Hart Publishing

Criminal Law, Simester and Sullivan (updated 18.05.05)

Gross Negligence, Manslaughter and Legal Certainty, Pages 40-44, 368-72

Misra and Srivastava [2004] EWCA Crim 2375

In *Misra and Srivastava* [2004] EWCA Crim 2375, two medical house officers were convicted of manslaughter on the basis of causing the death of V by gross negligence. They had failed to diagnose the critical condition of their patient V, thereby failing to provide the supportive therapy and antibiotics that would have saved his life. Their convictions were appealed on two main grounds. First, the Court of Appeal was asked to consider whether the decision of the House of Lords in G [2004] 1 Cr App Rep 237 required a reassessment of the offence of gross negligence manslaughter, replacing and confining that variant of manslaughter to reckless manslaughter. Secondly, the argument was put that gross negligence manslaughter was so unclear in its formulation as to contravene Article 7 of the ECHR.

Replacing gross negligence with recklessness?

It will be recalled that in G, the House of Lords effectively brought to an end to that form of recklessness known as *Caldwell* recklessness. Even for the former heartland of *Caldwell,* arson, the recklessness now to be proved was *Cunningham* recklessness, which requires proof that D foresaw that he may bring about the actus reus of the offence with which he is charged. The majority of the House of Lords in G expressed strong preferences for subjective forms of mens rea. In contrast, manslaughter by gross negligence involves an objective form of culpability. There is no need to prove that D foresaw V's death. Nonetheless, in *Misra* the Court of Appeal were disinclined to infer, from the preference expressed for subjective mens rea in G, the implication that all remaining forms of culpability expressed in objective terms were now superseded. Rightly so. Just a few years prior to the decision in G, the House of Lords in *Adomako* [1995] 1 AC 171 had examined the use of *Caldwell* recklessness as a basis for liability in manslaughter and found it unsuitable. Yet the response of that Court was not to replace it with subjective recklessness. Instead, gross negligence was reinstated as the primary basis of liability for instances of involuntary manslaughter not requiring proof of an unlawful act. There was no reason to hold that the decision in G has any impact on the decision in *Adomako*. Consequently, *Misra* confirms, if confirmation were needed, the existence of gross negligence manslaughter.

Gross negligence and legal certainty

The second line of attack on gross negligence manslaughter was that the basis of liability was so unclear as to contravene Article 7 of the ECHR, which provides that: "No-one shall be guilty of any criminal offence on the basis of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.…"

In addition to proscribing retroactive criminal law, Article 7 requires member states to attain minimum standards of clarity in the criminal law, so that citizens can reliably predict whether the particular form of conduct at issue will contravene the

criminal law: *Kokkinakis v. Greece* (1994) 17 EHRR 397 [S&S2 p. 41]. Recall the constituents of gross negligence manslaughter. There must be:

(1) a duty of care owed by D to V;
(2) a breach of this duty which exposes V to a risk of death and which causes V's death;
(3) circumstances of breach which are so bad as to amount to gross negligence.

The argument was put for the appellants that condition (3) leaves it to the jury to decide a question of law, namely whether the negligence causing death amounted to gross negligence and so constituted a crime. To leave this evaluation to be performed by different juries at each respective trial affords too little guidance to those who owe duties of care. This lack of clarity is compounded by circularity: gross negligence manslaughter is any killing in breach of duty found to be grossly negligent.

The argument failed. The court did not consider that the jury had a law-making function when deciding, on the facts proved, whether D was guilty of manslaughter on the basis of a negligent breach of duty owed to V. Whether the negligence was sufficiently bad as to be "gross" negligence was an issue of fact. If the jury made a finding to this effect, a verdict of guilty would follow *consequentially* on the basis of the finding; the verdict of guilt was not something *additional* to the finding. The jury were simply finding facts within the parameters of a legal standard, and the legal standard was sufficiently clear to satisfy the requirements of Article 7.

On the face of it, the Article 7 argument had some force. If someone were to ask, say, in what circumstances would D be said to have "murdered" V, we could tell our inquirer that, all other things equal, D murders V if he causes V's death with intent to kill or to cause really serious bodily harm. If there is time and patience, we could go on and tell him about the saga of the courts and the meaning of intent, the vagaries of the law of provocation, etc. But if, wisely, we confine ourselves to a bare description of the offence, we have given enough information to enable any person of normal temperament to stay clear of the clutches of the law of murder. Yet if we were asked by D, a young doctor at the outset of her career, what she must do if she is not to be convicted for manslaughter, the conversation would necessarily be longer. For instance, she might ask what would be her position if, during the course of an epidemic of influenza, she misdiagnosed V's meningitis as a case of flu, a mistake which leads to the death of V. She might further ask whether her inexperience and any tiredness from overwork would be factors in her favour, or whether it would be relevant if she was seeing many cases of flu at the time which presented symptoms similar to those experienced by V. Doubtless we could offer reassurance couched in general terms, but to give anything approaching adequate guidance we would need to talk to a skilled and experienced medical practitioner to get some sense of how bad a mistake it is to confuse flu with meningitis. The devil of liability would be in the details.

The fact of the matter is that if a legal system in the common law tradition is to avoid excessive particularity in criminal regulation, for many offences it must use, as definitional elements, evaluative standards of considerable generality. Frequently, the most the law will say are things like, if you drive a car, drive with *due care and attention*. If you take and keep someone else's property, make sure you are acting *honestly*. If you foresee a risk of hurting someone, satisfy yourself very carefully that this is a *reasonable* risk to take. Many further examples could be given. Wherever

the jury is given the final say on whether D has failed to meet such a standard, its task is regarded, juridically, as involving a finding of fact rather than a judgment of law. Much would be lost if offences dependent on such findings were to be eradicated from the law. Unfortunately, one price to be paid is that persons subject to laws drafted in this way can only be given broad, “ball park” advice as to the circumstances where they may transgress against such laws. That seems to be enough to satisfy the requirements of Article 7.