

**AN INVESTIGATION INTO HOW JUSTIFIABLE IT IS TO PUNISH GROSS
NEGLIGENCE MANSLAUGHTER IN THE CRIMINAL LAW.**

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By

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ABSTRACT

The following thesis is an investigation into whether it is justifiable to punish deaths resulting from gross negligence within the criminal law. The analysis centres around incidents of gross negligence manslaughter that arise in a medical setting as a majority of the leading cases in the area arose in this context. The findings are then applied to incidents of gross negligence manslaughter arising in different contexts in an attempt to assess the validity of punishing such acts.

An assessment of the harm principle takes place in order to establish whether acts of negligence, particularly gross negligence manslaughter, are rightfully considered morally blameworthy by the criminal law. This assessment is supplemented by an in-depth analysis of the legal test applied to establish criminal culpability for the offence. Thought is then given to exploring whether society stands to gain anything from inflicting punishment for the offence.

There are four main findings derived from the analysis that takes place. Primarily, it is argued that those who are negligent when acting in a professional position or when performing in a position of responsibility are actors who are morally blameworthy for the results of their actions. Secondly, that the legal test applied is effective in establishing those who should be seen as criminally culpable, as well as morally culpable. Thirdly, that society stands to gain from punishing the criminally culpable negligent actor. Fourthly, that negligence committed by those who are not holding themselves out as a competent individual is not justifiably punishable.

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INTRODUCTION TO THESIS

The aim of the research that has taken place is to establish whether the punishment of gross negligence manslaughter in the criminal law is justifiable. In order to establish an answer to that question it will first be necessary to assess whether negligent actions should be considered harmful and morally blameworthy. As a result, it will be possible to assess whether the criminal law is justifiably concerned with negligent actions.

Upon deciding whether negligent actions are morally blameworthy it will then be necessary to analyse how the criminal law decides whether those morally blameworthy actions should be considered criminal. The test applied by the courts in order to convert that moral blameworthiness into criminal blameworthiness will be considered. It is hoped that such an analysis will illustrate whether critics that call for the removal of negligence as a standard of fault are justified in adopting their opinion in relation to the way in which we criminalise of offenders.

The next step will be to analyse the actual punishment of the offence. Once decisions have been made in regard to the moral blameworthiness and criminal culpability of the offence it will be necessary to establish what the criminal law should do with a negligent offender in the way of punishment. Criticisms that negligent offenders do not pose the same level of risk as other offenders mean that it is necessary to consider what society aims to gain from inflicting punishment. It will then be considered whether society stands to achieve that aim if they punish negligent offenders. It is hoped that this will illustrate whether the punishment of negligent actions is futile or whether there is some benefit to be obtained that would justify it remaining as a basis for criminal culpability.

The Offences Considered

It is to be noted that negligence as a culpable state of mind does not only arise in the criminal law in relation to gross negligence manslaughter. Negligent conduct also arises in the criminal offences of careless driving (driving without due care and attention)¹, insider dealing², supplying intoxicating substances to an under-age person³ and most recently rape cases⁴ to name a few examples. However, the focus here is purely on the punishment of negligence in relation to manslaughter.

The severity of the offence of gross negligence manslaughter is the reason why it forms the focus of the thesis. Critics argue that negligent actions are not morally blameworthy enough to be seen as criminal. If this is considered to be true then offences that impose the most severe sentences and stigmatisation on the convicted are arguably the most inappropriate to use negligence actions as sufficient to warrant criminal punishment. Therefore, negligence as a standard for criminal culpability will be considered throughout the discussion that takes place. However, the focus of the discussion will be based on grossly negligent actions that result in death.

The Context

It is understood that gross negligence manslaughter can arise in a wide variety of contexts. However, the focus of the discussion is initially placed on gross negligence manslaughter in a medical context as the majority of leading cases in this area arise in a medical setting. Furthermore, the nature of the position of trust and responsibility that medical professionals

¹ The Road Traffic Act 1988, s.3.

² Criminal Justice Act 1993, s.52.

³ Intoxicating Substances (Supply) Act 1985, s.1(1).

⁴ Sexual Offences Act 2003 s.1(2).

hold is present in many other areas in which gross negligence manslaughter arises. Therefore, focusing discussion on medical professionals provides a strong foundation upon which to build discussion and go on to consider the punishment of the offence as a whole.

Focus is further placed on the medical profession as those acting in the said setting are in a specialised position of control when committing the offence which is often a characteristic of cases arising outside the medical profession. They hold themselves out as competent to perform their duties and this creates a relationship of dependence. It is a direct result of this competency claim that puts them in a position in which the said harm can take place. As a result, the importance of the accused's position or role when acting can be said to have a big impact on how we view negligence as a standard of fault. Those acting in the medical profession provide a good example for comparisons.

Therefore, gross negligence manslaughter arising in the medical profession will be considered and scrutinised in order to provide an example of the main criticisms and supporting arguments for the punishment of the offence. It will then be possible to assess its validity on a larger scale in order to draw final conclusions about the offence as a whole.

CHAPTER ONE

HARM AND CULPABILITY

It is firstly necessary to consider the justifications advanced to validate the intervention of the criminal law in order to perform a constructive analysis of whether the criminal punishment of negligence is satisfactory. Therefore, the following chapter will consider some of the main justifications advanced in support of the criminal law punishing gross negligence manslaughter. This will include the harm principle and how that creates a level of moral blameworthiness. With this in mind the aim will therefore be to assess whether there is a high enough degree of moral blameworthiness to criminally punish negligent acts.

INTRODUCTION

Von Hirsch notes that the legislature effectively has the power to make anything a criminal offence. As a result, it is argued by many commentators that there has to be a good reason to criminalise a certain form of behaviour, otherwise the law can become excessive and overly burdensome¹. The traditional principle that is usually advanced to justify the state inflicting punishment for any action it classifies as a crime is that the action causes harm or poses an unacceptable risk to others².

It has long been considered valid to criminally punish actions which result in the infliction of harm upon another. Mill even suggested that the *only* time a state could rightfully exercise its

¹ A. Von Hirsch, 'Extending the Harm Principle: Remote Harms and Fair Imputation' in A.P. Simester and A.T.H. Smith, 'Harm and Culpability' (Clarendon Press, Oxford 1996) 260.

² A. Ashworth, 'Principles of Criminal Law' (6th Edition, OUP 2009) 27.

power over society was in order to prevent harm being caused to others³. This is because punishment violates an individual's general rights and a failure to provide proper justification for that violation effectively leaves the state inflicting punishment upon individuals without good cause.

The most common justification that is generally advanced is the prevention of harm to other members of society⁴. This justification appears to apply equally to actions that are considered to have negligently caused harm to others. The reason that the criminal law is called upon in matters of gross negligence manslaughter, as opposed to just the civil law, is that the harm that has been caused is considered to be so great that it requires criminal sanction. The case of *R v Bateman* (1925)⁵ stated that negligence which had caused harm to another was considered a crime if it went "beyond a mere matter of compensation"⁶. Effectively, this meant that the criminal law would be called upon if the harm caused to the individual was so severe and morally blameworthy that the civil law could not effectively compensate the victim.

The use of the harm principle is of particular importance when considering gross negligence manslaughter cases in a medical context. The offence of gross negligence manslaughter can clearly arise in a variety of contexts and professions. However, mistakes made in a medical setting are a prime example of this and are illustrative of the important factors of trust and responsibility that are present when harm is caused in such scenarios. Therefore, medical scenarios provide a good example of the role the harm principle plays in the punishment of gross negligence manslaughter.

³ J.S Mill, 'On Liberty' (OUP 2008) 21-22.

⁴ J. Raz, 'Autonomy, Tolerance and the Harm Principle' in R. Gavison, 'Issues in Contemporary Legal Philosophy' (1987).

⁵ (1925) 19 Cr App R 8.

⁶ *Bateman* (n 5) 33.

The prevention of harm to society is the principle that underpins the criminal justice system. Therefore, it is necessary to analyse the principle of prevention of harm and consider how applicable it is to the offence of gross negligence manslaughter. It will then be possible to assess whether the harm caused by acts of gross negligence pose the same threats to society as other crimes do and whether they require the intervention of the criminal law.

WHAT IS THE HARM PRINCIPLE?

The Thwarting of an Interest

It is necessary to clearly describe what the harm principle is before detailed analysis can take place in regard to the role it plays in punishing gross negligence that results in death. It is a complicated concept that has been explored by many commentators. One of the most comprehensive summaries can be found in Feinberg's description of harm as being the 'thwarting, setting back or defeating of an interest'⁷.

A person has an interest in something that they have a stake in according to Feinberg's theory. This means that an interest can be in almost anything, ranging from physical property to one's own wellbeing and happiness⁸. The interest that an individual has is harmed when someone or something prevents it from being fully fulfilled or achieved at all.

The theory is applicable to individuals that are the victim of gross negligence manslaughter as the definition of harm is very broad. According to Feinberg's theory everyone has an interest in something during their life. It is suggested that the ending of someone's life is the most extreme way in which an interest can be thwarted as it defeats it being fulfilled entirely.

⁷ J. Feinberg, '*Harm to Others*' (1984, OUP) 33-34.

⁸ J. Feinberg (n 7) 33-34.

Therefore, causing death by gross negligence would logically cause harm to the interests of the victim, making it a morally blameworthy offence.

Does Death Thwart Interests?

However, there is debate as to whether death actually thwarts an individual's interests and subsequently causes them harm. Some argue that an individual ceases to exist at the moment that death occurs and therefore there is not a subject in existence to be harmed⁹. However, Feinberg suggests that interests can survive death and therefore they can still be harmed after an individual has died¹⁰. On the contrary, Partridge disagrees and believes that interests have to belong to someone and that interests cease to belong to anyone once death occurs¹¹.

It is therefore debatable whether death harms an individual's interests. At the exact point that a person dies they cease to be a conscious being. As a result, they are never aware that their investment in their interest has been harmed by the perpetrator. If this is considered to be true, then the victim of gross negligence manslaughter is never aware that their interests have been harmed. Therefore, it could be argued that the offence never results in an individual being harmed. If this was the case then gross negligence would not be a morally blameworthy act that deserves punishment according to the harm principle.

However, Feinberg counteracts this argument by stating that an individual invests all their energy and hope into their future and death ultimately prohibits these hopes from ever becoming fulfilled¹². Consequentially, at the exact moment that death occurs the individual

⁹ J. Feinberg (n 7) 80.

¹⁰ J. Feinberg (n 7) 83.

¹¹ E. Partridge, 'Posthumous Interests and Posthumous Respect' (1981) 91 *Ethics* 243, 249.

¹² J. Feinberg (n 7) 85.

has their ability to fulfil their interests terminated. This means that their interests are completely defeated and the subject is harmed according to Feinberg.

Feinberg's broad definition of 'interest' makes it plausible that everyone has at stake in at least one thing. However, in some contexts it is arguable that gross negligence manslaughter would not cause an individual to be harmed. For example, imagine if a doctor made a mistake treating an individual who was admitted into hospital after a failed suicide attempt. That individual believes themselves to have no interest in continuing to live otherwise they would not have attempted suicide. One therefore has to question whether they would have an interest to be defeated when the medical professional made a mistake that resulted in their death. In this scenario the victim of the grossly negligent act would apparently have no interest to be harmed.

However, the harm principle protects itself from this criticism. Feinberg states that interests can be harmed vicariously. As a result, harm can still be caused if someone is dependent on the victim for the advancement of their own interests¹³. If this view is adopted practically every victim is harmed when gross negligence manslaughter takes place. Even the suicidal victim discussed previously is likely to be harmed as someone who cared about them would have their interests thwarted by the death of the victim. The harm principle therefore appears to make gross negligence resulting in death harmful and morally blameworthy in any situation.

Inevitable Harm

It is arguable that if death is considered to always thwart an interest then we are playing a losing game from the moment we acquire an interest in anything. At some point we are inevitably going to die and there is no way of guaranteeing that we would have been able to

¹³ J. Feinberg (n 7) 70.

fulfil those interests if we had not been killed at the hands of a negligent medical professional. The individual causing your death could have merely ended an interest that you were never conceivably going to fulfil.

Feinberg argues that the degree of harm caused is dependent on how premature your death is¹⁴. The difficulty with this suggestion is that one can never be certain how premature the death caused by the grossly negligent medical professional is. The victim could have been healthy with a life expectancy of eighty years but be destined to be hit by a bus the day after he was due to be discharged from hospital. The fact that their interest would have been lost a day later will never be known to us. Therefore, even if we accept that death does appear to harm an individual's interests in living it is very hard to comprehend the degree of harm that has been caused by gross negligence manslaughter.

WHY USE THE HARM PRINCIPLE?

A general outline of the harm principle has been considered and it has been loosely discussed that the criminal law often relies on it in order to justify inflicting punishment on individuals. It is therefore necessary to now assess why causing harm to an individual as a result of a grossly negligent action is something that the criminal law seeks to prohibit and punish. This will be considered below and will be applied to the concept of punishing individuals for gross negligence resulting in death.

Erosion of Trust

Smith and Simester note that there has always been a need for a philosophical justification to be provided in order to validate the criminal law imposing controls on people's lives and that

¹⁴ J. Feinberg (n 7) 93.

this remains the harm principle¹⁵. The criminal law uses the harm principle to justify punishment as it is believed that as members of society we should all realistically be able to expect that we will be protected from certain harms caused by morally blameworthy offenders. For those harms that we have not been protected from we should be able to expect our community to pursue the perpetrator¹⁶. Therefore, the criminal law takes harm seriously because it is not just seen as harming the victim but also society as a whole.

For example, harms caused in a medical context do have wider implications in our community. Healthcare establishments are vital to the health of society and act as pillars of most communities. When harm is caused to those who have relied on the services of a healthcare establishment it begins an erosion of trust in a vital service. Therefore, the perpetrator has caused a wider harm than the one directly caused to the victim when a medical mistake results in death. With this in mind, it can be seen why the criminal law may seek to pursue those guilty of such harm.

The harm caused by the medical mistakes considered is not insignificant. The greater the harm caused to the individual the greater the harm that is caused to society. Death is the harm that members of a community fear the most. In the medical context example considered the healthcare system is an authority that is meant to do all that is in its power to protect individuals from suffering that harm. Therefore, the criminal law must be seen to respond and not appear to condone the level of harm that has been caused to the individual and the community. In this respect punishment of gross negligence manslaughter is justified.

¹⁵ A.P Simester and A.T.H Smith, '*Criminalisation and the Role of Theory*' in A.P Simester and A.T.H Smith, '*Harm and Culpability*' (Clarendon Press, Oxford, 1996) 4.

¹⁶ S.E Marshall and R.A Duff, '*Criminalisation and Sharing Wrongs*' (1998) 11 Canadian Journal of Law and Jurisprudence 7, 21. Also see T. Honoré, '*The Dependence of Morality on the Law*' (1993) 13 OJLS 1, 2.

Removal of Liberty

The criminal law also has to illustrate that it is not a body that condones the removal of anyone's liberty unnecessarily, regardless of the context in which it has taken place. No one would suggest that the criminal law is wrong to punish someone who wrongfully took someone's life intentionally in an everyday setting. The harm occurring as a result of a grossly negligent action should not impact on the principle that the criminal law will not permit harm being caused to members of a community it is designed to protect. The harm caused is identical in both scenarios and therefore should be condemned in both if the actor is morally blameworthy.

Social Contract

Gross has noted that the general objection to causing harm to another is something that originates from a consensus in society¹⁷. White and Haines have described this scenario as the forming of a social contract in which it is agreed that the unnecessary harming of another's interests is something to be avoided¹⁸. Gross negligence manslaughter also harms society that has a stake in avoiding unnecessary harm being inflicted upon its members. The apparent 'social contract' is damaged and in that sense the harm caused is far greater than it may initially appear. As a result, the criminal law's involvement is warranted.

The criminal law focuses on the prevention of harm and has maintained this objective to protect the 'social contract' we have all entered. For example, the case of *R v Brown* [1994]¹⁹ held that it was not even possible to consent to being harmed in one's private sexual relations because of the wider implications it would have on society. The law sees the implications of

¹⁷ H. Gross, *A Theory of Criminal Justice* (OUP 1979) 14.

¹⁸ R. White and F. Haines, *Crime and Criminology: An Introduction* (2nd ed, Oxford, 2000) 26.

¹⁹ [1994] 1 AC 212.

harm inflicted on one another as a serious issue that must be controlled and regulated. It therefore seems apparent that harm that is caused by gross negligence manslaughter also needs to be addressed by the criminal law.

The medical context in which gross negligence manslaughter often occurs makes it easy to believe that it does not cause the same degree of harm as offences committed in a conventional setting. However, just because the offence takes place in a medical setting, for example, does not mean that it only has a harming effect on those directly involved. The criminal law is concerned with the protection of society and trust is paramount to that. Gross negligence manslaughter erodes society's trust in fundamental positions of responsibility that we must be able to rely on. If it is not addressed properly society as a whole is affected. For that reason, the criminal law should be concerned with the harm that it causes.

DEGREES OF HARM

Harm being caused to an individual is not sufficient to warrant the implementation of punishment upon an agent. Feinberg notes that the harm principle must be supplemented with a set of interest rankings by which the level of harm caused can be assessed before the criminal law can decide whether it is serious enough to warrant intervention²⁰. Therefore, according to Feinberg's theory the harm principle suggests that there are varying levels of harm that can be inflicted upon an individual depending on the severity of the damage to their interests.

The difficulty that arises in relation to gross negligence manslaughter is that it does not recognise a scale of harm. The criminal law is only concerned with the harm caused to the victim by grossly negligent acts resulting in death. Death caused by any degree of negligence less severe than 'gross' is not recognised by the criminal law as an offence that is worthy of

²⁰ J. Feinberg (n 7) 36.

prosecution. There is therefore no hierarchy of harm caused by gross negligence as it is an all or nothing principle that is dependent entirely on how severe the degree of negligence is considered to be. As a result, there are certain deaths that occur as a result of negligence that go unpunished.

Problems with Penalties

This lack of a scale of negligent actions recognised as deserving of criminal punishment causes problems when implementing penalties. In the UK, sentencing for the offence ranges from two years to life imprisonment²¹. However, without the acknowledgement of varying degrees of negligence that can cause death then the sentence given appears to be largely random. The way in which the law only recognises harm caused by grossly negligent actions makes it appear as if there is little link between the level of negligence and severity of punishment implemented. It is clear that the gross negligence has caused harm but the law's response is hard to understand when it fails to punish those who cause harm to as a result of negligent actions that are not considered 'gross.'

Feinberg notes that causing death is the worst form of harm as it thwarts the ultimate goals of the victim²². However, difficulties arise when the criminal law is unwilling to acknowledge that negligence resulting in death which is not considered severe enough to be considered gross negligence should also be punishable as harm has also been caused to an individual. As a result the response to harm caused is not consistently applied in this area.

Some argue that the criminal law does recognise varying degrees of harm caused on the basis that it implements the 'gross' test. The role of the 'gross' test is to distinguish between morally blameworthy acts that are considered to be worthy of punishment and those that are

²¹ J.R Spencer, 'Criminal Liability for Negligence – A Lesson from Across the Channel' [2010] 59(1) ICLQ, 23.

²² J. Feinberg (n 7) 48.

not. However, the distinction that is created by applying the 'gross' test is not in regard to the level of harm caused as that is always the same – death. The 'gross' test merely indicates the whether the action that resulted in that harm is criminally blameworthy or not.

The Opportunity to Act Differently

It appears that the courts rely more on the theory advanced by Hart who suggested that the degree of negligence can be linked to how easy it would have been for the agent to have acted differently²³. This is largely the test that is implemented in the courts as consideration is given to how the reasonable man would have acted in the circumstances and, effectively, the opportunities to act differently open to them. If the agent had the ability to act differently it is possible to assess how severe their negligent actions were as other options being available to them suggest they should have acted differently. This effectively creates a scale of culpability.

Some criticise the proposal that there needs to be a hierarchy of negligence in cases of gross negligence manslaughter. Kazarian, Griffiths and Brazier suggest that administratively it would be impossible to prosecute for all harms that result from gross negligence and therefore the law should only be concerned with placing focus on the most extreme cases²⁴.

However, this argument seems to suggest that it is more necessary to recognise a scale of negligence when punishing individuals who have caused death as a result of a negligent action. For example, a scale of negligence recognised as criminally punishable could be used to establish culpability in cases where clearly the perpetrator has caused unnecessary harm, but not as the result of negligence severe enough to be deemed 'gross'. The criminal law's

²³ H.L.A Hart, *'Punishment and Responsibility'* (Clarendon Press, Oxford, 1968) 97.

²⁴ M.Kazarian, D.Griffiths and M.Brazier, *'Criminal Responsibility for Medical Malpractice in France'* [2011] 27(4) Professional Negligence 188, 199.

failure to acknowledge varying degrees of negligence beyond 'gross' and mere negligence that is not punishable results in the inconsistent implementation of moral blameworthiness that does not correlate with the principles found in the harm theory.

