BMA

The BMA position statement on the law of Gross Negligence Manslaughter

Background

Gross negligence manslaughter (GNM) is a common law offence – as opposed to a statutory offence which is defined by parliament and codified in legislation such as an Act of Parliament. It has been developed as a result of decisions as to principle, and the application of that principle, by the appellate courts. Whilst this means that the law can be further developed in the same way, it does mean that this is likely to be case specific and incremental, rather than through significant one-off reform.

BMA searches of news, legal, and medical databases, together with a request to the General Medical Council made under freedom of information legislation, found that 11 doctors had been charged with medical (gross negligence manslaughter in the UK between 2006 and the end of 2013. Of these, six (55%) were convicted[i].

The last three doctors convicted in 2012-13 all received custodial sentences rather than the usual suspended sentence. Before that the previous doctor to get a custodial sentence for medical manslaughter was in 2004. Since December 2014 four more doctors have been charged with medical manslaughter and are awaiting trial.

Investigations into the suspected offence are often lengthy and can take as long as three years. In the process, the doctor affected is under a great deal of stress and an NHS system that is already strained may be denied the services of that doctor.

The role of the Senior Coroner: BMA Members also underline that in their experience, a large proportion of GNM investigations begin after the Coroner has referred the matter to the police. this calls for clearer guidance and clarity on statutory roles, responsibilities and procedures and early prosecutorial involvement in police investigations in medical cases.

What the BMA has undertaken so far in relation to Gross Negligence Manslaughter

As part of its work on this issue, the BMA has responded to the Sir Norman Williams rapid policy review into the issues pertaining to Gross Negligence Manslaughter (GNM), commissioned by Health and Social Care secretary Jeremy Hunt in the aftermath of the Dr Bawa-Garba ruling[ii].

The BMA has also responded to the Leslie Hamilton independent review into how the law on gross negligence manslaughter and culpable homicide are applied to medical practice[iii].

In response to BMA member enquiries, the Medico Legal Committee discussed the option to lobby for legislative change to the law on GNM and sought advice from Duncan Atkinson, QC on whether to pursue this course of action.

Duncan Atkinson, QC, advised that Parliament had previously declined proposals for changes in legislation put forward by the Law Commission. Furthermore, legislative changes would be highly unlikely to make any real difference (as was the case with corporate manslaughter) and could also have an adverse effect on the medical profession.

Taking this advice into consideration, and after further consultation with its Members, the BMA has reached the decision not to petition for legislative changes to the law on GNM.

Future work to be undertaken by the BMA

The BMA will engage with stakeholders to address:

The irregular way in which the CPS approaches its investigations and prosecutions into GNM and the separate and often incoherent judiciary approaches.

The need for better quality expert reports through good practice guidance.

The BMA also believes the existing Crown Prosecution Service (‘CPS’) guidance should be further revised particularly in relation to early prosecutorial involvement in police investigations in medical cases and the roles and responsibilities of key offices including the Senior Coroner.

Legal test

GNM involves only the highest level of negligence. In considering the most recent case-law[iv], the legal test for GNM has the following five components:

i) The defendant owed the deceased a duty of care;
ii) The defendant negligently breached that duty of care;
iii) It was reasonably foreseeable, based on knowledge at the time of the breach, that the breach gave rise to a serious and obvious risk of death;
iv) The breach caused the death;
v) The circumstances of the breach were truly exceptionally bad so as to amount to gross negligence.

All five elements must be proven for an individual to be convicted of GNM.

Gross Negligence

The duty of care for both civil and criminal liability in negligence is focused on the act, rather than the actor. In other words, it considers the standard of care appropriate for a competent doctor undertaking a procedure or examination, rather than seeking to impose gradations of a duty of care based on the training or experience of the practitioner. It follows that a doctor will not be negligent if he had acted in accordance with a practice accepted as proper by a responsible body of medical opinion.

Whilst there is no requirement for the prosecution to prove subjective foresight of an obvious and serious risk of death on the part of a defendant, the bar that the prosecution must meet in proving the offence remains extremely high. For example, the need for an obvious and serious risk of death, rather than any lesser risk, has been thoroughly strengthened in recent cases such as *Honey Rose*[v], where it was underlined that the risk has to be objectively identifiable based on existing knowledge on the part of the defendant, rather than knowledge that could have been acquired through additional enquiry, however proper such enquiry would have been. Both in that case and in *Sellu*[vi] before it, the extraordinary degree of negligence that is necessary to amount to gross negligence has been repeatedly emphasised.

