law; both were undertaken to identify potential improvements within the existing legal framework.

Both reviews found that, although the threshold for prosecution has been set appropriately high following the decision in *R v Rose*, there remained a perception among healthcare professionals that the legal test has not been applied in a consistent manner, and that individuals were under investigation where the prospect of prosecution or conviction may be low. Both panels saw a need to enhance the

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transparency and understanding of the law, as well as the threshold for prosecution so as to provide assurance regarding how decisions are made. A series of guidelines was subsequently issued by the Director of Public Prosecutions.

The reviews also highlighted the central role of expert opinion in triggering an investigation and in determining whether a case should be prosecuted. Because problems with expert testimony may not be uncovered until trial or appeal, an unsound or biased opinion could potentially subject a healthcare professional to otherwise avoidable legal proceedings. Indeed, questions were raised regarding the use of expert witness opinion during the pre-trial stage, the competence and conduct of some experts, the experts' understanding of the law, and their understanding of their duties to the court. In Hong Kong, a training course for expert witnesses is available through the Hong Kong Academy of Medicine. Formal mechanisms to ensure the recruitment of competent expert witnesses, the engagement of a dedicated panel of 'super-experts' at the pre-trial stage, and the scrutiny of opinions regarding quality would be welcome.

Finally, the reviews emphasised the importance of maintaining an open and just culture of candour and learning. Families who feel that they have been denied information are more likely to seek answers through legal processes; thus, the method in which healthcare service providers manage the aftermath of a patient's death should be carefully considered. Legal protection may be given to statements that arise during internal proceedings, thereby creating a safe space for healthcare professionals to discuss and learn from their mistakes.

There is no doubt the criminal law serves important functions in safeguarding patient welfare, but it is also a blunt instrument that can destroy the fabrics and ideals of a healthcare system if not applied judiciously. Medical manslaughter cases should be handled with exceptional care—not because healthcare professionals are an exception to the law, but because of the exceptional damage that a single case can do. Neither medicine nor the law operates in a vacuum. Both earn society's trust and deference through not their power but the good they do, and both should reckon with each other's unique strengths and values, limitations, and challenges. Now that the likelihood of what happened in the United Kingdom being repeated in other places is all but real, it will be up to policymakers to determine how best to calm nerves and learn from lessons learned elsewhere.

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