The difficulty experienced stretches beyond the black letter application of the law in this area. Quick interviewed prosecutors and respondents in cases of gross negligence manslaughter and found that there was a distinct lack of understanding in regard to how severe the negligence in each case was. This was found to be particularly prevalent when it came to establishing if the negligence should be considered 'gross'²⁵. It is very difficult to know which negligent actions resulting in death are likely to be considered worthy of criminal intervention as a result of the law not creating a clear hierarchy of negligence that can be assessed and the basis of the negligent action alone.

The failure to implement a scale of negligence beyond gross negligence or mere negligence creates a great deal of confusion. The result is that this area of law is effectively black and white and fails to represent the wide variety of circumstances that give rise to the level of harm the offence of gross negligence manslaughter is concerned with - death. As a result, it can be hard to truly understand the actor's level of moral blameworthiness.

RESULT BASED CULPABILITY

The direct consequence of the law in this area only recognising *gross* negligence resulting in death as being worthy of criminal punishment is that it becomes easy for moral culpability to be based entirely on the result of the negligent action as opposed to the wrongfulness of the action itself. Feinberg's theory identifies that it is not enough for a harm to have been caused to an individual. It is also necessary for the action that caused the harm to also be considered

²⁵ O.Quick, 'Medical Manslaughter: The Rise (and Replacement) of a Contested Crime?' in C.A Erin and S. Ost, 'The Criminal Justice System and Healthcare' (OUP 2007) 38.

wrongful before an agent is considered culpable. A medical professional could be grossly negligent and cause extreme harm to an individual yet escape criminal prosecution entirely. However, the same mistake could be unfortunate enough to kill an individual and the criminal law will intervene. The moral wrongfulness of the medical professional's behaviour is determined entirely by the result of it and arguably not as a result of the degree of negligence the perpetrator is guilty of.

The Role of Luck

Luck therefore determines whether a grossly negligent action is morally worthy of punishment as opposed to the degree of carelessness or wrongful nature of the said act²⁶. Two doctors could make exactly the same negligent mistake in exactly the same circumstances and one patient may merely be injured while the other dies. Despite both doctors being grossly negligent in an identical situation only the one that caused death will potentially be considered criminally culpable. The doctor who only caused injury is 'lucky' to not be in the same position because the level of negligence is identical.

Many commentators are heavily critical of luck playing any part in determining culpability. As gross negligence is only criminally punishable if death occurs the offence has been subject to a large amount of criticism²⁷. In theory, the actions undertaken by both agents in the scenario considered are morally identical in every way. The only thing that separates them is the gravity of the result. Many argue that the actions themselves are wrong and we should attribute culpability on that basis because the punishment of such behaviour would also prevent future harm being caused.

²⁶ M.Brazier and A.Algharani, 'Fatal Medical Malpractice and Criminal Liability' (2009) 25 Professional Negligence 51, 59-60.

²⁷ See C.M.V Clarkson, 'Context and Culpability in Involuntary Manslaughter: Principle or Instinct?' in A.Ashworth and B.Mitchell ed 'Rethinking English Homicide Law' (OUP 2000) 142.

For example in the case of *R v Misra & Srivastava* [2005]²⁸ the accused doctors noted that there was some dispute over whether they were meant to chase the patient's blood results or the testing lab were meant to notify them. Their negligent mistake resulted in them being brought to the attention of the criminal law because the patient in that situation was so ill that the failure to treat him while waiting for the blood tests resulted in death. However, the doctors could have made an identical mistake several times with other patients and have not been considered morally blameworthy for the harm that it caused if they were lucky enough to not cause death. However, it is argued here that the absence of a lesser offence does not equate to gross negligence manslaughter being any less harmful or less deserving of criminal punishment on the basis that the agent has acted in a morally culpable way regardless of the other offences available.

The failure to know the correct procedure was the wrongful action in both scenarios and arguably the doctor was grossly negligent in both scenarios. Logically it would therefore be arguable that the doctors concerned should be seen as morally culpable in both situations. However, luck does determine when the criminal law intervenes at present to a degree.

Husak is of the opinion that both agents in identical scenarios should be treated equally by the law²⁹. However, gross negligence is a result based crime and there remains no lesser offence. For example, someone who attempts to murder someone but fails to cause injuries sufficient enough to cause death would still be liable for grievous bodily harm or attempted murder. The criminal law tends to use the initial act to consider whether they need to intervene and not just the result of the action. If the principle applied in gross negligence manslaughter was

²⁸ [2005] 1 Cr App R 328.

²⁹D. Husak, '*The Criminal Law as the Last Resort*' (2004) 24 OJLS 207, 211-212.

applied in the general criminal law it would be the equivalent of not charging an attempted murderer that was lucky enough to only cause injury with any offence at all.

Most commentators suggest that we should eliminate the end result from our mind when considering whether an action deserves punishment. If we would still consider it grossly negligent if the harm had not occurred then we should consider the act as morally blameworthy and potentially worthy of criminal punishment³⁰. By nature gross negligence in the medical context which is being considered is a professional acting outside of their area of competency or acting in a way that falls below the standard of care they know they should implement. In this respect, there is clearly some punishable wrong in failing to live up to the expected standards, regardless of the result that occurs and therefore it is submitted that the offence should remain punishable on this ground regardless of whether the criminal law punishes lesser harms caused.

The criminal law relies on the harm principle as a way of protecting society. Relying entirely on the result that occurs means the criminal law is unable to identify those that make grossly negligent mistakes if death does not occur. In many circumstances members of society could run entirely unreasonable and dangerous risks and be lucky enough to not cause death despite causing extreme harm. These people would be free to continue behaving in the way that they do and continue to cause harm as the criminal law can only intervene when death occurs despite the level of negligence illustrated. However, it is submitted here that grossly negligent actions that result in any harm should be considered criminally punishable as it can reduce greater amounts of future harm.

³⁰ A.P Simester and W.Chan, 'Four Functions of Mens Rea' [2011] 70(2) Cambridge Law Journal 381, 393-394.

It can be said that it is not purely luck that determines whether someone is responsible for their actions. The 'gross' threshold must also be crossed in order for the negligence that resulted in death to be considered bad enough to warrant criminal sanction. Therefore, even when an agent is 'unlucky' enough for their careless mistake to end in death there is still no guarantee that the criminal law will intervene by punishing the individual. However, this test is only applied after luck has determined whether an individual should be brought to the attention of the law.

Commentators such as Quick suggest that the offence of gross negligence manslaughter should be abolished on the grounds that luck determines culpability³¹. Luck playing such a monumental part in determining who should be punished for their actions illustrates that the harm principle can be used by critics of gross negligence manslaughter to suggest that it should be abolished. However, Quick's suggestion that this should result in the abolition of the offence is an extreme argument. Merely adding an additional offence, such as causing injury by gross negligence, would allow luck to have less of an impact on culpability. The fact that not all harms caused are punished is not a strong argument for the abolition of punishing gross negligence manslaughter.

Wrongfulness of the Initial Act

Many suggest that the initial act that leads to the harm being caused is what should be judged as determining moral culpability. Sela argues that an agent should not be more or less blameworthy based on things that were out of his control³². Effectively the law allows factors that you cannot attribute to the agent in question determine how the criminal law treats them.

³¹ O. Quick (n 25) 37.

³² G.Sela, 'Moral Luck and Liability Lotteries' [2010] 16(3) Res Publica 317, 318.

It is possible to see the objection to this when it is applied to other offences. However, the nature of gross negligence manslaughter is that the agent is usually in total control of the victim's wellbeing when acting even if they do not foresee the outcome of their actions. Patients in hospitals relinquish all their control over themselves to a doctor who is holding himself out as being capable of trying to resolve the problem. The doctor has sight of the vital information they need to decipher how an individual is likely to react to treatment, or at least they should if they are acting to the standard expected of them. Therefore, the outcome of their actions is completely controlled by them.

To make this clearer it is useful to use a contrasting example. Imagine two drivers, A and B, both failed to keep their eye on the road at the same point and, when travelling at the same speed, hit the back of a car in front of them. A hits a driver who is a young and healthy man who sustains nothing but minor injuries. B hits a driver who is also a young man who happens to have an underlying brain condition and the impact causes death. A and B's actions are identical in that they were both grossly negligent and there was no way that the characteristics of the person they hit could have been known to them so that they could have made an informed decision to alter their actions. In this example punishing B would be entirely based on factors that were out of his control.

However, if this scenario was transferred to a medical setting in which a patient had entrusted a doctor it would be different. The doctor has intricate knowledge of the patient's medical history and opportunity to discuss areas of confusion with other medical professionals. They have control over what they do and the knowledge needed to alter what commentators call 'luck'. They are informed agents or agents that could inform themselves in order to alter their behaviour before the negligent mistake is made. In that sense, the harm caused can be a good indicator of the level of moral blameworthiness and not be purely based on luck.

Sela goes on to note that the risk materialising determines the level of culpability as opposed to determining whether an agent is culpable at all³³. As has been said above, the only reason we aim this criticism at gross negligence manslaughter is because no lesser offence is available. If we punished grossly negligent individuals for grossly negligent actions that resulted in injury we would have no argument that luck was determining culpability as it would be obvious that the criminal law was punishing wrongful and morally blameworthy acts and not just wrongful results. The law is right to be concerned with actions that result in harm, whether that be injury or death, and therefore it is submitted that it should remain a criminal offence on these grounds.

The Role of *Mens Rea*

The role of *mens rea* in most offences is effectively the law's way of establishing culpability without luck determining whether it should intervene. As Sela has noted, the mind is the only thing that is truly immune from luck³⁴. The *actus reus* of an offence can to an extent be determined by 'luck' or 'fate' as some people refer to it. However, what the agent is thinking when carrying out the act that 'unluckily' ends in death is an insight into whether the act itself was morally wrong. This is ultimately why we criticise the lack of subjective *mens rea* needed for the offence of gross negligence manslaughter as we are unable to have an insight into whether the act itself was wrong.

However, subjective *mens rea* is not needed to understand whether the act itself was wrong in the circumstances we are discussing. We know that the agent has failed to live up to the required standard and have the thought processes he is expected to have as an individual working in that capacity. That allows us to know that the actions he did were wrong at the

³³ Sela (n 32) 322-323.

³⁴ Sela (n 32) 330.

point they were done, regardless of the outcome because he failed to behave in the way the role he claimed to be able to perform demanded.

We need subjective *mens rea* to understand whether an individual who causes grievous bodily harm was really intending to kill an individual or meant to cause mere injury. It helps us determine what offence they should be charged with. However, as the only offence available is gross negligence manslaughter we do not need this insight to determine what the agent should be charged with. Therefore, subjective *mens rea* would serve little purpose when punishing gross negligence manslaughter.

That is not to say that we should rely entirely on the end result of death. We should be making our judgements about whether someone deserves to be punished in a vacuum that only uses the end result to determine how *much* they should be punished. The way to achieve this is to start punishing gross negligence injury as then the focus will need to begin to shift from the end result to the action itself. If this was the case it would be hard to advance criticisms for the punishment of gross negligence manslaughter in the criminal law.

As the law presently stands it is an all or nothing scenario that gives rise to the option of prosecuting the agent. Once death has occurred the power then lies in the hands of the Crown Prosecution Service (CPS) as to whether they have enough evidence to prove the result caused was a result of 'gross' negligence and not just mere negligence³⁵. The result is that a lot of judgements are made on the basis of the result, as opposed to the moral blameworthiness of the action that caused it, before the case even makes it before a jury. When it does make it before a jury the action itself it is then scrutinised in light of whether it lived up to the standards to be expected.

³⁵ O. Quick (n 25) 30.

Therefore, many individuals escape liability as a result of the emphasis on the harm principle within the offence. The introduction of an offence of causing injury by gross negligence would restrict the harm principle from allowing luck to play such a dominant role in the offence. If it was possible to move towards a wrongful action based approach as opposed to luck then the offence may be less vulnerable to the criticisms that people advance to justify its removal from the criminal law.

MORALLY DEFECTIVE ACTIONS AND HARM

The harm principle is meant to centre itself on the idea that we cannot criminalise something merely because it is considered harmful³⁶. Criticisms aimed at the harm principle can often revolve around the suggestion that its use allows moral decisions about the outcome of actions to determine what is punishable as opposed to the moral blameworthiness of the action itself³⁷. Effectively the result of the actions are used as an indicator that morally something wrong has taken place and should be punished. Therefore, the real reason for inflicting punishment after harm has been caused is because someone has shown a lack of care that *turned out* to be morally defective as opposed to it being morally defective *at the point* at which it took place³⁸.

Negligence is a Blameworthy Lack of Care

The argument advanced here is that the agent is morally blameworthy when they illustrate such a lack of care in cases of gross negligence manslaughter. In circumstances where gross

³⁶ J. Herring, 'Criminal Law' (5th Edition, Palgrave Macmillan, 2007) 27.

³⁷ D. Husak, 'The Nature and Justifiability of Nonconsummate Offences' [1995] 37 Arizona Law Review 151, 158.

³⁸ A.P Smith and A.T.H Simester (n 15) 8.

negligence manslaughter arises the individual concerned is holding themselves out as competent to perform their role. They know, better than anyone, the limits of their competence and the training they have received highlights the standards they are expected to live up to. Therefore, regardless of whether they thought their actions would cause harm or not, when they act their mind knew whether they were acting outside of their level of competence or below a standard expected of them. Therefore, they should not have acted and have shown a lack of care that is rightfully considered morally blameworthy.

In order to show a morally culpable lack of care the agent ultimately has to be in control and have a responsibility to act in the best interests of the individual concerned³⁹. Medical professionals have complete control over the welfare of their patients. Patients relinquish all control to medical professionals who claim to be in a better position to act in their best interests. Therefore, the actions undertaken by the said professional that caused such harm can be said to show a lack of care for the responsibilities that should be upheld. This would suggest that they should be seen as entirely responsible for them by the law despite them being negligent mistakes.

Alexander, Ferzan and Morse argue that a negligent actor does not have control over the choices that they make as they make them inadvertently⁴⁰. However, this ultimately seems like a very weak argument. Just because an agent did not foresee or intend to cause harm does not mean he had no control over the actions he made which illustrated a lack of care in the circumstances. They are acting as trained professionals who have passed a required bar to illustrate that they are capable of achieving the standards required of them. It is within a medical professional's knowledge that they should not perform a procedure that is outside of

³⁹ S.A Bandes, 'Is it Immoral to Punish the Heedless and Clueless? A Comment on Alexander, Ferzan and Morse: *Crime and Culpability*' [2010] Law and Philosophy 433, 440.

⁴⁰ L. Alexander, K.K Ferzan and S.J Morse, 'Crime and Culpability: A Theory of Criminal Law' (2009) 85.

their level of competency or would clearly fall below the standards that are genuinely applied.

To be grossly negligent the agent would have to be either acting outside their level of competency or far below a clear standard they knew was required of them even if they did not realise that they would cause any harm. This means that they showed a lack of care to the highest degree when performing the action that has caused harm to the patient as they should, and are likely to have realised, that they are not capable of performing the course of action they took. This makes the action wrongful despite the outcome.

For example, the doctors in the case of *Misra & Srivastava* acknowledged that they did not know the procedure for chasing blood test results⁴¹. However, when telling the patient that they would take blood and consider the test results they were stating that they knew that the results may indicate what the problem was and that they would need to be analysed. They therefore knew the way in which they should have behaved. Their failure to obtain the blood results, or enquire about the procedure for doing so, showed wrongful lack of care which meant their actions fell below the level of competency they proclaimed to be capable of living up to.

Some would oppose this argument and suggest it requires the grossly negligent actor to be fully aware of everything that is a risk, which would be impossible. However, this is simply not true as the standard that is being asked of medical professional is to act within their level of competence that adheres to the standards expected within the profession. By holding themselves out as a medical professional they are claiming to at least be able to do that. No one is expecting them to know the answer to everything, but instead acknowledge when they do not know the answers to the particular problem posed and not take an unnecessary risk.

⁴¹ *Misra & Srivastava* (n 28).

Misra and Srivastava had accepted that they did not know the procedure for obtaining blood results. Therefore, they should have accepted that they were not competent to deal with the procedure and have inquired about the way in which they could make themselves capable of performing it correctly. Not knowing the answer themselves is not in and of itself blameworthy if they acknowledge that they do not know and seek to find out. No one was demanding that they knew everything. Their failure to find out what they were not aware of was a careless, morally blameworthy and grossly negligent mistake.

Leipold agrees with this point in stating that there is nothing about the negligence standard that requires an unrealistic perceptiveness of care⁴². Medical professionals are required to know the amount needed to label themselves as that particular medical professional, nothing more and nothing less. Realistically medical situations will raise areas that the professional has not experienced. In those situations what is being asked is to accept that they lack the competency to deal with the situation and that they need advice. Those who fail to do that show a lack of care that results in harm being caused and should therefore be considered responsible.

More than one Course of Action Available

It is often noted that for an action to have been the result of a degree of apathy being illustrated it is necessary for there to have been more than one course of action available to the agent. This once again suggests that actions which result in gross negligence manslaughter illustrate that the agent lacked the required degree of care when acting. If a medical professional did the only possible thing to keep a patient alive and it failed no one is going to consider his mistake 'gross'. However, the fact that we label their action a 'mistake'

⁴² A.D Leipold, 'A Case for Criminal Negligence' [2010] Law and Philosophy 455, 458.

means there was another option available – the right one. Their failure to establish what the right course of action was shows a lack of care that they are to blame for.

Alexander, Ferzan and Morse have suggested that negligent choices made that result in death cannot be considered culpable choices because the negligent actor has not chosen to risk harm⁴³. Obviously medical professionals in this position have not actively chosen to cause harm to someone. However, when you hold yourself out as capable of performing as a doctor or nurse you are making a choice to act in that position. If, when acting in that position, you make a grave error it is your responsibility because the only reason that you were in a position to take such action is because you declared yourself capable.

It appears that Alexander, Ferzan and Morse are focusing on choosing to cause the harm suffered as opposed to illustrating a degree of indifference when carrying out the act that caused it as a way of measuring culpability. If one is able to detach themselves from the end result of the action, it is easy to see that carrying out an action that you clearly have not been trained to do or is not in line with the general standards expected of you illustrates a lack of care that is dangerous. Therefore, the actor acts in a way that was grossly negligent regardless of their intention regarding harm. That means they are responsible for their actions and the criminal law is justified in punishing gross negligence manslaughter.

Blaming Character Traits

In their argument against gross negligence manslaughter Alexander, Ferzan and Morse suggest that we are inappropriately blaming people for their ignorance and character traits which they cannot control⁴⁴. The logic in this is hard to understand when it is put into a medical context. We are blaming the individual because they have inadvertently claimed that

⁴³ L. Alexander, K.K Ferzan and S.J Morse (n 40) 70.

⁴⁴ L. Alexander, K.K Ferzan and S.J Morse (n 40) 78.

they are not ignorant and have the character traits to perform the role by holding themselves out as a medical professional. They have positively claimed they are capable and on that basis they are trusted with making serious decisions. This considered they are responsible for their shortcomings because they would not have been in a position to cause harm if they had not proclaimed themselves as competent.

For example, imagine A walks into a hairdressers. An individual introduces themselves as a hairdresser that is able to give A their desired cut when asked. The hairdresser makes a catastrophe of the haircut. They are responsible because the only reason they were in the position to make a mistake was because they positively held themselves out as being competent. The lack of care they illustrate why proceeding to act when they are aware of their inability to fulfil the standards expected of them is a culpable act. If the individual cutting the hair made it clear that they were not a qualified hairdresser it would be A's fault for continuing nonetheless.

Negligent actors in the medical profession put themselves in a position of control wilfully. Their level of training and the general standards that they act within the realms of daily are a constant reminder of what is expected of them. Every time a medical professional decides to carry out a procedure or to treat a patient in a particular way they are effectively stating that they believe themselves to be able to perform it to the required standard. Their decision to act when they are unable to live up to the required standard demonstrates a lack care and if they are wrong about their level of competency then the only person that can be to blame is them.

Alexander, Ferzan and Morse provide an example of how they feel criminal negligence is blaming the innocent. Imagine A puts poison in a bowl of sugar. B makes C a cup of tea and poisons C as he did not know the poison was in the bowl. Alexander, Ferzan and Morse suggest that we would not consider them culpable and they compare this scenario to

punishing negligent mistakes. However, the difference is that B is not holding himself out as someone who is able to tell the difference between sugar and poison, whereas medical professionals are.