It must also be proved that the grossly negligent breach of duty was the cause of the death. The breach of duty must have been more than a minimal or negligible cause of death – it must have contributed significantly to the victim's death. A failure to act, beyond a point at which it can be concluded that intervention would not have saved the life, cannot establish causation. There is also no requirement for the jury to evaluate which competing cause of death was dominant.

The degree of negligence required was illustrated in the case of ***Misra***[vii] where it was said:

> '…*Mistakes, even very serious mistakes, and errors of judgment, even very serious errors of judgment, and the like, are nowhere near enough for a crime as serious as manslaughter to be committed*.'

As it is for the jury to decide whether negligence is gross, it is important that members of the jury are provided with the appropriate direction at an early stage in proceedings. The Criminal Practice Direction encourages the giving of written legal directions to the jury before the end of a trial in appropriate cases. Judges could be encouraged to provide written legal directions to the jury at the outset, rather than at a later stage in the trial.

Systematic failures

Systematic failings that provide the context for the actions of an individual may impact both in the determination of whether that individual's actions can be shown to be a cause of death, and as to whether any such actions can be characterised as gross. Systematic failures ought to represent

mitigation in relation to an individual being prosecuted for GNM and it is in the Counsel's experience that this is already the case.

Corporate manslaughter

Proving corporate manslaughter is a particularly difficult test. This is because the death must be shown to have been more than minimally caused by the way the hospital's activities were organised, and specifically the way they are organised by its senior management.

Furthermore, evidencing an audit trail of senior management hospital activities which led to a death in a hospital is generally very difficult to determine.

Increasing corporate manslaughter prosecutions may have the perverse effect of eroding the relationship between employer and employee that is currently mainly collaborative.

Involuntary culpable Homicide (Scotland)

The BMA asked Duncan Atkinson QC, to consider whether the equivalent offence of involuntary culpable homicide in Scotland could instruct how the offence of GNM could be developed in the England and Wales.

Culpable homicide is a common law offence (not defined in statute). Gordon's *Criminal Law* defines Culpable Homicide as:

> "*the causing of death unintentionally but either with a mens rea [guilty mind] which is regarded as sufficient to make the homicide culpable but not murderous, or in circumstances in which the law regards the causing of death as criminal even in the absence of any mens rea in relation to the death*"

However, this definition, also recognises that there may be circumstances where the defendant should be and can be found guilty even where the *mens rea* "*in relation to the death"* cannot be established.

Scottish Case law, however, explains that proving the *mens rea* is paramount in deciding a case of involuntary culpable homicide by addressing the key question:

> "*Did the perpetrator possess the necessary criminal intent at the time of the act?"*

This case law also explains that the criminal intent (*mens rea*) can be defined as:

> "*an utter disregard of what the consequences of the act in question may be so far as the public are concerned*" or "*recklessness so high as to involve an indifference to the consequences for the public generally*".[viii]

Therefore, while it appears to be possible to convict without the *mens rea* "in relation to the death", the Scottish case law authorities clearly state that in cases of involuntary culpable homicide establishing the *mens rea* is essential. So, any prosecution of a doctor for involuntary culpable homicide would appear to have to prove the *mens rea* in order to convict.

Conclusion

In considering the advice provided by Duncan Atkinson's QC, the BMA is of the understanding that introducing a similar requirement for *mens rea* for GNM would be highly unlikely to materially alter the considerations for the jury in most cases.

Moreover, it would not lead to greater certainty or more protection for the individual. This is because the same conduct that can be considered in GNM cases, to assess whether there has been a breach of the duty of care and/or the extent (grossness) of the negligence, would instead be held to determine

mens rea (the state of mind of the individual). Moreover, a judge would be no more likely to stop a case in the early stages for lack of evidence relating to *mens rea* because as with GNM they would consider that to be a matter for the jury.

In view of this advice, the BMA position is not to petition for legislative changes to the law on GNM. The BMA will, however, focus its efforts on:

- Addressing the inconsistencies in approaches in CPS investigations and prosecutions and the separate inconsistency in the way the judiciary approach cases.
- Petitioning for revisions to current CPS Guidance, particularly in relation to early prosecutorial involvement in police investigations in medical cases.

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[i] https://www.bma.org.uk/collective-voice/committees/medico-legal-committee/medical-manslaughter
[ii] Ibid
[iii] Ibid
[iv] [2017] EWCA Crim 1168, at para.77
[v] [2017] EWCA Crim 1168
[vi] [2016] EWCA Crim 1716
[vii] [2005] 1 Cr. App. R. 21
[viii] TRANSCO Plc v. Her Majesty's Advocate [2004] ScotHC 57 (16 September 2004), per Lord Osborne at para. 4.

Ends 21 November 2019