

Key elements of gross negligence manslaughter in the clinical setting

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Clinical liability arises when a medical practitioner fails to meet the standard of reasonable medical care.¹ Most medical malpractice litigation is pursued under the tort of negligence (civil cases). The burden of proof is ‘on the balance of probabilities’ in civil cases. In criminal cases, the burden of proof is ‘beyond reasonable doubt’, and the prosecution bears the burden of proof. Convictions for criminal charges such as gross negligence manslaughter (GNM) require a higher degree of wrongfulness.

A recent book chapter highlighted the tension and fears among healthcare professionals with rising the increasing number of high-profile GNM cases, coupled with the perception of arbitrary and inconsistent approaches to GNM investigation and prosecution in the United Kingdom² resulting in a rapid policy review on GNM in healthcare.³ The review panel emphasised that healthcare professionals could not be, or appear to be, above the law. However, the complexities of modern healthcare and the stressful clinical environment must be taken into consideration when deciding whether to pursue a GNM investigation.

In 2018, Leung⁴ reviewed key medical manslaughter cases from the previous decade: *David Sellu v R*,⁵ *R v Hadiza Bawa-Garba*,⁶ and the ‘DR Group case’.⁷ In the *Sellu* case,⁵ the surgeon was held in high regard by his peers and patients, and the penalty was considered unjustifiable and disproportionate. In the *Bawa-Garba* case,⁶ there was criticism for failing to give due consideration to system factors.⁸ In the ‘DR Group case’,⁷ a retrial of one of the defendants, Dr Mak, was ongoing at the time of the 2018 review. The findings of two reviews (by the United Kingdom Government³ and the General Medical Council⁹) led to a perception among healthcare professionals that the legal tests for GNM were inconsistently applied.² Thus, there is a need to review the judgements in the retrial of *HKSAR v Mak Wan Ling*¹⁰ and another case involving a doctor convicted of GNM, *HKSAR v Kwan Hau-chi, Vanessa*,¹¹ in the context of some key historical cases and published literature.

Before the retrial of the case of Dr Mak, the defendant doctor appealed on the question of requirement of the prosecution to prove the culpability of the defendant’s state of mind that

she was subjectively aware of the obvious and serious risk of death to the deceased.¹² The Court of Final Appeal unanimously dismissed the appeal that only application of the objective standard of reasonableness, as referred in the last element of the offence in *R v Adomako*,¹³ is needed with no additional requirement to prove the defendant’s subjective awareness of an obvious and serious risk of death.¹²

In the *Adomako* case,¹³ an anaesthetist in charge of a patient during eye surgery failed to notice or respond to obvious signs of oxygen tube disconnection, and the patient died. The jury convicted the anaesthetist of GNM. The evidence¹³ indicated that 4.5 minutes would have elapsed between the disconnection and sounding of the alarm; the anaesthetist responded in various ways but did not check the oxygen tube connection. One expert witness stated that a competent anaesthetist should have recognised the disconnection within 15 seconds because the patient’s blood pressure and pulse had decreased, and the patient’s chest was not moving. Another expert witness described the standard of care as ‘abysmal’ (extremely bad). The anaesthetist’s conviction of GNM was upheld by the House of Lords on appeal.¹³ Lord Mackay LC set the following tests for a conviction of GNM¹³:

- Had the defendant breached the duty of care towards the victim who had died?
- If yes, whether the breach of duty had caused death?
- If so, the jury needed to go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime.
- The jury would then have to consider the extent to which the defendant’s conduct departed from the proper standard of care constituting a risk of death to the patient, was such that it should be judged criminal.
- The jury question was whether the conduct of the defendant was so bad in all the circumstances as to amount in their judgement to a criminal act.

There was an argument about circularity because the jury was asked to define whether an offence had been committed; the jury’s task is to determine the facts, then apply the law. Lord Mackay was aware of the element of circularity and he did not

believe that it would be fatal as the test being correct to determine how far the conduct should depart from the accepted standard to be characterised as criminal. The judgement of the Court of Final Appeal regarding the case of Dr Mak stated that the test is not circular and there is no abdication of the judge's role in defining the offence for the jury.¹² Juries are assisted by expert evidence when considering difficult questions, and it is not unusual for juries to perform an evaluative function.¹² In *R v Misra*,¹⁴ Lord Justice Judge pointed out that the jury would be asked difficult questions, such as whether a defendant had acted dishonestly by reference to the contemporary standard, or when charged on dangerous driving causing death, whether the standard of driving fell far below the standard to be expected as a competent driver.¹⁵