If someone put a lethal concoction of drugs in the wrong packaging and a doctor gave it to a patient thinking it was the correct drug they would clearly not have been grossly negligent and culpable. The scenario is completely different in a medical context that gives rise to gross negligence manslaughter as the medical professional is claiming to be able to tell the difference. It is comparable to the following. Imagine that B was told that one bowl of sugar contained poison and the other did not and he claimed that he was trained to tell the difference. As a result, C trusted him and B misjudged his capabilities because the scenario in which he was identifying the poisoned bowl were different than ones he had experienced in the past and consequentially poisoned C. He should have recognised that his capabilities did not extend that far. His failure to do so resulted in him lacking the required degree of care for C's welfare and the only person responsible for that grossly negligent action is B.

Culpable Acts and Punishment

Despite it appearing that medical professionals do show a lack of care when acting it is suggested by Ashworth that courts often find ways to avoid finding medical practitioners guilty on moral grounds⁴⁵. There appears to remain a degree of sympathy for medical professionals despite their grossly negligent actions apparently being both harmful and culpable. Understandably they are not the usual people that the criminal law sanctions. However, it is hard to see how their grossly negligent actions resulting in harm being caused can be said to be not deserving of punishment.

⁴⁵ A.Ashworth, 'Criminal Liability in a Medical Context: The Treatment of Good Intentions' in A.P Simester and A.T.H Smith, 'Harm and Culpability' (Clarendon Press, Oxford 1996) 182-183.

It appears that commentators fail to see the significance of the setting in which these events occur. It would be wrong to punish people who have never claimed to be capable of doing what they have failed to achieve. However, medical professionals and others in similar positions of responsibility inadvertently say 'it is my job to not make grossly negligent mistakes and I am capable enough to not make them' when they decide to act in that given role. It is this inadvertent statement that triggers the patient's trust in their abilities and results in them relinquishing control to them. The harm is caused because of their decision to proceed to act when they are aware that they are unable to live up to the standards required of them that makes their lack of care culpable and deserving of punishment.

BLAME AS THE BASIS OF CULPABILITY

It is the blameworthiness of this lack of care that triggers the reaction of the criminal law⁴⁶. It has long been accepted that people are not thought to be criminals if they are not to blame for their actions⁴⁷. Gross negligence manslaughter requires a wrongful causing of harm to have taken place and is therefore no exception⁴⁸. As a result, it is necessary to examine whether we consider the actions that caused the said harm to be blameworthy in greater detail.

There is a wrongfulness requirement in all areas of the criminal law, including gross negligence manslaughter. Effectively it means that causing harm to an individual is not enough to warrant punishment as we must consider the action itself as wrongful⁴⁹. It must be possible to place the blame for causing the death of the individual at the hands of the

⁴⁶ J. Herring (n 36) 28.

⁴⁷ *Sweet v Parsley* [1970] AC 132, 138.

⁴⁸ A. Ashworth (n 2) 29.

⁴⁹ D. Husak (n 37) 155.

offender. Smith and Simester note that this blameworthiness is the integral part of the justification for the offence of gross negligence manslaughter⁵⁰.

Blame for Voluntary Actions

Hart notes that if an agent's action is voluntary then they are responsible for it and we can attribute fault to them⁵¹. Hart is of the belief that negligent acts are still voluntary and therefore considered blameworthy. It is necessary to remember that professionals acting in a medical context continue to hold themselves out as someone competent and only they truly know the complete extent of their capabilities. Therefore, they have wrongfully, albeit inadvertently, declared themselves as capable at the moment they perform, or fail to perform the required procedure correctly. The lack of care that they illustrate is blameworthy behaviour whether it was intentional or not.

Hart states that an action is voluntary and therefore blameworthy if it was possible for the agent to act in a different way than they did⁵². The very nature of gross negligence manslaughter is that a mistake has been made. A mistake inherently suggests that there was an alternative way to act – the correct way. Therefore, mistakes made in a medical context when there are set standards to be adhered to are blameworthy actions that are deserving of punishment.

A lot of the criticism aimed at gross negligence manslaughter centres around the lack of a subjective *mens rea* requirement. This is because subject *mens rea* would usually highlight whether an agent's actions should be considered blameworthy. However, this requirement is simply not necessary for gross negligence in a medical context because there are set standards

⁵⁰ A.P Smith and A.T.H Simester (n 15) 12.

⁵¹ H.L.A Hart (n 23) 91.

⁵² H.L.A Hart (n 23) 93.

in place that should have been adhered to. The failure to live up to these standards is an indication that the action was wrongful and how negligent it really was. The agent's subjective state of mind will not alter that.

Blaming for Social Harm

Duff argues that blameworthiness stems from what injures society as a whole and not just the victim⁵³. Under this concept of blameworthiness it is also possible to argue that grossly negligent actions resulting in death are morally blameworthy. The healthcare system is a pillar of society. Failure to adhere to the standards that would be expected of individuals that are trusted to work in that system results in the erosion of trust in the structures of authority that underpin society. Therefore, society is harmed indirectly by grossly negligent actions and the perpetrator of that harm is to blame.

Quick noted that medical negligence is very rarely reported by medical professionals. He attributes this largely to the fear that extensive reporting of such matters will erode society's trust in their abilities⁵⁴. Causing harm to individuals is the polar opposite of what the healthcare profession is meant to do and when this happens it can create a public relations problem⁵⁵. Therefore, the actions that give rise to gross negligence manslaughter are morally blameworthy in the sense that they do impact on society as a whole and should be punishable as a result.

All crime impacts on the community in which it takes place as well as the individual and gross negligence manslaughter is no exception⁵⁶. On that basis alone it is morally

⁵³ R.A Duff, *'Answering for Crime'* (Hart Publishing 2009) 141-142.

⁵⁴O. Quick (n 25) 35.

⁵⁵A. Giddens, *'The Consequences of Modernity'* (Polity Press 1991) 130.

⁵⁶ S.E Marshall and R.A Duff (n 16) 17.

blameworthy as it causes a threat to the community in which we live and it must be shown that such behaviour is not tolerated. Gross negligence manslaughter is no different than other crimes that create a fear of harm being caused that is not acceptable in our society. It is therefore hard to argue that it is not a blameworthy action that deserves to be subjected to the criminal law.

It appears difficult to argue that the grossly negligent actions of an agent that cause death are not blameworthy. It is understandable that the lack of subjective *mens rea* required for the offence and the fact that the actions are described as inadvertent instantly makes people believe that the actions are not morally blameworthy enough to warrant criminal punishment. Nonetheless, the actions are voluntary ones that cause a wider degree of harm in the society that we live in. As a result, the agent is directly to blame for the repercussions of his voluntary actions that caused the said harm and deserves to be held criminally culpable.

HOLDING YOURSELF OUT AS CAPABLE

Hart suggested that the only subjective element that should be considered in crimes of gross negligence is the actor's ability to have acted differently⁵⁷. In crimes of negligence it is arguable that the agent does have the capacity to act differently. In matters of gross negligence manslaughter in a medical context one can assume from the position that the individual was in that they either a) received training on how they should act; b) would have known how to act if they had adhered to their duty to remain up to date on training; or c) could have sought advice from someone if they were unsure about how to deal with the patient. Either way there was an opportunity to seek out how to act correctly and therefore an ability to act differently.

⁵⁷ H.L.A Hart (n 23) 151.

The fact that the individual has qualified to act in the given role is indicative that they have the mental capacity to live up to the standards that are expected of them. Their failure to exercise those capacities properly results in them failing to live up to the standards that are clearly set for them to adhere to or to fully inform themselves before making decisions. The individual owes a duty to themselves to ensure that they meet the criteria they need to continue practising as well as to the patient. But for their failure to do this the harm would not have occurred. Therefore they should be considered morally blameworthy.

When a medical professional qualifies they are considered to have the necessary skills to not cause unnecessary harm through negligent mistakes. There is a duty to remain up-to-date with medical developments that rests with the medical professional themselves. When they continue to act in their chosen role they are, albeit inadvertently, claiming 'I am competent to act in this position.' It is purely based on this statement that patients relinquish control to the medical professional and allow treatment to be provided. It is the medical professional's behaviour that puts them in the position of control and if they are not competent they are wrongfully holding themselves out as someone who is. That behaviour alone is morally wrongful, regardless of the outcome.

Duff states that the agent being in control of the action that caused the said harm is a precondition of criminal liability⁵⁸. One has to remember that the whole reason the medical professional is in a position of control when the harm takes place is because they claim to be capable of acting in the said role. They have the ability to acknowledge the limits of their capabilities and understand what is expected of them. They are entirely to blame for their own failure to live up to the standard they claim to be able to meet on a daily basis. Therefore, harm that is caused when they are in control is their fault because they have showed a lack of care in regard to the standards that are expected of them.

⁵⁸R.A Duff, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 OJLS 189.

The doctor must have owed the patient a duty of care and the sole reason that duty exists is because the agent claims to be qualified enough to perform that duty. When that individual falls 'grossly' below the level of what would be expected of someone claiming to be able to perform that role the only logical person to blame is them. But for their claim that they were capable of performing the duty of care they would never have been in the position to make the grossly negligent mistake that resulted in death.

Alexander, Ferzan and Morse suggest that criminal culpability can be measured in light of the level of risk the actor themselves perceived and not the reasonable person⁵⁹. However, when an individual has been rigorously trained in order to meet the required standards they are aware of when they are acting outside of their level of competency or in a way that would not realistically comply with the usual standards that are required. As a result of the training the individual would have had to undergo in order to attain their professional status they would be aware that they were showing a lack of care when it came to acting in keeping with the general standards applied. As a result, they must be considered morally culpable.

Alexander, Ferzan and Morse provide an example of why negligent mistakes should not be criminally punishable. Imagine a mother leaves her children in the bath to answer the door and when entertaining the guest forgets about them. One of the children drowns. Alexander, Morse and Ferzan suggest that she should not be seen as culpable because she had lost the memory of them being in the bath and was unable to retrieve it⁶⁰.

This argument would make sense if the person who left the children in the bath was not a parent as they have never stated themselves as being capable. However, being a parent means they have inadvertently taken on the responsibility and control of the risks the children are

⁵⁹ L. Alexander, K.K Ferzan and S.J Morse (n 40) 70.

⁶⁰ L. Alexander, K.K Ferzan and S.J Morse (n 40) 79.

exposed to. This is like an individual who takes on the responsibility of being a medical professional. They put themselves in a position where they *should* think and are *expected* to. Their failure to do this shows a lack of care for the responsibilities they had adopted and it is their fault as a result.

This is justified by Alexander, Ferzan and Morse as they suggest that the mother's failure to return to the children was a result of a character trait she could not control⁶¹. However, the criminal law punishes people for character traits they cannot control all the time, for example greed, bad temper and anger⁶² and those are traits that no one has positively claimed to not have. In the medical profession the individuals are actively claiming to have the necessary traits needed. Failing to exercise them successfully should therefore be considered punishable like other character traits are in the general criminal law.

Medical professionals put themselves in a unique position in which they state that they are capable of not causing unnecessary harm. By making that inadvertent statement they further put themselves in a position of responsibility where they have a high degree of control over the wellbeing of others. They are entirely responsible for their involvement in the situation and their negligent actions show a lack of care that causes harm. They are morally responsible for the outcome and even though it may not be foreseen or intended injury their training would mean that they should have regard for the risk their actions may pose. As a result, it seems correct that the criminal law punishes their behaviour.

CONCLUDING THOUGHTS

The assessment of the harm principle has made it clear that those who cause death through negligent actions cause significant harm to the victim. If this harm is caused by a medical

⁶¹ L. Alexander, K.K Ferzan and S.J Morse (n 40) 85.

⁶² A.D Leipold (n 42) 462.

professional who fails to live up to a standard of care or competency expected of them then the agent should be considered morally blameworthy. Their negligent actions fall below a clear standard in a way that they should know they are not capable of performing.

It is the ability of the agent to take such risks that means the criminal law should be concerned with the negligent offender in general, and specifically in cases of gross negligence manslaughter. They have highlighted themselves as someone who lacks the required degree of care to act in the role they have assumed. When these morally defective actions cause harm to another it is the role of the criminal justice system to intervene in order to effectively protect the society it is meant to defend.

It is easy to see why some commentators feel that negligent actors are not morally blameworthy. The description of a negligent offender's actions as 'inadvertent' or 'mistaken' suggests that they have done nothing morally blameworthy to cause injury to another. However, this opinion developed from a failure to truly recognise the relevance of the situation in which these cases occur. It is the nature of the offender's position as a medical professional that makes their lack of care such a significant issue that should be seen as morally culpable.

It is this classification of a morally blameworthy mistake having been made that triggers the involvement of the criminal law. The way in which the criminal law decides to deal with the morally blameworthy behaviour that has taken place will be discussed in the next chapter.

CHAPTER TWO

CRIMINALLY ESTABLISHING GROSS NEGLIGENCE MANSLAUGHTER

It has been established that the acts of gross negligence that result in death in a medical context are morally blameworthy acts that cause harm to others. It was suggested in the previous chapter that the actions of the grossly negligent offender are rightly considered morally blameworthy and culpable failures to live up to a given set of standards. However, this does not naturally mean that the offence is criminally culpable. The fact that grossly negligent actions are morally blameworthy triggers the involvement of the criminal law in deciding whether it should be considered criminal. Therefore it is necessary to also examine how we establish whether a grossly negligent action is morally blameworthy enough to be criminal before we can conclude whether the offence is rightly punishable.

Further criticisms advanced towards the inclusion of gross negligence manslaughter in the criminal law revolve around the test that is applied to establish whether the grossly negligent action which has caused harm requires criminal intervention. Therefore, the test applied in such cases will be considered and assessed. It is hoped that this will make it possible to establish whether the way in which criminal law decides if this moral blameworthiness should be considered criminally blameworthy is appropriate.

Problems can arise if the test implemented by the criminal law is flawed. If there is not a strong link between a morally culpable act and a criminally culpable act it is possible to argue that offenders are not being treated fairly. This has been the source of much contention in this area and has led for calls for the offence to be removed from the ambit of the criminal law.

The Test Applied

Lord Mackay clearly summarised the test that was to be applied in gross negligence manslaughter cases in his leading judgment in *R v Adomako*¹. Here he stated that in his opinion the

...ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred².

This position was later supported in the case of *R v Misra and Strivastava*³. Here Judge LJ noted that the circumstances should be judged from the viewpoint of the reasonably prudent person and whether they would have seen the risk of death⁴. Therefore, the test applied for gross negligence manslaughter is very similar to the civil concept of negligence. It must be proved that there is a duty of care, that the duty has been breached, which has resulted in a death that would have been obvious to a reasonable prudent person.

¹[1995] 1 AC 171 (HL).

² *Adomako* (n 1) 187.

³[2005] 1 Cr App R 21 (CA).

⁴ *Misra and Strivastava* (n 3) 344.

Duty of Care

The case of *R v Wacker*⁵ confirmed that 'duty of care' was effectively given the same meaning in gross negligence manslaughter as it is given in the tort of negligence. However, the Law Commission Report No. 304 (2007) suggested that a more liberal test of establishing a duty of care may be applied in criminal cases. It stated that "you owe a duty of care towards anyone who may foreseeably be harmed by your actions"⁶. In this respect it is arguable that any individual acting in a position of responsibility can be seen as owing a duty of care. For example, as was discussed in chapter one, the medical professional in charge of the patient's care has complete control of their wellbeing and therefore they can foreseeably be harmed by their actions if the care provided is inadequate⁷.

Whether that duty exists is an issue for the presiding judge to establish and not something the jury has to decide⁸. However, in cases of gross negligence manslaughter it seems inevitable that the individual standing trial, particularly those acting in a professional context at the time the grossly negligent act was committed, is going to be found to owe a duty of care to their victim. The test regarding a duty of care appears therefore to be more significant to gross negligence manslaughter that arises in more unusual circumstances⁹.

Gardner agrees that establishing a duty of care is often going to be seen as a "redundant test". This is due to that fact that "virtually any fatal act which could plausibly be termed grossly negligent will of necessity possess the required characteristic of foreseeably harming another

⁵ [2003] QB 1207 (CA).

⁶ Law Commission Report No. 304 (2007).

⁷ See discussion at page 34.

⁸ See the cases of *R v Evans* [2009] 1 WLR 1999 (CA) and *R v Singh* [1999] Crim LR 582 (CA).

⁹ This will be explored further in the following chapter.

person”¹⁰. This element of the test is clearly satisfied from an objective viewpoint with no insight into whether the individual concerned understood the duty that they owed.

This approach has been the source of a vast amount of criticism as *mens rea* plays a minimal role in establishing whether a criminal offence has taken place. However, the requirement to establish a duty of care could be used to add a subjective *mens rea* element to an offence that is lacking enquiry into the mind of the offender at the point of harm being caused. A requirement to enquire into the mind of the agent to establish whether they knew the gravity of the duty they owed could add a subjective *mens rea* element to the crime.

The lack of subjective *mens rea* in the offence has been the source of much debate regarding whether it should even be considered a criminal offence. The requirement to consider whether the agent knew the gravity of the duty they owed would be largely futile in a medical context as inevitably a doctor or nurse would be aware that they do, but would potentially carry some weight in other situations which give rise to the offence. Such reform to the test implemented could silence critics who claim that the offence should not be criminalised because those who commit it possess an inadvertent, as opposed to guilty, mind.

If a medical professional was found to have subjectively appreciated the gravity of the duty of care that they owed it would be possible to counteract a lot of arguments that are advanced towards the test that is implemented. Critics of gross negligence manslaughter accept that the agent is morally blameworthy for the harm caused to the victim as a result of their grossly negligent act. However, it is considered that the objective *mens rea* required for the offence shows a lack of criminal culpability for the action. Showing that the agent knew the gravity of their duty, but still failed to live up to the standard of competency it demanded of them,

¹⁰ S. Gardner, ‘Manslaughter by Gross Negligence’ [1995] LQR 22, 23.

would show a notable lack of care. This would make it arguable that the test implemented by the law does identify those who should be considered criminally culpable.

It would remain a largely futile test because inevitably it will be possible to establish that the agent knew they owed a duty of care in the vast majority of circumstances in which the offence is likely to occur. However, this would arguably prove that the agent had a subjectively guilty mind for those critics who oppose gross negligence manslaughter being considered a criminal offence on the mistaken belief that the actor has been inadvertent in these cases.

Breach of Duty

The test for gross negligence manslaughter further requires that the established duty of care between the defendant and the victim has been breached. Herring notes that the “jury must ask whether the defendant’s actions fell below the standard expected of the reasonable person” and thus breached their duty to the victim¹¹. However, if the defendant is professing to be able to exercise a certain skill, such as that of a medic, then the reasonable person considered in this respect will be equipped with these skills¹².

It is this element of the test that was discussed in detail in chapter one¹³. The duty that has been breached is the one to perform to a specific level of competency. The fact that a reasonable person acting in that position could live up to this level of competency suggests that it is not as arduous a duty to be fulfilled by the actor as some have suggested¹⁴. By acting in a particular role they are claiming to be able to live up to a minimum standard of

¹¹ J. Herring, *Criminal Law – Text, Cases and Materials* (4th edn, OUP 2010) 276.

¹² Adomako (n 1) 171.

¹³ See discussion at page 18.

¹⁴ See discussion at page 26.

competence that others also performing the role have adhered to. Their failure to do this is their breach of that duty they subjectively knew they had to live up to.

Causation

Herring notes that this element of the test is merely a “straight forward application of the rules of causation”¹⁵. Plainly speaking, the breach of duty must be seen to have been the cause of death. If there is no causal link between the breach of the duty of care and the death of the victim then a finding of gross negligence manslaughter cannot be established.

It is the causation element of the test that links the agent’s failure to live up to the standards required of them to the harm that has been caused to the victim. The agent knows subjectively that there are standards that they must live up to if they want to practise as a medical professional whether the test applied by the law is subjective or not. Their knowledge of this should trigger their mind to not be complacent or perform acts that are out of their known level of competency. If they fail to heed this warning and harm arises as a result they are the direct cause of it.

PROBLEMS WITH THE GROSS NEGLIGENCE MANSLAUGHTER TEST

Criticisms of the above test are made by commentators in support of the proposal that the offence should be eliminated from the realms of the criminal law. Therefore, these criticisms will now be examined in full so that a conclusion can be reached as to whether the exclusion of the offence from the criminal law on these grounds is justifiable.

¹⁵ Herring (n 11) 276.

No Mens Rea Requirement

Some of the main arguments advanced towards the removal of gross negligence manslaughter from the criminal law are linked to the role that *mens rea* plays in the offence¹⁶. Primarily, a great deal of criticism is aimed at the fact that in order to prove culpability for the offence it is not really necessary to establish a guilty state of mind in the conventional subjective sense. The case of *Bateman* has always held that *mens rea* is necessary in cases of negligence and that negligence constitutes a state of mind. Leigh however disagrees with this being the case and states that the use of the reasonable man test means that we do not assess the capacities of the actual actor¹⁷.

It is arguable that the test does involve inquiry into the mind of the offender and that criticisms of the test applied on these grounds are incorrect. Judge LJ in *Misra*, argued that gross negligence manslaughter does require inquiry into the state of mind of the agent¹⁸. Commentators seem to become preoccupied with the notion of a guilty mind being linked to intending to cause the said harm. However, it is argued here that the guilty mind element of the offence is present in gross negligence manslaughter. For example, in the medical scenario example being considered at some point the medical professional assessed the situation. At that point, they would know whether they had dealt with such a problem before and whether they were aware of all the information they needed to make the judgement correctly. It is the inaccuracy of this judgement that is their subjective *mens rea*.

If the actor realised they did not possess all the information they needed then this should have been a trigger in their mind that they were not competent enough to perform the procedure or

¹⁶ E. Fruchtman, 'Recklessness and the Limits of Mens Rea: Beyond Orthodox Subjectivism' [1986] 29 CLQ 315, 318.

¹⁷ L.H. Leigh, 'Liability for Inadvertence: A Lordly Legacy?' [1995] 54 MLR 457, 469.

¹⁸ *Misra and Strivastava* (n 3) 341.

said act. Those who go forth and perform or fail to acknowledge their lack of competence to perform the action may fall below a standard expected of them. The course of action they have taken is a subjectively wrongful one and that is the inquiry into their mind that takes place.

Some commentators have been seen to be in agreement with this suggestion and have argued that the lack of care the agent demonstrates could make them seem more culpable than the average risk-taker¹⁹. For example, the medical professional who acts in this way has the ability to act differently. He has received training and expressly held himself out as someone capable of acting competently in the given role he acts in. Average criminals do not positively hold themselves out as being trustworthy individuals in a formal manner in this way. The failure to live up to the positive statement that the medical professional has made by considering their level of competency and skill is their subjective *mens rea*. It is the presence of this that means that the offence should be considered criminally culpable.

Williams notes that “failing to think can be a state a mind only in the sense that unconsciousness is a state of mind; that is to say, it is an absence of a relevant state of mind”²⁰. He therefore feels that courts describing the test applied as still being concerned with *mens rea* is an “abuse of language”²¹. However, it seems that Williams fails to appreciate the context that gross negligence manslaughter arises in and the implications of those scenarios. The requirement of the duty of care being present in cases of gross negligence manslaughter means that the accused individual has positively held themselves out as someone capable of performing their role. This triggers people’s trust and prompts them to relinquish control to the individual concerned. If they are not competent enough to

¹⁹ C.M.V Clarkson and H.M Keating, ‘Criminal Law’ (6th Ed, Sweet and Maxwell, 2007) 422.

²⁰ G. Williams, ‘Recklessness Redefined’ [1981] Cambridge Law Journal 252, 256.

²¹ G. Williams (n 20) 256.

perform the actions required of them in that role then they should not continue to act. Their failure to appreciate the limits of their competence is their guilty state of mind.

Williams seems to feel that the agent must have a conscious thought about the outcome of their behaviour before it can be considered a state of mind. However, just because an individual has not willed the harmful outcome of their actions or foreseen the harm expressly does not mean there is an absence of a state of mind entirely. The agent knows the standards to be adhered to and whether they are capable of doing that in the given situation. Therefore, when they proceed with a course of action which does not meet these standards they have illustrated a positive mindset – a lack of care. As a result, it can be argued that the gross negligence manslaughter test does require *mens rea* to be present and as a result those who possess that *mens rea* should be criminally punished.

Leigh, highlights that judges argue inadvertence is a mental state because it is yours and, thus subjective²². It is argued here that the mental state required for the offence to be satisfied is not mere inadvertence. The harm that is the outcome of the agent's actions is clearly unintentional. However, the agent has positively held themselves out as someone capable of performing the said action correctly otherwise they would not be in the position they are acting in. Their inability to successfully acknowledge the limits of their capabilities is a state of mind that put the victim at risk. That failure to appreciate their limits despite the persistent reminders of the responsibilities that need to uphold is a state of mind.

Kimel criticises the directions given in the cases of *Adomako* and *Misra* in relation to *mens rea* by suggesting that the focus should be more on moral culpability than states of mind²³. However, inquiring into whether it was reasonable for the medical professional to have

²² L.H. Leigh (n 17) 213.

²³ D. Kimel, 'Inadvertent Recklessness in Criminal Law' [2004] 120 LQR 548, 549.

understood that they lacked competency to perform in the way that they did allows us to establish their guilty state of mind and moral culpability for their actions.

As a result of such opinions on the role of *mens rea* in gross negligence manslaughter there are criticisms that the offence is almost a strict liability offence. Once a breach of duty has resulted in death the jury are likely to find the action leading to the death to have been grossly negligent and worthy of criminal sanction on the basis that death has occurred. Quick notes that without significant *mens rea* elements in offences the jury are free to draw inference from outcomes of behaviour²⁴.

The strict liability criticism develops from the fact that death being the outcome of the negligent actions is often seen as establishing moral culpability and not *mens rea*²⁵. However, it is arguable that this is the case in other offences too as is impossible to avoid considering that death has occurred. For example, in cases of constructive manslaughter the *mens rea* for offences like assault resulting in minor harm is no different from the *mens rea* required to convict someone of unlawfully killing a person. It is the outcome that is determining culpability. This is also the case with gross negligence manslaughter as if no death arises and there is only minor injury there is no criminal action available.

However, that is not to say that the result of the negligent actor's actions is the only thing considered by the criminal law when establishing whether they deserve criminal punishment. *Mens rea* does play a role in establishing whether individuals in these situations should be considered criminally culpable as well as morally. This is because it is impossible to ignore that significant harm has been caused to someone altogether.

²⁴ O. Quick, 'Medicine, Mistake and Manslaughter' (2010) Cambridge Law Journal 186, 201.

²⁵ B. Mitchell, 'Minding the Gap in Unlawful Dangerous Act Manslaughter: A Moral Defence of the One-Punch Killer' [2008] 72 Journal of Criminal Law 537, 547.

It appears that the criticisms aimed at the subjective element of the gross negligence manslaughter test are based on a failure to truly appreciate the context in which the cases arise. It is necessary to understand that the requirement of a duty of care being present in cases of gross negligence manslaughter often means that the agent's actions are subjected to a set of standards that they must adhere to. By continuing to place themselves in a position where they owe that duty of care they are saying they are capable of living up to the standards implemented. It is only the individual that can appreciate the limits to their ability to adhere to the set standards. Their lack of care in ensuring they live up to the said standards is a mindset that is rightfully blameworthy.

The focus of the criticisms seems to rest too much on needing to intend the harm that is caused to establish the necessary *mens rea* for a criminal offence. However, in the leading cases involving medical professionals there is a clear pattern of failing to have enough regard for the standards the agent has positively proclaimed they can meet by acting in the given role. It is for this reason that gross negligence manslaughter should remain a criminal offence that inflicts punishment on those who are capable of making grossly negligent mistakes in these circumstances.

No Moral Culpability

Some feel that the apparent objective test being applied means that the offender in cases of gross negligence manslaughter is not morally culpable for the outcome of their actions. The law in this area is effectively punishing acts that society feels are worthy of punishment, but does not provide the means to establish whether the individual who has committed them possess the necessary mental blameworthiness to be considered deserving of punishment.

Because there is a lack of investigation into the subjective *mens rea* of the defendant some feel that grossly negligent acts resulting in death should not warrant criminal sanction²⁶.

Fruchtman argues that negligent acts not being morally culpable enough to deserve punishment is an overstatement in that the nature of negligence is a failure to live up to standards that the reasonable person in that position should. It is suggested that this is worthy of punishment in and of itself whether they were aware of it or not²⁷.

However, the position that those guilty of gross negligence manslaughter find themselves in is more culpable than may initially be thought when it is analysed in more depth. They are aware of the standards they are required to live up to due to the training they have received, the demands of whatever role it is they are performing and the on-going regulations that they are likely to remain subject to. They are more than aware of the standards demanded of them and therefore proceedings to act in their given role is effectively inadvertently claiming that they are capable of meeting those standards. The lack of care that is demonstrated when it comes to upholding these standards is therefore morally culpable and should be subject to the criminal law.

In cases of murder and constructive manslaughter the offender is not expressly claiming they can meet any particular standard. They have not suggested that they are someone who can actively protect welfare interest. However, as a society we are comfortable in punishing their failure to adhere to the refinements of the law because they are seen as morally reprehensible failures. Those that cause death through gross negligence understand the restrictions on their actions that are implemented by the standards of their profession and expressly state that they are capable of living up to them. This statement is made every time they perform a procedure

²⁶ E. Fruchtman (n 16) 332-333.

²⁷ E. Fruchtman (n 16) 333.

or particular act and when they perform a procedure without giving significant thought to the standards in place regulating their behaviour they are acting in a morally reprehensible way that should be criminally blameworthy.

Circularity

Further criticisms arise in regard to the test implemented to establish gross negligence manslaughter in relation to the supposed circularity of the test. The jury in these matters are asked to convict if they feel that the negligence is so 'gross' that it is worthy of criminal sanction. Effectively, the jury are asked to convict the accused of a crime if they believe that their behaviour was so bad that it should constitute a crime. Therefore, the test is often considered a circular one in which the jury decide what should be a crime as opposed to assessing whether the application of the law suggests the negligence in question was criminal.

Lord Mackay acknowledged in *Adomako* that the test does involve an element of circularity²⁸. The direction of the Lord Chief Justice in the case of *Bateman* appears to have directed the jury in a way that seems equally as circular as the modern day test that is applied. He stated that the jury must be of the opinion that the negligence in question went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime²⁹. Therefore, historically it would seem that negligent actions are determined to be criminal by the jury themselves and not the jury applying a set test to the circumstances before them.

Virgo argues that this circular reasoning is unsatisfactory as it provides the jury with an open invitation to find the Defendant guilty on the basis of their 'gut reaction'³⁰. The nature of

²⁸ *Adomako* (n 1) 186.

²⁹ *R v Bateman* (1925) 19 Cr App R 8, 11.

³⁰ G. Virgo, 'Reconstructing Manslaughter on Defective Foundations' [1995] 54 CLJ 14, 16.

gross negligence manslaughter, particularly in the medical context largely being considered, is that every time it arises there are going to be different circumstances to be taken into consideration. For example, every patient will be unique in that they will suffer from different illnesses and the circumstances that have brought them into the medical setting will inevitably be distinct from every other patient. Therefore, the reasonableness of the agent's actions will be dependent on the circumstances of each case.

As a result it would be impossible to lay down a rigid test for the jury to implement. In order for the law to produce decisions that are correct in the specific circumstances it must be flexible. Therefore, only the jury who have heard all the evidence in that given matter are in a position to truly judge whether the negligence was so 'gross' that it should be considered criminal. The test that is implemented must be flexible in order to respond to the variety of circumstances that must be taken into account in matters such as these. It allows the agent's actions to be put into perspective so that how morally reprehensible their actions were can clearly be seen. Therefore, the described 'circularity' of the test is in fact a way of ensuring that the test applied can take into consideration all the relevant information.

There is however a lack of guidance as to what a 'gross' breach of duty actually means. Juries are given no guidance as to what the definition of 'gross' is and it has been argued that this can give rise to inconsistent verdicts and levels of culpability in each case. Understandably, this suggestion creates concerns about whether each Defendant in these circumstances is treated equally to other Defendants. There can be no guarantee that the definition of 'gross' given in one case is as liberal as the definition given by a different jury in another.

A failure to give clear guidance when applying the test for gross negligence manslaughter is not something that is rare in this area of the law. In the case of *R v Adomako*, Lord Mackay

went as far as to say that it is “unwise” to give detailed directions to the jury that were too specific³¹. This problem is not restricted to unlawful killing as in the case of *R v Misra and Strivastava* Judge LJ noted that juries face ambiguous and undefined terms every day in their job as jurors. Some examples he provided were that of deciding if a defendant acted “dishonestly”, if someone acted in “reasonable self-defence” or if a driver’s standards fell far below that of a “competent and careful” driver³². Therefore, it is widely acknowledged that it is a challenging task to provide clear and definitive guidelines to juries.

It is argued here that this level of flexibility is necessary in the criminal law. The criminal law has to protect a society that is diverse. That diversity gives rise to a wide variety of situations and circumstances that have a bearing on whether an agent is morally and criminally culpable for their actions. Therefore, the tests applied to establish this culpability cannot be so rigid that they prohibit consideration being given to relevant factors. If that was the case the criminal law would not truly be able to separate the culpable from the innocent.

The law is always going to develop and change in order to adapt to modern society and advances made. A prime example can be seen when referring to the level of foresight required in murder cases to be able to infer intention. The level has changed from being “little short of overwhelming”, to “highly probable” and finally to “virtually certain” over the last forty years. This has resulted in change and unpredictability over this period of time. To an extent, inconsistency and unpredictability is something that comes hand in hand with the law due to its need to constantly evolve if it is to serve a purpose.

It was noted in chapter one that the term ‘gross’ is also subject to much debate amongst the Crown Prosecution Service and defendants themselves as it is not given a definitive

³¹ *Adomako* (n 1) 181.

³² *Misra and Strivastava* (n 3) 348.

definition³³. It is understandably difficult for them to understand what cases are worth attempting to prosecute and which are going to be considered matters of mere negligence not worthy of criminal punishment. However, this does not have to mean that Defendants are treated with a degree of inequality. 'Gross' being a liberal concept allows for each defendant to make their case and attempt to justify their actions in the circumstance. Because the test is not a rigid one with a prescribed definition it is possible for the law to react accordingly to the exact circumstances that will have determined the standard the said individual had to live up to. It is therefore arguable that the liberal nature of the test is a positive thing that ensures those who are morally culpable can be identified.

This circularity was eventually questioned in the case of *Misra* where it was argued that the gross negligence test applied was in breach of Articles 6 and 7 of the European Convention of Human Rights. It was held that the test was not in breach of the relevant Article 6 which requires individuals to be given a right to fair trial and Article 7 which prohibits criminal sanction for something that was not a crime at the time it was committed.

The result of implementing such uncertain tests is that it is difficult to predict the outcome of cases. Levels of culpability for the crime of gross negligence manslaughter can be at opposite ends of the spectrum. One jury may find a minor breach of duty resulting in death as sufficiently culpable to warrant punishment. Other juries may decide that in their opinion a major breach of duty is still not 'gross' enough to hold the individual responsible for the death.

Nonetheless, it must be remembered that the offence arises because a given standard has not been lived up to by the accused. What that standard is and how far below it the individual has fallen is entirely dependent on the exact circumstances and information that the agent had

³³ See discussion from page 14.

before them when making their decision to act in the way that they did. As a result, levels of culpability are naturally going to change from case to case and it would be impossible to create a set standard. Each case must be judged by the jury that hears all the relevant evidence and the only way to achieve this is to apply a flexible test.

Gross negligence manslaughter is distinct from murder and constructive manslaughter offences in that it is the circumstances in which the actions are taken that determine culpability as opposed to the nature of the action itself. For example, cases of murder and manslaughter always arise when a dangerous or violent act has taken place. However, in cases of gross negligence manslaughter, what is dangerous behaviour in one situation may not be dangerous in another. The circularity of the test actually creates fairness so that each case is judged on the exact circumstances from which it arises. For this reason, it seems unjustified to argue that the test implemented is defective.

Clearly, a failure to think on the part of someone who owes a duty of care is concerning. Those in a position of responsibility are trusted with the welfare of other individuals and therefore such a failure to live up to the standards required is worthy of criminal sanction. The only conceivable way to establish if someone has fallen so far below a standard expected of them that it should be criminal is to focus on the precise details of the scenario in which it arose. To set a rigid standard from which the jury were given a definitive definition of 'gross' would be for the law to make the decision for them without fair consideration given to those circumstances.

It is therefore argued that the liberal nature of the test is actually a positive element of the way the offence is dealt with by the criminal law. It gives those who have made a genuine mistake the opportunity to clearly make their case to the jury and the jury have the flexibility to make a common sense decision in light of all the necessary information. In addition, it

allows the jury to fully comprehend how far below the required level of competency the agent has fallen and allow the law to react correctly to the level of moral blameworthiness of that action. As a result, it is argued that the flexibility of the test allows fairness and that gross negligence should remain a criminal offence.

Reasonable Man Considerations

It is also necessary for the jury to bear in mind what the reasonable man would have done if he found himself in the agent's position. This test is also criticised by some legal commentators as it is suggested that it unfairly judges the agent for not having character traits he could not control. However it is argued here that the use of the reasonable man test is a positive and helpful tool when establishing criminal culpability for gross negligence manslaughter.

The reasonable man test provides the jury with the necessary information required to decide whether an agent has fallen grossly below the standards expected of him. In cases involving a duty of care there will inevitably be standards that the individual had to live up to. By using the reasonable man test juries are able to examine what those standards should have been and compare the actions of the offender with what they should have done. This is helpful as experts providing evidence are restricted from stating whether they feel the negligence was gross³⁴. Therefore, the reasonable man test allows juries to make informed decisions that are not just based on 'gut instinct' as some suggest.

For example, in the case of *R v Wacker* it was held that the reasonable man would have been a competent and experienced heavy goods vehicle driver carrying 60 people in the container pulled by the tractor he was driving³⁵. The objective test can give juries direction in decision

³⁴ O. Quick (n 24) 196.

³⁵ *Wacker* (n 5) 1212.

making as an expert witness would not have the liberty to suggest whether they felt that was a gross breach of duty. Therefore, the reasonable man test is paramount as it provides juries with the necessary information they need to make an assessment of whether conduct was gross without someone experienced in the area explicitly telling them it was. It allows for impartial and reasoned decision making to take place.

The reasonable man test is not problematic in cases where a standard of care has not been reached. This is because consideration for what the agent knew they should have done clearly informs the jury of the action the agent was claiming to be able to successfully perform. As a result, the test gives the jury a sense of perspective. This is especially important in cases of gross negligence manslaughter when the action that should have been taken in the given circumstances is likely to be monitored and regulated in a way that the jury are not familiar with. It is a useful tool that ensures the offender is protected from being seen to fall below the required standard because the bar has been set too high.

CONCLUDING THOUGHTS

Fruchtman notes that “our system of criminal justice can be said to rest ultimately on a single principle: *actus non facit reum, nisi mens sit rea* (the principle of *mens rea*)”³⁶. Gross negligence manslaughter appears to be no exception to this rule when it is being dealt with by the courts. The form of *mens rea* required is admittedly different than that which is commonly applied in criminal offences. The focus must be on whether the agent knew themselves to be acting below the required level of competency rather than whether they knew the harm that they were going to cause. However, this form of *mens rea* can still

³⁶ E. Fruchtman (n 16) 315.

indicate how morally blameworthy the agent's actions were and indicate whether they should be considered criminally culpable.

Manslaughter may be seen as a less severe offence than murder, however in exceptional cases the maximum sentence that can be issued is also that of life imprisonment³⁷. With this in mind, it seems paramount that the principles applied in order to establish culpability are effective in separating those who deserve to be punished from those who do not. The flexibility of the test that is applied in establishing whether the actions were 'gross' is an effective way of separating the morally culpable from an actor who cannot be said to be criminally to blame for his actions.

Gross negligence manslaughter is a unique offence in that it occurs in settings that the criminal law does not usually deal with. As a result, the test that is implemented to measure culpability for harm that occurs in these settings must be distinct from other offences. The criticisms that are aimed at the inclusion of the offence in the criminal law seem largely based on a failure to understand these exceptional circumstances in which the offence arises and the need for flexibility to be able to deal with these criminal breaches of duty.

It was identified in the previous chapter that the actions of the negligent wrongdoer in a position of responsibility and trust can cause harm. It was further noted that they are morally responsible for those acts. The legal test that is implemented to establish whether they should be considered criminally culpable seems to adequately reflect the scenario in which the offence arises. There is an appreciation for the focus on holding oneself out as competent, which is an appropriate way to enquire into an agent's mind in these circumstances.

Furthermore, the degree of flexibility implemented in the test is coupled with the use of the reasonable man test allows for fair outcomes. A jury must be able to fully appreciate the

³⁷ Although it should be noted that this is rare in cases of gross negligence manslaughter.

unique circumstances that gave rise to the offence which will directly impact on the agent's level of moral culpability. As a result, it would seem that the criminal law deals with establishing criminal culpability in cases of gross negligence manslaughter effectively. It is therefore concluded that on this basis there is no reason to suggest that it should no longer be a criminal offence.

CHAPTER THREE

THE JUSTIFICATIONS PROVIDED FOR THE INFLICTION OF PUNISHMENT

Having considered the justifications advanced for the punishment of gross negligence manslaughter it is now necessary to examine if the criminal law stands to achieve anything from implementing such punishment. Therefore, the following chapter will examine the many justifications that are advanced to justify punishment of grossly negligent behaviour that is considered to be criminally culpable. In light of these justifications it will be possible to assess whether punishing gross negligence manslaughter achieves anything and should remain a punishable offence on that ground.