In the *Misra* case,¹⁵ the doctor was convicted of GNM when their patient became infected with *Staphylococcus aureus* after surgery and did not receive the necessary treatment. The defendant doctor appealed on the basis that the test for gross negligence presented to the jury was circular and unclear. The appeal was dismissed; the jury's determination of 'gross negligence' was regarded as a question of fact, rather than a question of law. The Lord Justice Judge wrote that there was a failure to appreciate the patient's serious illness, including the classic signs of infection (elevated temperature, rapid pulse, and lowered blood pressure). The mistakes made were elementary.¹⁶

In the retrial of the case of Dr Mak,¹⁰ the defendant doctor was found guilty of GNM by the jury. The judge was satisfied that the jury must have found the defendant doctor in breach of her duty to the deceased and it was reasonably foreseeable that the breach of that duty giving rise to a serious and obvious risk of death and indeed caused the death. The jury must have also been satisfied that the circumstances of the breach were truly exceptionally bad and so reprehensible to justify criminal punishment.

In the case of Dr Kwan,¹³ the patient attended for liposuction procedure. The patient was infused with the combination of sedative drugs at the start of the procedure and she was deeply sedated and unconscious. She was attached to the Mindray machine during the procedure and the device alarmed throughout the procedure indicating that there was a problem with patient's vital signs. The alarm was ignored and silenced each time by one of the assistants. After the completion of the procedure, the defendant doctor left leaving the patients under the care of medically untrained assistants while the patient was still unconscious. The defendant doctor was called back by her assistants when the patient's condition had deteriorated. The defendant doctor called for help but did not provide resuscitation of

basic life support.

The jury's verdict was that the defendant's failures fell far below the standard of a competent doctor.¹³ The inactions and actions of the defendant substantially caused the death of the patient. A reasonably competent doctor would have foreseen that the breach of her duties gave rise to a serious and obvious risk of death and her breach was so truly exceptionally bad and so reprehensible.

In *R v Rose*,¹⁷ the defendant optometrist negligently failed to examine the retinas of a child and thus did not identify papilledema; consequently, hydrocephalus in the child was not diagnosed or treated, and the child died a few months later. The Court of Appeal held that, in failing to examine the eye at all, the optometrist would not have been aware of 'a serious and obvious risk of death'; thus, Rose was considered simply negligent. Conversely, in *R v Winterton*,¹⁸ the defendant construction manager was convicted of manslaughter when a trench collapsed on a labourer, causing that labourer's death. The Court of Appeal held that the obvious and serious risk of death caused by the trench should have been apparent to Winterton.

An article by Robson et al¹⁹ offers the criticism that current GNM tests are not particularly concerned with the context in which a negative event occurs; they are solely focused on evaluating responsibility for specific acts of misconduct. Importantly, Robson et al¹⁹ address the element of culpability necessary for conduct to be considered criminal, particularly with respect to distinguishing errors from violations. Errors constitute instances in which 'one tries to do the right thing but actually does the wrong thing'; violations constitute instances that involve intentional deviations 'from those practices deemed necessary to maintain the safe operation of a potentially hazardous system.'²⁰ Robson et al¹⁹ argue that a negligent doctor should not be criminally liable for a momentary lapse of concentration or an instance of inattention that involved an error in judgement.

Although current law only applies the objective standard of reasonableness, case law has established the key elements that can be used to determine whether negligent act of medical practitioner would be alleged GNM:

- gross departure from expected standard of care;
- ignoring reasonable foreseeable obvious and/or serious risks;
- failing to take actions to allow the risks continuing to endanger patient's life;
- the acts of medical practitioners disregard the life of the patient; and
- the circumstances of the breach of duty (in the *Adomako* case all circumstances were emphasised) should have been truly exceptionally bad, ie, no reasonable doctor would have done.

It is important that precise direction is given to jury to consider the facts whether the standard of care has really fallen far below the standard and exceptionally bad taken account of the circumstances. The jury must consider whether the defendant doctor should have been aware of reasonably foreseeable obvious and serious risks, but failed to take action. Recent editorial has highlighted the important role of expert opinion in triggering an investigation and determination of a case for prosecution.²¹ Juries rely upon high-quality expert opinions when making factual determinations regarding whether a medical practitioner's conduct constitutes GNM.

A criminal conviction has serious and devastating consequences; thus, many countries (both common law and civil law jurisdictions) uphold the doctrine of 'Presumption of Innocence'. For GNM in clinical context, the facts must be accurately dissected and assessed by competent experts; each element of the offence must be proven beyond reasonable doubt to support a conviction of GNM.

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