INTRODUCTION

There is “radical” disagreement about the purpose of punishment and the justifications provided for its use among criminal justice theorists¹. However, establishing the general justifications provided by various theorists is paramount in creating an understanding of the role that it plays in society. It is necessary to be able to justify punishment due to the fact it violates fundamental freedoms of individuals which, without valid justification, is merely a breach of an individual’s rights². In addition, it is essential that the infliction of punishment is beneficial to both the offender and society for it to be fully vindicated.

The justifications offered for deciding that punishment may need to be inflicted were considered in chapters one and two. It was put forward that grossly negligent actions resulting in death made by an individual acting in a position of responsibility and trust were

¹ D. Husak, ‘*The Criminal Law as the Last Resort*’ (2004) 24 OJLS 207, 217.

² D. Husak (n 1) 211.

rightfully considered harmful and culpable choices made by the agent. However, recognising these actions as crimes and subjecting them to the interference of the criminal law is futile if we stand to achieve nothing from the inflicted punishment as direct victims or indirectly as a society. Therefore, it is necessary to establish that some benefit can come from inflicting punishment on those found guilty of gross negligence manslaughter before it is possible to confidently say its place in the criminal law should remain.

Definition of Punishment

Firstly, it is necessary to consider what is implied when we refer to ‘punishment’ before in depth discussion can take place. On the whole, there is a lack of consensus when trying to define punishment. Lacey is of the opinion that many of the discrepancies found between theories of criminal justice are due to the fact that commentators do not all work with the same definition of punishment³. Despite these difficulties, it is possible to highlight the features that punishment tends to contain.

On a basic level, Hart claims that punishment is “to announce to society that these actions are not to be done and to secure that fewer of them are done”⁴. Therefore, punishment acts as a means of publically announcing what behaviour is forbidden by the state. In this sense, punishment involves some form of public declaration to the citizens of the state in which it is being enforced.

More complex definitions of punishment note it as being the state’s implementation of unpleasant consequences on an offender in relation to their criminal offence⁵. Although this

³ N. Lacey, *State Punishment – Political Principles and Community Values* (Routledge 1994) 4.

⁴ H.L.A Hart, *Prolegomenon to the Principles of Punishment* in *Punishment and Responsibility* (London 1968) 6.

⁵ N. Lacey (n 3) 7.

seems like quite an acceptable definition, many commentators disagree with it. Lacey feels that punishment should be seen as the

...principled infliction by a state-constituted institution of what are generally regarded as unpleasant consequences upon individuals or groups adjudicated, in accordance with publically and legally recognised criteria and procedures, correctly applied, to have breached the law, as a response to that breach, as an enforcement of the law and where that response is not inflicted solely as a means of providing compensation for harm caused by the offence⁶.

However, this definition provided by Lacey does raise some problems. It can be said that Lacey fails to note whether punishment must be seen as unpleasant to the offender or to society as a whole. If unpleasantness is a major part of punishment it needs further clarification. Without this clarification it is hard to establish if the consequences inflicted upon an offender have to be considered unpleasant by them, and therefore tailored to their opinions, or just unpleasant to the majority of citizens.

Further problems arise with the definition in regard to the necessary level of culpability needed to find the offender blameworthy enough for punishment. Lacey criticises traditional definitions of punishment for lacking a distinction between intentional, reckless, negligent and accidental acts as an indication of the level of punishment deserved. However, it can be said that her definition of punishment also fails in this regard. Therefore, it seems that definitions of punishment provided tend to lack the vital element of being able to link the severity of the offence with the punishment inflicted, which was one of the criticisms discussed in the previous chapter concerning the harm principle⁷.

⁶ N. Lacey (n 3) 11-12.

⁷ See discussion at page 13 onwards.

The definition of punishment is therefore a broad and debated area, which could dominate discussion itself. Thus, for clarity here it will generally be accepted that punishment is the infliction of unpleasant consequences upon an offender who has committed a crime. The unpleasant consequence inflicted should be considered one that is proportionate to the severity of the crime.

RETRIBUTION

Retribution advocates the concept of desert as a satisfactory justification for punishment. Plainly speaking, it holds that the infliction of punishment is justified because the offender 'deserves' it. Herring notes that retributivists feel it is "good in and of itself to punish regardless of any consequences of the punishment"⁸. The infliction of punishment under this theory is commonly considered as giving the offender their "just deserts" as a consequence of the crime they have committed. Any additional positives that may come from punishment are merely a bonus to those who justify punishment from the retributivist position⁹.

Voluntary Actions

At the heart of the retributivist justification of punishment is free will. Punishment can only be justified for retributivists if an individual has committed an offence voluntarily, freely choosing to act in the way they have. It is this that provides the basis for desert. Theoretically the individual has chosen to commit an offence and consequentially they deserve the punishment that society has decided to inflict on those who commit that particular criminal offence.

⁸ J. Herring, *'Criminal Law –Text, Cases and Materials'* (4th edition, OUP 2010) 65-66.

⁹ I. Kant, *'The Metaphysical Elements of Justice'* (Bobbs –Merrill Indianapolis 1965) 100.

It has previously been discussed that it is possible to argue that those who commit gross negligence manslaughter have demonstrated a lack of care and therefore their actions are morally blameworthy¹⁰. It is necessary to focus on the argument that is being advanced in the previous chapter, namely that the agent has failed to demonstrate a sufficient level of competency, contrary to his claims, and this should be seen as a morally culpable action. If that argument is accepted as illustrating that the medical professional is criminally responsible for the action that resulted in harm, then they should be punished under the retributivist theory as it is arguably what they 'deserve.'

It is the fact that offences such as constructive manslaughter and murder have been committed voluntarily and freely that make society comfortable with punishing them. It is argued that it is the belief that negligent actions are not voluntary actions that makes society question whether they are comfortable punishing them. Hart has previously argued that negligent actions are still voluntary because they are mistakes making them distinct from involuntary acts¹¹. What separates the voluntary actions, in regards to levels of culpability, is whether the outcome is additionally voluntary. The initial act that leads to a charge of gross negligence manslaughter is just as deserving of some form of punishment under the theory as the acts of murder or constructive manslaughter as they do not show inadvertence but instead a lack of care.

Medical professionals, and other individual's acting in a position where they are responsible for making decisions that could impact on another individual, are trained to be aware of the legal implications of acting outside of their level of competence or falling below the standards that are set for them to adhere to. Therefore they know that their failure to act in

¹⁰ See discussion from page 24 and 30.

¹¹ H.L.A Hart (n 4) 97.

line with those standards is wrong and could result in harm, and fail to appreciate that this should prevent them from performing the said action. This is no different than a thief who knows that it is legally prohibited to steal from a shop and that the shopkeeper will suffer harm in the loss of money as a result, but still acts below the standard that society expects of him.

Both actors are subject to a set of standards that they must adhere to, whether that is standards of care delivered to a patient or the law. Both actors know that the implications of not adhering to those set standards are that others may be potentially harmed. A patient may be fatally injured or may go unscathed and the shopkeeper may realise his loss and be harmed or never notice that something has been taken. Both actors are in the same position theoretically and society is happy to agree that the decision of the thief to steal is a morally culpable one whether the shopkeeper is ever actually harmed or not. The grossly negligent offender is no different in that he falls below the standards that are expected of him and fails acknowledge the harm the failure to adhere to them may cause. Therefore, the punishment of gross negligent manslaughter should be seen as being just as justifiable as the punishment of theft on this basis.

However, one has to question if the retributivist view is somewhat dated causing it to no longer offer satisfactory reasoning for a modern society. Packer comments that the law still remains full of references to retributivist justifications. We still use phrases such as “paying a debt to society” and an offender “getting what is coming to him”¹² when we talk of inflicting punishment. It was noted in the previous chapter that there appears to be an increasing desire to bring complacent professionals to justice and give them the punishment they deserve¹³.

¹² H.L. Packer, *The Limits of Criminal Sanction* (OUP 1969) 10.

However, it was also noted that statistics suggests there is a degree of sympathy from juries for professionals who find themselves in the dock¹⁴. Therefore, it could be suggested that when it actually comes to practice few people genuinely believe that those acting in a professional position who find themselves in the dock for gross negligence manslaughter 'deserve' to be punished. Those who have failed to carry out their professional duties to a satisfactory level are not the usual criminals that you find standing in a dock. The belief that they were intending to fulfil their duties but failed to adhere to a set of standards or level of competency arguably gives the impression that even if you would be justified in inflicting punishment on them for the harm they are responsible for causing, there is a feeling that it is not deserved.

Culpability as a Justification for Punishment

Retributivists argue that it is permissible to punish an agent purely on the basis that they are responsible for causing the harm inflicted on the victim. The retributivist position justifies why *some form* of punishment should be inflicted on the agent. However, it fails to provide a reason why any *particular form* of punishment should be inflicted. It is arguable that those who have killed someone by a grossly negligent act are responsible and should face some form of punishment. However, the retributivist theory fails to explain what can be gained from punishing the grossly negligent individual in the way that the criminal law does decide to punish them.

For example, imagine if A threw a cricket ball against a glass window knowing it would break. It is easy to see that A is culpable for the damage done, but that does not provide a justification for taking away A's ball. We would further need to explain that taking the ball away is his punishment because it prevents him from being able to commit that same harm to

¹⁴ See discussion at page 30.

someone's property easily again. Retributivism does not appreciate this vital distinction. As a result the theory tells society little about what it can gain from punishing grossly negligent actions or criminal actions in general. If there is nothing obvious to gain from the punishment of the offence it is arguable that we should not criminalise it at all.

For retributivists culpability for an act is equated with blameworthiness and blameworthiness is equated with punishment-worthiness¹⁵. It was noted in the previous chapter that the reason the law seeks out those who are culpable for harm caused is to protect society from future harm and is therefore a benefit to every member of the community¹⁶. However, the sole justification that punishment is 'deserved' makes it impossible to know if we stand to gain anything at all from inflicting punishment on the grossly negligent agent.

The Problem with Desert Based Principles

One of the main criticisms of the retributivist approach is that it is a backward-looking theory, justifying punishment on the past conduct of the offender¹⁷. This feature distinguishes retributivism from other theories that tend to focus on the impact punishment can have on future conduct as well. Focusing on past conduct limits the justifications retributivists can provide for the infliction of punishment as they only see good arising from chastisement as a bonus. Punishment based on desert does not justify itself on the grounds of any good that arises from it. Consequentially, it is often argued that punishment on this basis actually does very little to benefit society.

¹⁵ N. Lacey (n 3) 18.

¹⁶ See discussion at page 30.

¹⁷ A. Von Hirsch, '*Doing Justice – The Choice of Punishments*' Report to the Committee for the Study of Incarceration (1976) 45.

However, the focus on the past conduct of the agent supports the punishment of negligent mistakes that have been established as being morally blameworthy. The nature of gross negligence is that the agent has failed to live up to a required standard or perform to the level of competence demanded. Failing to do that once is likely to prohibit them from being a future threat and someone who needs rehabilitating in the way forward-looking theories aim to.

For example, imagine a grossly negligent scaffolder, whose duties were to ensure that scaffolding was put up safely on a building site, fails to adhere to safety guidelines he should have followed and a colleague is killed as a result of his grossly negligent actions. That individual is unlikely to be able to perform the same role, and consequentially cause the same harm again, due to the fact that he has identified himself as an individual unable to live up to those given standards. As a result, if punishment is ever going to be justified in these scenarios the focus would arguably have to be on the blameworthy action done in the past and not what future good could come from their punishment.

Lewis argues that a desert based theory provides a strong link between an offence and the punishment received¹⁸. Theories that base their justification of punishment on the future good that will arise from it have a tendency to become preoccupied with the future impact of punishment and can pay little attention to the severity of the harm caused and the level of culpability as a means of measuring how we should react. As a result, forward-looking theories can result in inconsistent sentencing.

It was noted in the previous chapter that the agent holding themselves out as competent is what places the medical professional in a position to cause the said harm¹⁹. However, the fact

¹⁸ C.S Lewis, '*The Humanitarian Theory of Punishment*' (1953) VI Res Judicata 224.

¹⁹ See discussion at page 34.

they are acting in a regulated setting means that once they have caused the said harm they are unlikely to ever be able to return to that position again as they have illustrated their incompetence in the highest degree. Therefore, society arguably stands to gain little from inflicting punishment in an attempt to rehabilitate them. The justification of their punishment on the basis that it is deserved as a result of their failure to meet standards they claimed they could reach means they will be prevented from causing harm in the same setting again, which protects society from future harm.

The Two Strands of the Desert Based Principle

Further benefits of the retributivist position can also be found when looking at the two strands of the desert principle that are offered to justify punishment. Clarkson and Keating argue that there are two different roles that desert can still play even if it does not look to the future impact it may have as a justification. Primarily, desert can be seen as eliminating the unfair advantage that an individual has acquired from crime²⁰. Secondly, Von Hirsch argues that punishment restores the equilibrium that has been violated by the offender between them and their victim²¹.

Arguably, the agent in these cases had the advantage of control over the patient or situation in question that was acquired through holding themselves out as a competent professional in their given field²². The wrong use of that control and the harm that resulted from it is the cause of the damage to the equilibrium that was in place. If that was not punished then the said professional could continue to enjoy the increased control that they have acting in that position without ever being questioned. As a result, the punishment of gross negligence under

²⁰ Clarkson and Keating, '*Criminal Law*' (7th edition, Sweet and Maxwell 2010) 27.

²¹ A. Von Hirsch (n 17) 47.

²² See discussion at page 34.

the retributivist theory has something to offer society to make it worthwhile as this equilibrium can be corrected.

Some argue that offenders guilty of gross negligence manslaughter are not deserving of punishment as they have not intended to upset the equilibrium present between them and the victim. This argument rests on the fact that those guilty of gross negligence manslaughter are only seen to possess a guilty mind on an objective level as opposed to most other offences of such a serious nature, such as murder or constructive manslaughter. Those who possess a subjective intention or foresight have a realisation that their act is likely to upset the equilibrium or was dangerous enough to. However, some suggest that the objective *mens rea* needed in cases of gross negligence manslaughter suggests that the offender had no knowledge that the equilibrium was going to be disturbed. Thus, they could not have prevented it happening and as a result are not deserving of punishment.

However, this can be argued against as in cases of gross negligence manslaughter the offender has a duty of care to uphold. This duty means that the rights of the victim have been relinquished to the care of the offender purely on the basis that they have put themselves in a position to perform that duty. Therefore, the equilibrium is arguably in their hands to a greater degree than in cases of murder or constructive manslaughter. The negligent offender should have done more to protect those rights as they should have recognised they had a duty to uphold. Thus, actions that upset the equilibrium between the offender and the victim when a duty of care is present could be seen to be even more severe and deserving of punishment.

For example, in the case of *R v Adomako*²³, the patient had consented to an operation which involved him being unconscious, leaving his safety in the hands of those medical professionals involved. The equilibrium was therefore controlled entirely by the medical

²³ [1995] 1 AC 171 (HL).

professionals concerned in this case. This is distinct from a case of murder for example where the victim may have the opportunity to fight back. When Adomako failed to realise that the patient's ventilator had been disconnected he was responsible for disturbing the equilibrium that had been put entirely into his control. No one else can be blamed for the disturbing of the equilibrium other than the negligent actor and therefore they are deserving of punishment.

Similar arguments can be made in relation to desert based principles aiming to remove the unfair advantage the offender has gained. The grossly negligent medical professional has not gained anything in the way that a mugger has gained the money in your purse. However, they are free to continue acting incompetently while someone has been gravely harmed at their hands. This is obviously an advantage over the position that the victim is in and therefore, focusing punishment on removing this unfair advantage suggests we have something to gain from the punishment of the offence committed in a medical setting.

In addition to the above, desert based justifications can also act as censure or denunciation²⁴. Feinberg notes that "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation"²⁵. Punishing the grossly negligent actions of those in positions of control sends out a strong message. Control over the wellbeing of others is a significant burden to carry and should not be done so lightly. It is paramount that as a society we are able to trust in those who have positions of power. A warning clearly has to be given to those who abuse it by failing to take their duty as seriously as they should. Therefore, the retributivist theory of punishment suggests there are gains to be made from inflicting punishment on those who commit this offence.

²⁴ Clarkson and Keating (n 20) 27.

²⁵ J. Feinberg, 'The Expressive Function of Punishment' (1963) Volume 49, Number 3, The Monist 397.

Vengeance

There is the further retributivist argument that punishment is justified because it satisfies a desire that victims and society have for vengeance. This actually appears to be quite a positive argument that works to support the desert based principle. It is arguable that even minimal punishment that is considered too lenient provides some form of vengeance for victims of crime, and society as a whole. Court cases and sentencing can direct a victim's focus from their own personal desire for vengeance to the way in which the law can provide it.

As was discussed in chapter one, the victim of gross negligence manslaughter has had their interests set-back in the most significant way possible²⁶. The impact of that stretches beyond the individual to their family and society as a whole due to the erosion of trust it can create in the healthcare system and vital establishments in society. Those who are in positions of control have effectively abused those who rely on their services through their incorrect claim that they are competent. The risk that poses clearly creates a desire for vengeance in society and therefore, the justifications offered by the retributivist position suggest we stand to gain from the punishment of gross negligence manslaughter.

It would seem that deaths caused negligently have a very similar impact on society as deaths caused intentionally. Someone who commits an intentional murder harms their victim and if not caught and reprimanded can create an element of distrust in society's ability to protect individuals. A failure to capture and punish someone guilty of murder can create an element of distrust in the police authorities and the protection that they offer. This is similar to the impact caused by someone found guilty of gross negligence manslaughter. For example, a

²⁶ See discussion from page 7.

doctor who causes death through negligence has harmed his victim and if they do not face any repercussions their behaviour will create an element of distrust in the medical system.

Authorities need to be seen as though they implement punishment for wrongdoing in order to be trusted. It appears to be the case that negligent offenders threaten the authority of major pillars of society, such as the healthcare system, education system or even construction services. This is not entirely dissimilar from those who cause death intentionally or recklessly who threaten the authority of the police. In this respect utilitarian theories that hold offenders responsible on such a large scale can still be fairly applied to those guilty of gross negligence manslaughter.

Expiation

Clarkson and Keating also note that retributivism justifies punishment by stating that the “offender must be made to work off their guilt; they must be purified through suffering”²⁷. They argue that this approach is derived from religious origins about purging of sins and new found developments in psychology. Psychology puts emphasis on mentally suffering due to guilt as opposed to just physically²⁸. Therefore, the offender should be made to repent psychologically and understand the implications of their criminal actions on others as opposed to go through the motions of incarceration or paying a fine for example.

Effectively, the punishment that the individual receives acts as a way of reassuring society that they will be made to be apologetic for their mistake. Von Hirsch and Ashworth argue that the apology that the victim and society receives is in many ways worthless. This is due to the fact that it is a forced apology that they only symbolically offer by going through

²⁷ Clarkson and Keating (n 20) 24.

²⁸ Clarkson and Keating (n 20) 24.

punishment and provides no guarantee that they actually repent²⁹. However, it is an apology nonetheless to a society and family that will be demanding answers. It will have some impact on their life and therefore suggests they should be punished.

On the whole, those who commit gross negligence manslaughter pose a threat to society as a result of their morally blameworthy actions. The justifications advanced by retributivists that support why we should punish crimes generally are applicable to those who had committed the crime of gross negligence manslaughter. Society appears to benefit from them being punished for their behaviour and therefore it is arguable that it is right to punish them criminally.

UTILITARIANISM

Utilitarianism takes a different approach to justifying punishment than retributivism. Instead of focusing on past conduct, utilitarians justify the infliction of punishment by emphasising the important impact it can have on future behaviour. Therefore, justification for the infliction of punishment under a utilitarian concept is twofold. Primarily, it suggests that punishment of an offender has a positive impact in that it contributes to society after it has been inflicted and secondly the offender can be positively impacted upon. Thus, the emphasis of the justification remains on looking to the future as opposed to being consumed with the wrongful action that took place in the past. Effectively punishment is seen as a tool that can be used to deter members of society from breaching the law in the future and can incapacitate and rehabilitate those who do to prevent further harm.

²⁹ A. Von Hirsch and A. Ashworth, *'Proportionate Sentencing'* (2003) 94.

The Means to an End Problem

The positive outcomes that utilitarian theories put forward as justifications for inflicting punishment have been subject to an array of criticisms by commentators. Some have argued that achieving deterrence and reducing crime through rehabilitation and incapacitation uses people as a means to an end³⁰. Offenders are used as an example and mechanism for achieving social goals and a healthier community for the future. The focus is placed on achieving good for society as opposed to respecting the guilty agent's rights and dignity. However, the infliction of the punishment is justified under the theory as it is claimed that it protects society from suffering future harm.

As was discussed in chapter one, gross negligence manslaughter impacts on society in that it erodes trust in the profession in which they are working³¹. The implications of that are widespread as it can result in an erosion of trust in establishments of authority that underpin the running of society. The punishment of individuals who are guilty of that gives a clear message to those acting in similar positions that greater care should be taken and more thought should be given to the level of competency they believe they are capable of achieving. This effectively means that punishment of gross negligent manslaughter has the potential to have a deterrent effect. It is in society's interests and those using professional services that these offences are eradicated as far as possible. Therefore, under utilitarian theories of justice it is also worthwhile for society to punish the offence.

Interfering with Dominion

Supporters of the utilitarian approach would argue that they do not believe in punishment for punishment's sake. Braithwaite and Pettit note that the purpose of punishment under the

³⁰ Dealt with in detail below.

³¹ See page 33 for discussion.

theory is to maximise the concept they refer to as 'dominion' which refers to an individual's ability to maintain control over their life and minimise unpredictable interference³². Therefore, the argument advanced by utilitarianism is that the offender has interfered with the victim's dominion and as a result has to answer to the law for this interference.

Braithwaite and Pettit feel that crime violates dominion in two ways. Primarily, it attacks the dominion of the victim either partially or entirely and secondly, it also attacks the dominion of those not directly affected as it reduces the sense of control they have over their lives³³. Therefore, in some ways utilitarians justify punishment in a backward looking way, as retributivists do, looking at the past harm that has been caused to justify the infliction of unpleasant consequences.

The dominion argument is similar to the one advanced in chapter one regarding the control that the agent acting in a position of trust and responsibility had over the life of the victim³⁴. People who rely on any professional or specialised service are required to relinquish control over to those claiming to be able to act in that position. For example, in the medical setting considered the individual must be confident that their best interests will be protected and cared for. The medical professional holding themselves out as someone capable of doing this therefore acquires complete control over the fate of the individual. When they fail to exercise this control with due care and attention to the levels expected of them they act way that could potentially interfere with that individual's life in a negative way.

Under the utilitarian theory of punishment the state has a right to intervene when dominion is violated. This is because it is in the interests of everyone individually, and the community as

³² Braithwaite and Pettit, *'Not Just Deserts'* (Claredon Press 1990) 45.

³³ Braithwaite and Pettitt (n 32) 47.

³⁴ See discussion at page 27.

a whole, that people are able to retain control over their lives. The harm caused by grossly negligent individuals violates this principle. Therefore, it can be argued that preventing this kind of harm from happening as much as possible through deterrence and incapacitation is a worthwhile cause that justifies the punishment of gross negligence manslaughter.

Disproportionate Sentencing

Forward-looking theories that justify punishment on the basis of the impact it can have on future behaviour can raise problems in regard to disproportionate sentencing. Sentencing tends not to be measured according to the level of the offender's culpability alone. Instead there is a temptation to give lengthier sentences, in order to achieve future goals, that are just not justifiable when compared to the severity of the offence. This weak link between the offence and the punishment issued can make the penalties applied seem inconsistent and unpredictable.

When deterrence of future crime is the primary justification for inflicting punishment it is easy to see how this problem can arise. For example, imagine if there had been a rapid increase in people caught selling pirate DVDs in the West Midlands. Those previously caught may only receive the minimum sentence until it is noted by authorities that there continues to be a rise. In the name of deterrence this would urge the judge to issue a higher sentence for the next individual caught, treating them unequally compared to others caught. Utilitarianism justifications for punishment allow factors such as bad timing and region to determine sentencing in some cases.

However, Lacey has noted that forward-looking theories that operate in this way can be positive because it is possible to measure how effective they are at deterring crimes of a

similar nature³⁵. If there is a marked decrease in a particular type of crime in a certain area after an individual has been made an example of then it can be suggested that punishment is actually serving a purpose. This can arguably indicate what type of punishment is effective and reduce the risk of issuing sentences that are effectively futile.

Cases of gross negligence manslaughter arguably come to the attention of the public a great deal. A professional person accused of being a criminal is something that is not reported very often. When it does happen society and the profession in which the agent was working have it drawn to their attention. Therefore, punishing these offences can have a deterrent effect purely on the basis that so many people will be made aware of the penalty that has been imposed. If this is the case and it can be seen that punishment of the offence results in a decrease in its commission then society stands to gain. As a result, we are right to punish it.

It is easy to understand why some argue that justifying the implementation of punishment on the grounds of deterrence is problematic. In theory it can result in overly excessive sentences being implemented in order to ensure the message that society will not accept that type of harm being caused is received. However, judges and courts cannot make their own laws. There are sentencing guidelines that must be adhered to and gross negligence manslaughter is no exception. There are mechanisms that are in place that can ensure this does not happen. Even proportionate sentences make a clear statement that the behaviour is not accepted. Therefore, the value that can be gained from punishing the offence far outweighs the risk of excessively punishing it.

Educative deterrence can act to inform the community as a whole of the repercussions of crime. However, the success of such an aim is going to depend entirely on the audience. Those who are responsive to its message may make it seem like a justifiable aim. Evidence

³⁵ N. Lacey (n 3) 28.

suggests those effected by deterrent messages are people who are unlikely to commit crimes anyway and those inclined to commit crime are groups that are less likely to think of consequences³⁶. With this in mind, it is arguable that the offender is punished as a means of deterring others when that deterrent message is unlikely to have an impact.

However, gross negligence manslaughter is arguably more immune to this problem than other offences. This is on the basis that it takes place amongst a very small and unique community of professionals who are all in a position where they could make the same mistake. Therefore they are more receptive to the message the law has to give as if they made a similar mistake they could find themselves in a similar position. The deterrent impact of punishing other crimes is limited because the vast majority of people in society know that they would never put themselves in a position to rob a bank or steal a car for example. Therefore, the deterrent message being given is irrelevant because they would not be tempted to commit the offence anyway.

Some would argue that the deterrent effect of punishing gross negligence manslaughter is limited as a result of it taking place in such a small community. Arguably therefore, the only people who are likely to be deterred are those acting in the capacity in which the guilty agent was working. Society as a whole is unlikely to be in a similar position of control, responsibility and trust. Therefore, seeing a construction worker prosecuted for a mistake they made in that given context is unlikely to impact on the way in which they conduct themselves. Whereas, the punishment of speeding is likely to have a deterrent impact on general members of the public because they could potentially be in that position.

³⁶ P. Robinson and J.M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 OJLS 173, 179.

Arguments such as this highlight the deterrent impact of punishing gross negligence manslaughter is limited to the professional area in which it arose. For example, the punishment of the scenario in *R v Misra and Strivastava*³⁷ is unlikely to have had a very deterrent impact on society as a whole. The majority of people will never work in a hospital performing the duties Misra and Strivastava did, so the case being brought to light will be irrelevant to them. In addition, the evidence brought to trial in the case of *Misra and Strivastava* highlighted that a third year medical student would have been expected to identify the infection the victim had³⁸. Therefore, punishment of such an offence is mainly going to target those working within that profession who fall far below the standard expected of them as a result of the negligence needing to be 'gross'.

The professions in which gross negligence manslaughter can often occur make up a very small percentage of society. Therefore, when a member of that given community is convicted and punished for failing to live up to a set of standards it is bound to have a more powerful impact on that community. The punishment of an individual who is in a similar position stands as a striking message that incompetence is something that is not tolerated and is easily identifiable amongst a small group of people that make up that profession in comparison to the whole of society.

Those found guilty of gross negligence manslaughter stand as a reminder that anyone working in that given profession could cause the said harm if they fail to be attentive enough. The nature of the offence means that those found guilty of it are put in a position daily where they have to make decisions that, if conducted incorrectly, could result in them causing extreme harm. Therefore, messages to be received from the punishment of individuals who

³⁷ [2005] 1 Cr. App. R 21 (CA).

³⁸ *Misra and Strivastava* (n 37) 334.

have committed the offence are more likely to be received and taken on board. As a result, there is a lot more to be gained from its punishment than may initially be thought.

Robinson and Darley believe that career criminals rate their ability to go undetected far higher than others would and therefore never consider being caught as a risk³⁹. If those who we are attempting to deter rate their chances of being caught at zero, they are never going to respond to examples they have seen made through punishment. However, gross negligence manslaughter is unique in that those working in a position of responsibility and trust are aware that the duty they have to live up to could be breached if they fail to be as attentive as they should be. They are unlikely to rate their chances of going undetected as zero because when a death occurs at their hands it is likely that questions are going to be asked. As a result, making an example of individuals who have got it wrong is inevitably going to resound with them.

As Andenaes notes the “criminal law does not operate in a cultural vacuum. The functions and importance vary radically according to the kind of society which they serve”⁴⁰. If the criminal law is going to punish gross negligence manslaughter it has to be sure that the rewards of doing that serve the microcosm in which they occur. It seems that theoretically the aim of deterrence is likely to have an impact of those who perform within a given profession which gives rise to positions of responsibility and trust. If the aim of deterrence is successful when criminalising the actions of those convicted of gross negligent manslaughter then there is a lot of benefits to be gained and we should continue to criminalise it.

³⁹ P. Robinson and J.M Darley (n 36) 185.

⁴⁰ J. Andenaes, ‘*The General Preventative Effects of Punishment*’ (1966) 114 U.Pa.L.Rev 949, 950.

Incapacitation

Other branches of utilitarianism put forth the justification of incapacitation as opposed to deterrence. In the case of *R v Sargent*⁴¹ Lawton LJ acknowledged that for some offenders deterrence is not effective and the only solution is to “lock them up”, removing their ability to go on and commit more crimes. The main criticism advanced towards this aim is that the sentence issued to the offender is likely to be longer than is usually issued for the crime in question because punishment has failed to deter them in the past. Once again, offenders are used as a means to an end in order to benefit society as a whole.

Incapacitation as an aim also relies heavily on making predictions about how dangerous the recidivist is, or how likely they are to commit an offence again in the future. No one can ever be sure how an individual will react to a course of punishment, and there is nothing to say that their reaction the fourth time round will not be different to the first three times. Predicting the likelihood of someone reoffending is not an exact science and at times is likely to result in far lengthier sentencing than is necessarily justified.

The aim of incapacitation is preventing the individual from causing the same harm again. The conventional way that this is achieved is through imprisoning an offender. However, this is not the only way that an individual can be prevented from committing an offence like gross negligence manslaughter again and effectively be incapacitated. The grossly negligent offender has committed the crime because they have the opportunity to do so in the given setting as a direct result of their declaration that they are competent and capable. Once they are found guilty in a court of law of the offence they are unlikely to ever be able to have the opportunity to practice and commit the offence again. Effectively, the punishment for

⁴¹ [1975] 66 Cr App 74 (CA).

conviction is removing the opportunity to ever be in that situation again. As a result, even those who are not subjected to a prison sentence are incapacitated.

It is the criminal conviction that marks the said agent out as someone who truly could not live up to the standards demanded of him. It is that conviction that triggers their punishment and the need for society to appropriately deal with them. The most effective way for the criminal justice system to protect society is to incapacitate them through attaching a criminal stigma that will prevent them from practicing again. The punishment of the offence under this ground seems more than justifiable as a way of protecting society.

Lacey notes that in order to incapacitate someone it is necessary to judge the agent according to their actions and their character⁴². This approach to punishment puts a lot of focus on the scenario in which the crime occurred and the nature of the individual that committed it as this is the only way the law can truly establish how best to incapacitate them. As was discussed in chapter one their actions are their own and not determined by matters that are out of their control⁴³. When punishment is based on these principles it can be truly effective and is implemented as a direct response to the guilty individual. If the punishment is effective in preventing the individual committing the same offence then it is worth punishing.

Packer suggests that punishment based on incapacitation seems to show no connection at all to the offence committed and as a result it is not possible to inflict a proportionate sentence⁴⁴. However, it seems that the polar opposite of this is true when incapacitation is the focus of punishment. To know how to incapacitate an individual attention must be paid to the exact circumstances in which the offence took place and the characteristics of the offender so the

⁴² N. Lacey (n 3) 68.

⁴³ See discussion at page 32.

⁴⁴ H.L. Packer (n 12) 49.

right form of incapacitation can be implemented. Punishing gross negligence manslaughter on the grounds of incapacitation appears to tailor the punishment so that future harm to society can be prevented. If that can be achieved it seems logical that we continue to punish it.

Note should be given to the argument that gross negligence manslaughter offenders could potentially be more dangerous than intentional or reckless offenders. Because gross negligence manslaughter needs no subjective *mens rea* to prove the guilt of the actor, the legal system is dealing with an individual that they know nothing about in regard to their mind-set. In relation to cases of murder and unlawful act manslaughter you have an insight into the mind of the offender and can use that to assess how dangerous the actor is. There is the potential that the grossly negligently offender thinks in a way that is more dangerous than one may initially consider and needs to be incapacitated. The possibility that this may occur could give the use of incapacitation as a justification some standing.

Incapacitation could potentially work for gross negligence manslaughter on the basis that we do not know how dangerous an offender is because we have had no subjective insight into their mind-set. If it was possible to establish the subjective *mens rea* of someone guilty of gross negligence manslaughter it would be possible to assess how dangerous they are to society. Although information of this nature can be considered if it arises, it is never sought after in evidence. When it does arise it gives a clearer understanding of how dangerous someone is. For example, in *Wacker* Mr Wacker was someone who had a criminal mind as he was willing to illegally smuggle sixty immigrants into the UK. The gross negligence manslaughter was just a hideous by-product of that behaviour. However, for actors such as Misra and Strivastava there is no indication that they possessed a dangerous criminal mind.

Wilson has argued that punishment on the grounds of incapacitation is futile because it merely stores up problems for the future when the convicted individual is released⁴⁵. This may be true in regard to the vast majority of crimes. For example, a convicted thief will be presented with countless opportunities to commit the offence again upon release despite being incapacitated for a time. However, gross negligence manslaughter is different because conviction will prevent that individual ever acting in the same position of responsibility and trust again as a result of the fact that they have indicated that they are not competent to perform the role. As a result, incapacitation can truly solve the problem of an individual who has failed to live up to very important standards and can serve a purpose. On these grounds the offence is worth punishing.

Rehabilitation

Other utilitarians justify punishment by aiming to rehabilitate those people found guilty of criminal acts. Rehabilitation is commonly seen among commentators to be one of the more ambitious aims of punishment. The aim is theoretically to “secure conformity not through fear (which is the more limited object of deterrence) but through some inner positive motivation on the part of the individual”⁴⁶. Succinctly, the aim is to alter the convicted offender’s desire to commit crimes in the future.

Moore argues that there are two main aims of rehabilitation in a theory of punishment. Primarily, it means that criminals are educated in a way that makes them safe to return to the streets. This has a positive effect on society that is now protected from being harmed further by their behaviour⁴⁷. Secondly, there are also paternalistic reasons behind seeking to

⁴⁵ W. Wilson, ‘*Central Issues in Criminal Theory*’ (Hart Publishing, 2002) 53-54.

⁴⁶ Clarkson and Keating (n 20) 42.

⁴⁷ M. Moore, ‘*Placing Blame*’ (Clarendon Press Oxford, 1997) 85.

rehabilitate individuals. It means that the offender can be returned to society where they can live a flourishing and fulfilled life⁴⁸.

It is arguable that through punishing those convicted of gross negligent manslaughter it is possible to rehabilitate them. It was noted in chapter one that gross negligence manslaughter is a result based offence and therefore can go undetected⁴⁹. If undetected the agent is free to go on and continue to commit further offences. However, punishing those who are found to have committed such offences when they are detected will mark out that individual as someone capable of making such mistakes in that given role. As a result, they are unlikely to ever be employed to work as a medical professional again and will have their incompetence drawn to their attention.

On the other hand, failure to punish those who are detected and found guilty means that the perpetrator can fail to comprehend the consequences of their actions. There is also a failure to truly draw attention to their level of incompetence to the establishment that would employ them and this provides an opportunity for the same mistakes to be made in the future. Failure to punish individuals who have killed another through gross negligence gives the message that the law does not take what they have done seriously. As a result, in the mind of the offender and those likely to employ him he has not made a grave mistake and could be put in similar positions again where the same could happen. Punishment can effectively deter an individual in the context we are concerned with.

Commentators have suggested that inflicting punishment in order to rehabilitate can lead to sentencing that is overly excessive⁵⁰. This is on the basis that the punishment can be linked to

⁴⁸ M. Moore (n 47) 85.

⁴⁹ See discussion at page 16.

⁵⁰ Clarkson and Keating (n 20) 43.

the future goal of deterrence as opposed to the blameworthiness of their act. This appears to be something that can be successfully argued when concerned with crimes committed in the general public. Everyday criminals have the opportunity to commit similar crimes upon release at any point and therefore the action taken to rehabilitate them and adjust their mind-set has to be drastic. A lifestyle alteration must take place and this can mean that punishment has to be excessive in order to achieve that.

Nevertheless, someone convicted of gross negligence manslaughter is an offender who fails to live up to a reasonable standard but not someone who feels that harm caused is acceptable. In this sense it seems it is possible to see how someone guilty of gross negligence manslaughter could be easier to rehabilitate. They already hold moral beliefs about harm that correlate with those held by society, unlike someone who is found guilty of grievous bodily harm for example, who has intended the outcome of harming their victim. A small amount of education about the assessment of risks would be needed to rehabilitate a negligent offender whereas extensive rehabilitation programmes would have to be implemented in order to alter the moral values that an offender who harms with intent has.

Rehabilitation can take a variety of forms and does not have to be what we would consider it to be in a conventional sense. As a response to murder we would expect rehabilitation to educate the offender as to the devastation their actions created in order to alter the way they think. Considering gross negligence manslaughter is felt to be a less severe offence, we could consider rehabilitation as being the re-education of the individual in their chosen skill. For example, if Mr Adomako received extensive extra training about the procedures he should have gone through in the operating theatre he would pose less of a threat to society and would have had his value system rehabilitated by learning to put more emphasis on safety.

Furthermore, gross negligence manslaughter is unique in that those who commit the offence only pose a threat when performing in the position of responsibility in which they were acting. Therefore, they can be deterred simply by removing the possibility of them acting in that setting again. They are distinct from everyday criminals who will constantly be surrounded by the temptation to behave contrary to the law on a daily basis. Punishment can remove any opportunity to commit the offence again purely by labelling the agent as a 'criminal'. Therefore, punishment does not need to be excessive in order to achieve the aim of deterrence in relation to gross negligence manslaughter.

Cohen has argued that human beings are not easy to remould so that they conform with the values that society has⁵¹. For example, someone convicted of theft who is released from prison will be faced with shops, homes and other people's belongings on a daily basis. As a result, everything about that individual's lifestyle and thought pattern must be changed and that individual must also desire change in order to be rehabilitated⁵². However, a grossly negligent offender can quite easily have the opportunity to perform that role removed from him when punished. Deterring someone who had committed gross negligence manslaughter is not an arduous task that requires excessive intervention of the state.

In addition, it is often argued that rehabilitation is a futile aim because it is an almost impossible task to establish what will rehabilitate someone⁵³. This is true in regard to usual offences that are committed. In order to rehabilitate someone who is a habitually violent offender requires a deeper understanding of their social circumstances and their psychological state. The task is simply not as complicated when dealing with a medical professionals for example because they are only dangerous when they are being asked to live

⁵¹ M. Cohen, '*Moral Aspects of the Criminal Law*' (1940) 49 Yale LJ 987, 1012-1014.

⁵² C.S Lewis (n 18) 224.

⁵³ C.S Lewis (n 18) 224.

up to expected standards that pose risks of extreme harm to individuals if not achieved. This is easily solved by prohibiting them from acting in those settings but allows them to be afforded the liberties and rights every citizen should be able to enjoy. Punishment of gross negligence manslaughter in this respect is therefore effective and has a positive impact on society.

PENALTIES

It is necessary to assess the penalties received by those found guilty of gross negligence manslaughter. This will provide an indication of the criminal law's opinion regarding the level of severity for offences of gross negligence manslaughter.

Quick notes that there has been an increase in prosecution rates for gross negligence manslaughter since the introduction of the Crown Prosecution Service (CPS). This would suggest that the harm caused is now taken more seriously by society⁵⁴. There, appears to be an increasing determination in society to seek out professional complacency⁵⁵.

However, prosecution and conviction rates remain low. It appears that despite the law acknowledging that harm has been caused as a result of gross negligence, many still afford a great deal of sympathy to those accused who are not seen as conventional offenders. It is possible for moral decisions to be made in relation to blameworthiness. The CPS decide whether there is sufficient evidence to prosecute and whether it is in the public interest and juries are directed to convict for harms they believe to have been caused by gross negligence with no definition of 'gross' really being provided. The flexibility in the law allows moral

⁵⁴ O. Quick, 'Prosecuting 'Gross' Medical Negligence: Manslaughter Discretion and the Crown Prosecution Service' (2006) 33 Journal of Law and Society 421, 429. Also see S. McDowell, 'Doctors Charged with Manslaughter in the Course of Medical Practice 1795-2005: A Literature Review' Journal of the Royal Society of Medicine 99 (2006) 309 and M.Kazarian, D.Griffiths and M.Brazier, 'Criminal Responsibility for Medical Malpractice in France' [2011] 27(4) Professional Negligence 188 for statistics.

⁵⁵ A. McCall Smith, 'Criminal Negligence and the Incompetent Doctor' (1993) 1 Medical Law Review 336.

judgements to be made on whether we consider the behaviour blameworthy enough for the law to impose an actual penalty.

We also have to remember that the low statistics do not mean that the occurrence of death by negligence is rare. In a medical context it can be hard to attribute blameworthiness on the basis that the patient is ill or they would not have been there. It is hard to determine the true cause of many deaths and therefore the prosecution and conviction rates are not an indication of how often it occurs.

In the scheme of things the usual individuals that face the charge of gross negligence manslaughter are not considered to be harmful people. Quick notes that the prosecution of grossly negligent offenders is far from the mainstream problems that the police are required to deal with⁵⁶. As a result, evidence may not be pursued in the same way. The law acknowledges that the grossly negligent actions concerned are serious but appears to take the attributing of blame for it less seriously.

Nonetheless there is a reason why the maximum sentence available for gross negligence manslaughter is the same as murder – a life sentence⁵⁷. Therefore, the penalties available mark society's belief that the grossly negligent actions need to be addressed. It is suggested the level of moral blameworthiness of the grossly negligent offender in these scenarios means that society can stand to gain from their punishment and the penalties implemented should be taken seriously as they can have an important impact of society.

⁵⁶ O. Quick, 'Prosecuting 'Gross' Medical Negligence: Manslaughter Discretion and the Crown Prosecution Service' (2006) 33 Journal of Law and Society 421, 439.

⁵⁷ Although this being implemented is unheard of.

CONCLUSIONS

The above arguments illustrate the main arguments advanced by utilitarians and retributivist to justify the infliction of punishment on those that society considers worthy of punishing. It can be seen that the punishment of gross negligence manslaughter can be beneficial to society if the aims of either theory are trying to be achieved. Hart has argued that the general justifying aim for the infliction of punishment is social protection to be achieved through deterrence⁵⁸. However, it seems that the punishment of gross negligence manslaughter can be justified on the basis of the aims of either of the theories advanced.

As was discussed in chapter one, the main aim of the criminal law is the prevention of harm and the protection of society⁵⁹. Identifying those who are a threat to that principle is achieved through the implementation of the harm principle. However, deciding what to do once individuals who have compromised that principle are identified is a complicated problem. Society has to gain something from inflicting punishment upon those who are guilty of such damaging behaviour otherwise the whole criminal law process is effectively futile.

Crime clearly impacts on the society in which we live as well as the individuals who falls victim to it⁶⁰. Gross negligence manslaughter is no exception to this. It harms the victim and has far wider effects on society and the trust that is invested in vital authority institutions⁶¹. However, the implementation of punishment in response to such gross negligence is futile if society stands to gain nothing from its infliction upon offenders. The above analysis suggests

⁵⁸ H.L.A Hart (n 4) 47.

⁵⁹ See S. Mill, *'On Liberty'* (Cambridge University Press 1989) 125.

⁶⁰ S.E Marshall and R.A Duff, *'Criminalisation and Sharing Wrongs'* (1998) 11 Canadian Journal of Law and Jurisprudence 7, 17-21.

⁶¹ See discussion at page 33.

that society does stand to gain from the punishment of the negligent offenders in these scenarios and therefore the offence should remain in the criminal law.

The view of protecting society through punishment is not just a theoretical one. The Criminal Justice Act 2003 states that one of the purposes of punishment is the protection of society⁶². The Wolfenden Committee also held that one of the functions of criminal law and punishment is to

... preserve public order and decency, to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and aggravation of others⁶³.

Gross negligence does pose a threat to society and the individual's in it and on that basis should be addressed. On that basis, those who are culpable of causing the offence to take place deserve to be punished for their failure to adhere to the prescribed standards.

Gross negligence manslaughter occurs in a unique setting which happens to make offenders guilty of the offence more susceptible to the aims that punishment tries to achieve. It is easy to deter someone guilty of the offence and effectively incapacitate them without the usually negative impacts of those aims being evoked. A great deal of positive can be achieved from the infliction of punishment for gross negligence manslaughter compared to offences that we as a society are comfortable punishing, like violent offences and theft. Therefore, it is arguable that the act of gross negligence manslaughter is harmful, culpable and worthwhile punishing in the name of protecting individual autonomy and society as a whole.

⁶² Criminal Justice Act 2003 s. 142 (1)(d).

⁶³ The Wolfenden Committee Report 1957.

CHAPTER FOUR

IS IT ONLY JUSTIFIABLE TO PUNISH GROSS NEGLIGENCE MANSLAUGHTER IN A MEDICAL CONTEXT?

The previous chapters have focused on gross negligence manslaughter in medical contexts. This approach was taken because the majority of the leading gross negligence manslaughter cases have arisen in this context. Gross negligence manslaughter arising in a medical context also provided a good example of the importance that acting in a position of responsibility and trust has in relation to the offence due to its link with owing a duty of care. Those acting in a medical context very clearly act in a position of responsibility where they should possess a required level of skill and therefore, in many ways, acts as a prime example of the actions the offence is aimed at encompassing.

However, the offence can, and does, take place in alternative settings and scenarios. Conceivably this can be in any setting in which it is considered that the offender owed a duty of care to the victim and acted negligently in causing their death. This can be where the offence would not be considered to fall within the realms of murder or other manslaughter offences and in the past has included teachers, lorry drivers and police officers to name but a few examples.

It can sometimes appear that the offence is not designed to deal with grossly negligent actions that lead to the death of an individual in alternative settings. For example, the duty of care may not be as obviously present, the role itself may not pose as much of a risk naturally to people's health and wellbeing and the nature of the roles that the offenders are acting in will not necessarily implement the same demands on them.

It is argued here that the punishment of gross negligence manslaughter is justifiable in situations where the individual concerned was acting in a position of responsibility and trust which they are proclaiming to be capable of performing competently. The nature of the role that medical professionals play, the level of training they receive and the standards implemented to regulate their behaviour make their mistakes culpable failures to perform at the required standard. It is suggested that a majority of other professional roles also implement the same demands and therefore should be considered punishable. However, there are cases where the offence occurs outside of people carrying out jobs that require specific skills and are therefore incidents that are not comparable. It will therefore be argued that the offence of gross negligence manslaughter is justifiable when the agent was acting in a position of responsibility and had declared themselves as competent.

ARE NEGLIGENT ACTORS IN OTHER SCENARIOS MORALLY BLAMEWORTHY?

Chapter one argued that negligent offenders in a medical setting are morally blameworthy¹. This assertion was based largely on the suggestion that the nature of the role performed by the agent in a medical scenario means that their failure to adhere to the set standards illustrated a culpable lack of care. Therefore, it is necessary to firstly consider whether negligent actors in other scenarios outside of medicine should be considered as morally blameworthy enough to trigger the intervention of the criminal law.

Is Harm Caused?

The harm principle was discussed in detail in chapter one and therefore it is unnecessary to reiterate the points that were made. What can be concluded is that death causes harm to a victim. Whatever the level of culpability for the causing of death, it always thwarts the

¹ See discussion starting at page 5.

interests of an individual as it prohibits them from fulfilling their aims or sets back their interests. It is therefore suggested that the scenario, role the agent is playing and the reason that the victim is in the said setting is irrelevant to this consideration. Harm is always caused when death takes place².

It is therefore necessary to assess whether negligent actions that occur in other scenarios are the result of a morally blameworthy actions, as was established to be the case in medical settings. Therefore, analysis will mainly be concerned with gross negligence manslaughter that occurs in circumstances when the agent is carrying out a requirement of their profession as it is suggested that negligence in other professional scenarios is largely the same as medical settings. The argument advanced here is that their failure to live up to the standards implemented to regulate their given role is morally blameworthy and therefore should also trigger the intervention of the criminal law. This argument will be based on the fact that the duty of care created in settings where an individual claims that they are competent of performing a role that impacts on the wellbeing of others is unique in that it burdens professionals with additional duties that mean that extra consideration should have been given to the actions they took.

Negligence as a Culpable Lack of Care

It was argued in chapter one that agent's acting in the medical professional should be seen as criminally culpable when they are grossly negligent as they have demonstrated an unacceptable lack of care. This was suggested to be the case as a result of them holding themselves out as competent to perform the role in which they are acting. They know the level of their competence and the general standards that should be adhered to. Therefore, it is

² See discussion at page 5.

known to them when a procedure or approach is out of their competence. Thus, failing to take sufficient note of those procedures and restrictions is a degree of negligence that should be seen as gross and therefore criminally culpable.

It is argued that the lack of care demonstrated can also be present in alternative scenarios when the agent takes action, or responds to a situation incorrectly, when their role suggests they should be able to perform it competently. For example, in the case of *R v Wacker*³ the negligent agent was a lorry driver who killed sixty illegal immigrants that he tried to transport in his vehicle into the United Kingdom by temporarily shutting the air vents to the cabin they were sat in to avoid detection by the transport police. This temporary shutting of the air vents lead to the immigrants dying.

When Wacker agreed to transport the illegal immigrants in his lorry he assumed responsibility for their welfare and inadvertently proclaimed himself as being capable of doing that. If Wacker had not made that promise then the illegal immigrants would not have got into the lorry. There were therefore standards he had to live up to when putting those immigrants in his lorry that should have been at the forefront of his mind. When he decided to close the air vents he should have thought about the impact that would have on those travelling in the lorry because he had assumed that responsibility by agreeing to transport them. In this respect he should be considered morally blameworthy for his actions on the basis that he was acting in a position of responsibility he declared himself capable of performing.

At the core of the medical professional's duty is preventing further harm being caused to the patient's wellbeing as far as is reasonably possible. Therefore, they are obliged to perform

³ [2003] QB 1207 (CA).

their duties with that aim in mind and it is that which makes patients relinquish control to them. When they make a decision to treat that patient they are aware of the harm it could cause as a result of their level of competence or the training that they have received. Wacker was in a very similar position and he should have questioned his decision to close the vent because the demands of his role as someone willing to transport the illegal immigrants meant he should have considered the risk his actions posed to those who had effectively relinquished all control over their wellbeing to him.

Alexander, Ferzan and Morse argue that a negligent actor does not have control over the choices that they make as they make them inadvertently⁴. Wacker *should have* had control over his choice to close the air vent as he had assumed responsibility for those travelling in the lorry. The role that he assumed voluntarily, inadvertently held him out as capable of safely transporting the individuals concerned and therefore demanded a higher degree of care. The fact that his decision should have incorporated the welfare of the immigrants into the equation means that he showed a lack of care for the level of competency he claimed he could meet in the sense that a doctor who poses a risk to the patient's health by not meeting the standards of the profession has.

Imagine a doctor has been advised by his superior that a patient requires an injection of a certain drug. He has never performed the procedure before and in that case he knows that the standards he must adhere to suggest that he should obtain advice first. He decides that the injection probably goes in the patient's arm as he feels that is the most likely scenario. His job is to ensure that he knows how to perform every procedure that he undertakes. If he does not know how to do it then he lacks the sufficient level of care he should be taking and consequentially acts negligently.

⁴ L. Alexander, K.K Ferzan and S.J Morse, '*Crime and Culpability: A Theory of Criminal Law*' (2009) 85.

Wacker's original duty was to transport goods from one country to another and the standards he had to adhere to were in relation to safely doing that. However, once he agreed to carry the individuals in the back of his lorry he wilfully assumed the responsibility of transporting them safely. As a result, he should have had consideration for the impact blocking the air supply to the cabin could have on his illegal passengers. Both the doctor and Wacker make grossly negligent mistakes which they should and would not have made if they had lived up to the standards demanded of them in the roles they were professing to be capable of performing.

An agent's actions demonstrate a culpable and negligent lack of care when they are made in an area which they are professing to be competent in. If the actions they are performing are the core purpose of the role that they have assumed then they are obliged to have an understanding of when they can realistically achieve what is demanded of them. Once the declaration of being a capable agent able to perform their role to a satisfactory standard has been made then that individual is acting in a position of responsibility. A set of standards were expected of Wacker, just as they are of medical professionals. When he was grossly negligent in performing them he was justifiably found culpable.

The Importance of Control

Control is at the heart of grossly negligent actions that are morally blameworthy. The victim in a medical setting has handed over the control they have over their own choices to the medical professional. They do this on the basis that the medical professional in question is holding themselves out as someone capable of having that control and using it to achieve good. The reason they are in a position to act outside of their area of competence is because they have claimed to be able to perform their role successfully.

This is arguably also the case in alternative scenarios where the agent has obtained control over the situation as a result of them holding themselves out as an individual who can perform that role. For example, Wacker portrayed himself as a lorry driver who had room in his lorry and was willing to try and transport the immigrants to the UK safely. Therefore, their decision to relinquish control to him was made on the grounds that he had the means and capabilities of safely transporting them to the UK. Therefore, Wacker obtained control over the wellbeing of the immigrants through claiming to be able to successfully perform the role.

A similar example can also be considered. Imagine an electrician is fixing an electrical problem that the victim had in their home. The victim employs them because they claim to have a specialism in remedying this particular type of problem. However, when fixing the problem the electrician is unsure if he is meant to fit a trip mechanism or not in this kind of circuit. He knows there is a right answer and he is not certain but guesses that he does not. The victim is subsequently electrocuted as result. He is responsible because the victim gave him control over the situation as a direct result of him claiming to be competent to perform the role just as the immigrants in the Wacker case relinquished control to him because he declared himself as a trustworthy individual to carry out the task.

The means in which the agent gains control over the victim, which puts them in a position to make a grossly negligent mistake that impacts on their wellbeing, determines how much awareness they should have had about the risk they posed. Medical professionals gain control over the victim's wellbeing purely on the basis that they hold themselves out as a doctor or a nurse. The patient therefore allows them to treat them on this basis alone because their positions states that they will do all they can to enhance their wellbeing.

Wacker gained control on the grounds that he had a lorry that the immigrants could travel in. If the immigrants had thought that he would not attempt to do this safely with their welfare in mind it is unlikely that they would have got into the lorry. Wacker inadvertently provided reassurances as to the quality of that journey by virtue of the role he claimed to be able to perform. As a result, the illegal immigrants were misled due to the status Wacker was claiming to be able to uphold. This indicates that he had an obligation to perform to a required standard and should have realised his behaviour may be endangering them.

Is the Initial Act Wrongful?

The impact of having such a high degree of control in a medical setting is that the initial act turns out to be wrongful. In chapter one it was discussed that, regardless of the eventual outcome, it is the initial act that the negligent actor performs that is wrongful and morally blameworthy⁵. It is argued that this is only the case when the actor is claiming to be competent to perform the role in which they are acting. When you claim to be competent to perform a role that could potentially cause harm to others then there will inevitably be a set of standards that should be adhered to when performing that role. The morally blameworthiness in a medical setting comes from the initial lack of care demonstrated which resulted in the agent performing an action that harmed the victim and falling below the standard they claim to be able to perform to.

However, it can also be argued that the initial act is wrong if the agent is performing in a capacity where the nature of the role is underpinned by the aim of protecting the wellbeing of another. This is because the requirements of the role should trigger the agent's mind into reconsidering how they are acting as they have an obligation to. Their negligent behaviour is

⁵ See discussion at page 17.

therefore illustrative of a failure to meet a standard they have declared themselves of being able to meet that is morally blameworthy.

For example, imagine a teacher is supervising pupils on an adventure holiday. His role on the holiday is largely supervisory to ensure that the children are accounted for and behave themselves. The children want to go swimming and he permits them to swim in the lake. He supervises them, but unknown to him the lake has long weeds in that get caught around one of the children's feet and they drown.

His negligent mistake is a morally culpable failure to meet the requirements of the role he assumed when he held himself out as someone who should have established the dangers that the lake posed. As a result, this should have triggered his mind to assess that there may be hidden dangers that could cause harm. In assuming the supervisory role he held himself out as someone who had the required level of knowledge to perform the role competently. The negligent doctor has an awareness that his act could be dangerous because of the strict standards he has to adhere. The negligent teacher has assumed a role in the same way and if he had not received the level of training required then he should not identified himself as someone capable of performing the role. Therefore, the inability to meet those standards was morally blameworthy.

The decision that the teacher makes is an informed one because it is a requirement of the role he has assumed to make an informed decision about the lake and consider the dangers that it may pose. This is comparable to the role of the doctor who must understand that the decisions they make bear serious risks and therefore they should obtain a second opinion if they fear they could be incorrect. It is the nature of the role and the obligations that come with it that determine if the initial act was morally blameworthy and not its description as 'negligent'.

The action taken by the teacher in the above scenario which allowed the children to enter the lake was made while there was an obligation on him to think otherwise. As a result, holding him out as morally blameworthy is just because he has shown a lack of care for the standards that would suggest his actions should have ensured he enquired into the safety of the lake. As a result, punishing those who are acting in a position where they have held themselves out as being capable of protecting or furthering the wellbeing of the individual means that we are punishing them for failing to think of something they have declared themselves as being capable of thinking of.

The Role of Luck

If the initial act is not considered morally blameworthy then the agent's blameworthiness is largely determined by luck⁶. It will effectively be the end result of having caused death that suggests that the criminal law should intervene. This is problematic as moral blameworthiness does not determine culpability but luck instead. However, it is argued here that this problem is avoidable when the agent was acting in a position of responsibility in which they proclaimed to be capable of living up to a certain standard.

The teacher allowing children to swim in a lake example can be revisited to illustrate that the role that luck arguably plays in this area of law can be minimised if focus is placed on agents who have held themselves out as capable. It was suggested that the teacher's initial decision to allow the children to swim in the lake was morally blameworthy on the basis that in assuming the role of supervisor of the said activities he held himself out as an individual capable of achieving the expectations of a supervisor. These expectations undoubtedly would include ensuring the safety of the children. As a result of him assuming this responsibility, we can reasonably expect him to think of the consequences that may arise from permitting the

⁶ See discussion at page 16.

children to swim. Therefore, his blameworthiness is derived from the fact that he assumed a role he was not trained for or capable of performing competently.

This is comparable to the medical setting that has been discussed as the medical professional is also holding himself out as an informed agent. He claims to know the impact that the treatment he is administering will have on the patient in question with regard to their medical history, the opinion of others and their experience in the role. Therefore, they have control over the outcome of their actions. Those acting in other professions and positions of responsibility are in the same position.

However, those acting outside of the ambit of their professional role or are not holding themselves out as capable do not have the necessary knowledge to make informed decisions in the same manner because it is not central to their role to know the exact dangers posed. For example, imagine A is playing cricket and strikes the ball extra hard into the crowd. A spectator is hit on the head and killed. The initial decision to hit the ball is not morally blameworthy because in taking on the position of batsman he has not assumed a position of responsibility where the welfare of others should be at the forefront of his mind. His role merely requires him to hit the ball and score runs and he never held himself out as someone able to protect those sitting in the crowd, they effectively assumed the risk of being hit themselves. Gross negligence manslaughter should be an offence reserved for those who assume positions of responsibility and require control over situations as a direct result of that position.

The teacher in the above scenario held himself out as someone who knew that dangers the lake possessed and as someone who *should* have known. His decision was grossly negligent in the same way a doctor who fails to fully comprehend the dangers his treatment posed to his patient is. Therefore, he showed a morally blameworthy lack of care and possessed control

over the outcome as a result. His blameworthiness is therefore not based on bad luck, but on his failure to live up to the standards he stated he could surpass.

Conclusions

Those who do not hold themselves out as being capable of performing a trade, profession or general position of responsibility that impacts of the welfare of others do not have their decisions regulated. With regulations and standards comes a suggestion that the negligent actor should know the correct way to act in the circumstances. Therefore, it is the assumption of responsibility over the welfare of others that is a significant element of the offence of gross negligence manslaughter. Failure to live up to the standards that the given role implements is a morally blameworthy failure of the agent, even when it arises outside of a medical setting.

DOES THE LEGAL TEST IMPLEMENTED TREAT NEGLIGENT ACTORS IN OTHER SCENARIOS FAIRLY?

It is argued here that those acting outside of the medical professional or in other skilled positions are just as likely to act in a morally blameworthy way. It is therefore necessary to assess how the test that is applied to establish criminal culpability applies to cases outside of a medical context⁷.

Duty of Care

It was considered in chapter two that whether a duty of care is present is decided objectively by the judge in each case⁸. This causes few problems where it is obvious that a duty of care would be in existence, as is the case in medical scenarios. However, the duty of care being in place plays a vital role in deciding what type of behaviour should rightly be expected of the

⁷ See discussion at page 42 for test applied.

⁸ Refer to discussion at page 42.

agent in the given circumstances. If an agent was unaware that a duty of care even existed it would seem unreasonable for the law to expect them to act within the realms of it.

The difficulty with gross negligence manslaughter outside of a situation where an individual has assumed a role of responsibility that is supposed to protect the welfare of others is that the agent may not be aware that they even owe a duty of care to the victim. If the agent does not know that they owe a duty of care then they cannot reasonably be expected to act in a way that protects the victim. This problem can arise in situations where individuals are not acting in a situation that is demanded of them by the role that they are professing to be capable of.

The case of Wacker is once again a good example to raise here. Wacker was a lorry driver who made a morally bad decision to attempt to criminally transport illegal immigrants into the country. The demands of his newly assumed role as a lorry driver willing to do this would and should have indicated to him that he owed the immigrants a duty of care. He effectively held himself out as an individual capable of protecting the welfare of the immigrants when they were in his care. As a result, it should have been obvious to Wacker that he owed them a duty of care. His breach of that duty was rightly considered punishable because he should have subjectively been aware of its existence.

In cases where it is not obvious to the agent from the nature of the role being performed that a duty of care was owed it seems unjust to place the demands of the duty on them. If the individual knows that they owe a duty of care then their behaviour and approach taken should be altered by having that knowledge in mind. However, someone who does not know that they owe a duty to another individual cannot be expected to go forward and uphold that duty.

For example, in the case of *Mirsa and Srivastava* the doctors failed to follow up the blood tests undertaken on a patient. This was as a result of them not being entirely aware of the

procedure to be followed or the password needed to access the results on the computer, which they admitted. Both Defendants accepted that they knew the results were vital in establishing the cause of the patient's illness and that they should have been obtained. The fact that they acknowledged they should have obtained the said results illustrates they knew they had a duty of care. Obtaining the results would have allowed them to ensure that duty to the patient to find out what was wrong was upheld. The fact that they knew they should have obtained the results is an indication that they knew how to uphold the duty of care and their failure to do so was their fault.

However, in cases where the duty of care is not obvious to the agent as a result of their role it is hard to expect them to not breach it. The vast majority of cases that arise in a professional context would make it clear to the agent that they owed a duty of care when acting within the realms of that role. However, it is arguable that the cricketer discussed in the above example never knew he had a duty to those spectators sat in the crowd. The fact that he did not means that it is unreasonable to blame him for a breach of that duty because it is not a conscious breach, but a genuinely inadvertent one.

The duty of care test effectively works to indicate that the role of the agent was to protect the interests of the victim, which they failed to do. In situations where the agent clearly owed the victim a duty of care and they were aware of it seems reasonable to suggest that their failure to do so is a breach of that duty that they have allowed to take place. This would not just occur in a medical setting but other scenarios such as with teachers, police officers and tradesman to name but a few examples. However, it is an impossible task to expect an individual to uphold a duty they do not know exists.

Agents that hold themselves out as capable in their given trade or in positions of responsibility they assume with the welfare of others as a reasonable demand of the role

inadvertently acknowledge that a duty of care exists. That acknowledgment means that they are aware they should not breach it and that they have a responsibility not to. However, when people who are not acting in such a position make grossly negligent mistakes they are doing so without a knowledge that they are meant to be protecting the interests of others. As a result, they cannot alter their behaviour in light of the duty they know that they owe and are therefore not responsible for the breach that occurs.

With this in mind it is argued that the criminal test implemented regarding a duty of care is only successfully applicable to scenarios where the agent is performing in a role that they hold themselves out as capable of performing in a skilled manner or in role that, when performed correctly, ensures the welfare of others. In situations where this is not the case the agent can be unfairly labelled as a criminal for their failure to do something they did not know was expected of them.

Objective *Mens Rea* Requirement

The use of an objective *mens rea* test in gross negligence manslaughter cases has also raised a lot of criticism. The agent has to be seen to have failed to act in a way in which the reasonable man would have done in order to be found criminally culpable for the act in question. In cases of medicine or other professions where the wellbeing of others is at the centre of their role then the agent being judged by the standards of the reasonable man is acceptable. This is because the reasonable man represents the standards that are expected of them and they encounter this on a daily basis. As a result, they are aware of what the reasonable man would do in that situation and are not being judged on failing to have characteristics that they do not. Their declaration of being competent to act in that role is their claim they can meet the standards of the reasonable man.

When someone is not holding themselves out as a professional acting in a trade or someone responsible for the welfare of another then it is arguably fair to expect them to have the characteristics of the reasonable man. Take the frequent example that is used in this area of a niece that has neglected her dependent aunt to the extent that she dies. The niece has adopted the role of carer for her aunt and therefore has held herself out as an individual who is capable of living up to the standards of the reasonable carer. Therefore, to punish her for failing to live up to what the court considers the reasonable man would have done is effectively punishing her for failing to exercise capacities she has claimed she possessed anyway.

The reasonable man test works in areas where the agent is working in a profession or position where the expectations of the role are obvious⁹. This is because there are clear standards to live up to and it is easy to know what characteristics and actions the reasonable man would have taken by merely referring to examples of individuals acting in that position. However, in regard to roles which do not require the agent to protect the interests of individuals, such as the cricketer discussed above, we cannot truly establish what standards he should have been living up to. As a result, the batsman would be judged for not having characteristics that he never claimed to possess and may have been incapable of possessing.

The negligent niece never passed tests or was regulated the way in which those who work in a profession or trade are. Therefore, it may be arguable that she is not as aware of what the reasonable man would have done to the same extent as professionals. However, in assuming the complicated role of providing for her elderly and frail aunt she suggested that she had an idea of the requirements she would have to satisfy. As a result, the criminal test that is implemented to establish culpability for gross negligence manslaughter rightly condemns some individuals for not living up to standards they were arguably aware of.

⁹ See discussion at page 34.

Those who act in a profession or position of trust where they are holding themselves out as capable are stating that they are capable of living up to the standards of a reasonable man in their position. Professions are regulated and there are enforcement bodies that implement standards. As a result, is it easy to equip the reasonable man with the knowledge that he would realistically have. However, in the case of those who are considered grossly negligent outside of a profession, trade or position of responsibility results in them being judged against standards they did not know existed and never claimed to be aware of. They are effectively judged for characteristics that are genuinely out of their control.

Circularity of the Test

This approach being taken outside of scenarios where the agent was acting in a professional position also causes problems in regard to the 'gross' test that juries are asked to implement. It was discussed in chapter two that juries are directed to convict if they are of the belief that the negligence was so 'gross' it should be considered criminal¹⁰. When the reasonable man test is implemented when professionals are involved in the matter the measure of what is 'gross' can be made against genuine standards and experienced individuals who can be examined on what approach they would have taken. However, for those acting outside of such professions the jury are being asked to consider if something is 'gross' without having any genuine examples to measure the negligence against.

Juries are given very little guidance in regard to what the word 'gross' means. Therefore, what the reasonable man would have done is a bar against which it possible to measure how far from the standards expected of him the professional or tradesman departed. However, those acting outside of a trade or performing duties that would not normally be demanded of them in their chosen role do not have the benefit of this comparison being made. There are no

¹⁰ Refer to discussion at page 52.

experts that can be called to express what a reasonable person would have done in that scenario. Therefore, jury members are largely left to decide how negligent they really were without any concrete evidence to measure it against aside from their own opinion.

The result of this is that those acting outside of a profession or trade, when the protection of an individual's welfare is central to the role, who are negligent are likely to suffer from inconsistencies in the approach taken to establishing their criminal culpability. When there is no set standard that should have been adhered to the jury will be able to decide what they believe is 'gross' without being able to compare the negligent actor's behavior against any realistic standards. As each jury is made up of different individuals this means that similar cases could have varying outcomes. The test implemented in the criminal law can therefore result in inequality between defendants.

This is less likely to happen in cases where the individual is working as a professional or tradesperson that has held themselves out as capable. It is easy to obtain expert evidence that will illustrate the standard and approach the defendant was claiming to be capable of taking. This is likely to be largely the same in similar cases that arise if it is a universally accepted approach to take. As a result, a greater level of consistency can be assured when establishing criminal culpability in such cases.

Therefore, it is suggested that the test implemented is not fair to those who are not acting within a profession or undertaking a role where welfare and protection of others is a standard which they claim to be able to live up to a required standard. Their behavior is measured as culpable against an invisible bar that has been set and punishes them for their natural characteristics that they have never claimed are otherwise. This suggests that verdicts that are reached can be inconsistent and unreliable in some scenarios. As a result, the test applied is arguably only successfully identifies the culpable in a limit set of scenarios.

WHAT DO WE GAIN FROM PUNISHING NEGLIGENT OFFENDERS WHO ACT IN POSITIONS OF RESPONSIBILITY?

It has been suggested that the punishment of those acting outside of position of responsibility that inherently implements set standards means punishing individuals who are not morally blameworthy for their actions. It was further stated that the criminal law test that is implemented is largely ineffective in establishing those who should be punished in these situations. Nonetheless, it is still worth considering if we stand to gain anything as a society for punishing those who are considered to have been grossly negligent in these scenarios.

Justifying Punishment on Retributivist Grounds

In chapter three the justifications advanced for punishment were applied to cases of gross negligence manslaughter arising in a medical context¹¹. There it was suggested that medical professionals acting in their given role are deserving of punishment under retributivist theories of punishment as a result of their morally blameworthy voluntary actions that caused the death of the victim.

The main objection to the punishment of those acting outside the medical profession or positions of responsibility is that the individual is not aware that there was a set of standards to be adhered to. This is because they have never held themselves out as being competent at performing that particular role and so they are arguably not showing a lack of care that is grossly negligent in the circumstances. As a result, it is argued that they are not morally blameworthy. Therefore, the suggestion that they deserve to be punished by the criminal law is flawed in this sense.

¹¹ See conclusions found on page 92 for general overview.

Further arguments advanced by retributivist theories suggest that the punishment of gross negligence manslaughter is justified on the grounds that the negligent offender has upset the equilibrium present and therefore the equilibrium needs to be restored¹². However the difference is that those acting in a profession or in the course of a position of responsibility know when they are acting that they are either not competent enough to or are not adhering to the standard expected of them. Therefore, when they do act outside of this level of competence they show a lack of care as to whether the equilibrium may be upset.

However, those not acting in a profession or within the exact demands of their profession are not in the same position. There is nothing to indicate to the negligent cricket batsman that his behavior will potentially harm the spectator even if he knows he did not need to hit the ball that hard. This is because he is not regulated by standards and expectations of competency that he has willfully agreed to adhere to in order to protect the welfare of spectators. His striking of the ball far harder than was required in the circumstances is the product of an inability to know that he is acting incorrectly due to his lack of training and personality traits that would indicate this to him if he was acting in a regulated role. Therefore, he has not shown a lack of care in regard to the equilibrium as he merely meant to score points and as a result is not deserving of punishment due to his actions.

For example, in the case of *R v Adomako*¹³, the patient had consented to an operation which involved him being unconscious, leaving his safety in the hands of those medical professionals involved. The equilibrium was therefore controlled by the offender entirely. When Adomako failed to realise that the patient's ventilator had been disconnected he was responsible for disturbing the equilibrium that had been put entirely into his control. This is

¹² See page 76 for discussion.

¹³[1995] 1 AC 171 (HL).

because the declaration that he made of being competent to perform his duty meant he should have realised that his actions fell below the standard expected of him. He is therefore entirely responsible for upsetting the equilibrium.

This is not the case when the individual concerned is not subject to standards and regulations that they are aware of and therefore they are not deserving of punishment. Society stands to gain little from giving an individual who was not actually responsible for upsetting the equilibrium their just deserts. It is hard to understand the cathartic effect this would have for members of society.

It was noted in chapter three that denunciation and statement that the individual's behavior is not accepted by the state acts as a justification for punishment¹⁴. However, it is hard to see what will be achieved in regard to this by punishing an individual who acted outside of position of responsibility. Those acting in the medical profession, or other similar professions, can be seen as worthy of denouncing because their failure to live up to the claims of competency they made are the sole reason that they were in the position to make the mistakes they did. Therefore, the criminal law makes it clear that behavior of this nature is not acceptable.

However, those not acting within a profession or defined position of responsibility have never lured individuals into handing control to them through advancing false claims such as this. Therefore, their punishment does not denounce a particular kind of dangerous behavior other than a failure to think when they did not have the knowledge available to them to make that judgment. Therefore, punishing them under this justification is largely futile.

¹⁴ See page 73 for discussion.

Utilitarian Justifications

It was seen in chapter three that utilitarians justify punishment on the future benefits it can offer society and it was argued that in the case of gross negligence manslaughter in a medical context these can be achieved¹⁵. However, it is argued that the implementation of punishment on this basis in regard to gross negligence manslaughter in other contexts outside of skilled professions and roles in which the welfare of others is central is once again futile.

For example the punishment of those acting in a professional context can deter them from behaving in that way again effectively as their classification as a criminal will prevent them from ever acting in that role again in the future. It further delivers a message to people acting in similar professions and roles that the regulations and standards that are in place are important if they do not want to find themselves in the same position.

However, those acting outside of a profession or trade are not regulated by such standards. Therefore, their punishment cannot prevent them from ever being in the same position again. Furthermore, it is unlikely to deter other members of society who are not faced with the dangers of acting negligently on a daily basis like those who are responsible for the welfare of individuals or society as a whole. Therefore, the punishment of these types of offenders is unlikely to achieve deterrence even if it is felt that the agent deserves to be seen as morally culpable.

For example, the punishment of the scenario in *Misra and Strivastava* is unlikely to have had a very deterrent impact in society. The majority of people will never work in a hospital performing the duties that Misra and Strivastava did, so the case being brought to light will be irrelevant to them. In addition, the evidence brought to trial in the case of Misra and

¹⁵ Refer to page 75-86 for discussion of this.

Strivastava highlighted that a third year medical student would have been expected to identify the infection the victim had. Therefore, even those working in the profession involved are likely to understand the mistake made was unacceptable. After all, the negligence does have to be classed as so 'gross' the reasonable man in that position, with that expertise, would have foreseen how dangerous it was.

It is further argued that it is impossible to rehabilitate an offender that has acted negligently outside of a position of responsibility they have assumed and stated themselves capable of performing. The main aim of rehabilitation is to correct the way in which the individual thinks in order to give the offender the right skills to avoid committing criminal acts again. This is effective in terms of those acting in a professional setting as they clearly do not possess the skills needed to act in that position.

Fine and Cohen note that utilitarians presuppose a warped set of values need to be addressed when rehabilitating a convicted offender¹⁶. In cases of gross negligent manslaughter where the actor has failed to live up to a level of competence they claim to be able to achieve this is arguably the case. They have failed to acknowledge the restrictions imposed for the benefit of others when they should have. However, the negligent actor who has not held themselves out as capable theoretically has no knowledge of the standards they should be living up to and does not live up to them for that reason. Therefore, they have no 'warped values' that can be rehabilitated.

It was further argued in chapter three that the negligent offender in a medical context can be incapacitated successfully by being prevented from acting in the same position again and this

¹⁶ 19 R.P Fine and G.M Cohen, 'Is Criminal Negligence a Defensible Basis for Penal Liability' (1967) 16 Buffalo L. Rev. 749, 750-52

is true of other professionals acting in a skilled position¹⁷. The grossly negligent teacher can be prevented from being in charge of the care of children ever again. However, the only way to incapacitate someone who has committed such an offence outside of a defined role of responsibility that they have assumed is through sentencing them to imprisonment and that is only a short term solution. Those who are banned from performing in their chosen profession are incapacitated for life.

For example, the scenario involving the negligent batsman should be considered. The batsman who hit the cricket ball far harder than was necessary and subsequently killed a spectator was not acting in a position of responsibility he had assumed. Therefore, he cannot be incapacitated by being prevented from entering situations like that again because there would be no way for the criminal law to monitor that. The only way that it could be achieved would be to sentence him to a term of imprisonment. On release he would be free to enter society again and potentially make the same negligent mistake, perhaps just in a different setting. It is very difficult to incapacitate a negligent offender who is not acting in a position of skill or professionalism for the long term.

The difference with acting as a professional or within a trade is that it is very easy to successfully punish the agent in order to protect society from future harm. If a grossly negligent electrician kills someone through their error they can be banned from acting as an electrician and that can be regulated by authorities that ensure you have a right to practise the skill you are professing to be capable of performing. Society is therefore protected from them where they are most dangerous.

Committing gross negligent manslaughter within a professional role illustrates that you are incapable of acting reasonably when faced with the demands of that particular role. It is

¹⁷ Refer to discussion at page 83.

therefore easy to remedy the possibility of it occurring again on another occasion. It is hard to identify where those who have not committed gross negligence manslaughter in such a position are most dangerous and pose a threat of causing harm to society. Even if it was possible to identify where they pose that harm it would arguably be impossible to regulate their behavior and prevent them from posing further harm.

As a result, it is argued that punishing gross negligence performed when acting as a professional or in the course of a trade is beneficial. Society can gain from their punishment in that deterrence, rehabilitation and incapacitation can be achieved successfully. However, gross negligence manslaughter that occurs outside of an assumed position of responsibility does not pose the same risks to society. Therefore, the punishment of it poses little benefit to society.

CONCLUSIONS

It is therefore advanced that those who act in professional positions or as being capable of conducting a trade or role are guilty of making morally blameworthy actions. Those who are not acting in a professional position or are acting in a professional position but act in an area they are not professing to be competent in are not morally blameworthy. This is on the basis that they are not claiming to be able to live up to any standards or regulations implemented by that profession that should trigger their mind to think about acting differently when performing. They effectively do not have the training or capacity to comprehend that their action is potentially dangerous. Their grossly negligent action does not show a lack of care.

As a result, their moral blameworthiness in the eyes of the criminal law is entirely determined by the unfortunate outcome of their actions. The initial act is arguably not wrongful because they do not have the capacity or an obligation to be able to think otherwise at the time the

action takes place. They are not an informed agent that has control over the eventual outcome and therefore their moral blameworthiness depends entirely on a matter of luck. As a result, it is argued that their action lacks a degree of moral blameworthiness and the criminal law should not intervene as a result of that.

Furthermore, even when the criminal law does intervene the test applied does little to effectively separate the culpable from those who are not when the agent was not holding themselves out as a responsible and trustworthy individual. The lack of subjective *mens rea* requirement is not detrimental to the fairness of proceedings when an individual had held themselves out as a professional because it is possible to genuinely establish what the reasonable man in his position would have actually done. There are standards that teachers, doctors, police officers and health and safety managers for example have to adhere to. Therefore, equipping the reasonable man with the knowledge of these standards that were available to the agent in order to understand is all that is required to know how he should have acted in the situation.

However, those acting outside of a profession or in a way that their profession does not demand them to suffer from the reasonable man test. It is not possible to ever truly comprehend what the reasonable man in these situations would do because there are no set standards that the individual should have adhered to. Furthermore they never claimed to be capable of acting in the way the reasonable man would have. As a result, they are condemned for not having character traits that they may be incapable of possessing and have never claimed to be in possession of.

In addition, this makes it especially difficult for juries to assess what is actually 'gross' negligence as opposed to mere negligence that has taken place. Juries are effectively allowed to make up their own mind as there is no set standard in place to determine how extreme the

level of negligence was. This can result in inconsistent verdicts and a lack of certainty for those who commit gross negligence manslaughter outside of a skilled profession that requires individuals to adopt responsibilities and protect the welfare interests of others. Whether they are considered criminally culpable is determined entirely on the nature of the jury selected.

Therefore, it is argued that the system implemented to decide whether those considered morally blameworthy are criminally culpable is unfair to those who were not acting in a professional role or a position for which they have received training for at the time of the incident. With this in mind, it seems inappropriate to continue to punish those individuals in the criminal law.

Lastly, it is submitted that even if we do consider those acting outside of a professional role morally and criminally culpable we gain little as a society from punishing them. Their lack of moral culpability means that they are not really deserving of any punishment inflicted under a retributivist justification for punishment.

In addition, it is very difficult to effectively deter or incapacitate someone who was grossly negligent outside of a professional setting where their behavior is regulated by set standards. It is nearly impossible to establish a way in which to prevent someone who was simply unable to recognise the dangers of their behaviour because they have not agreed to live up to those standards of competence. Therefore, we stand to gain very little in the way of prevention of future harm as a society.

If society does not gain the prevention of future harms from the implementation of punishment on those found criminally culpable then the exercise of punishing is largely futile. Those acting in skilled positions for which they have acquired responsibilities as a result of their training are more than rightly brought to justice for their failure to do what they

state they are qualified to achieve. Those not acting in a skilled position seem to be a victim of a system that is not designed to deal with the kind of risk they pose and therefore should not fall within the realms of the criminal law.

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