

# ELLIOTT & QUINN'S **CRIMINAL LAW**

TWELFTH EDITION



Pearson

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# **Elliott and Quinn's Criminal Law**

manslaughter charge to be based on an offence of negligence. The Court of Appeal itself acknowledged it would have been better if this prosecution had been brought for gross negligence manslaughter, where more than just a civil level of negligence is required.

## ● Criticism

### Liability for omissions

The distinction between acts and omissions may be reasonable when applied to an omission which is simply negligent, but it is difficult to find grounds for excluding liability where an accused deliberately omits to do something and thereby causes death, and where that omission is clearly morally wrong.

### *Mens rea*

The *mens rea* is very easy to satisfy, which can be seen as anomalous given the seriousness of the offence. The Law Commission (1996) has commented on unlawful and dangerous act manslaughter:

[W]e consider that it is wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee, and which would not even have been foreseeable by a reasonable person observing his conduct. Unlawful act manslaughter is therefore, we believe, unprincipled because it requires only that a foreseeable risk of causing some harm should have been inherent in the accused's conduct, whereas he is actually convicted of causing death, and also to some extent punished for doing so.

### Causation

See later in the text for a critical discussion of causation (p. 135).

## Gross negligence manslaughter

In civil law, an individual who fails to take the care a reasonable person would exercise in any given situation is described as negligent. Clearly there are degrees of negligence – if it is negligent for a nurse to leave a very sick patient alone for ten minutes, for example, it will be even more negligent to leave that patient alone for an hour. Where the death of a person is caused by another's negligence which is so severe as to deserve punishment under the criminal law, this is described as gross negligence and can give rise to liability for gross negligence manslaughter.

Until the summer of 1993, it was generally accepted that two forms of involuntary manslaughter existed: constructive manslaughter, described above, and **Caldwell** reckless manslaughter. However, that stance had to be reconsidered in the light of the House of Lords' decision in **R v Adomako** (1994), approving most of the Court of Appeal's judgment on the case in **R v Prentice** (1994).



### Key Case

#### **R v Adomako (1994)**

Lord Mackay LC gave the leading judgment in **R v Adomako** (1994), with which all the other Law Lords agreed. He stated that **Caldwell** reckless manslaughter does not exist but that instead there is gross negligence manslaughter.



At the Court of Appeal level, several appeals had been heard together as they raised the same legal issues; one concerned Drs Prentice and Sulman, a second concerned Mr Adomako and the third, Mr Holloway. Prentice and Sulman had injected a 16-year-old leukaemia patient in the base of her spine, unaware that the substance injected should have been administered intravenously and that injecting it into the spine made it a virtual certainty that the patient would die. She did in fact die shortly afterwards. Adomako was an anaesthetist whose patient had died from lack of oxygen when the tube inserted into their mouth became detached from the ventilator; Adomako had not realised quickly enough why his patient was turning blue. Holloway was an electrician who had accidentally wired up a customer's mains supply to the kitchen sink, causing the death by electrocution of a man who touched the sink. All were convicted at first instance of manslaughter.

The appeals by Sulman, Prentice and Holloway were allowed by the Court of Appeal, but not that of Adomako. He, therefore, was the only one to appeal to the House of Lords, which is why the Court of Appeal judgment is known as **R v Prentice** and the House of Lords' judgment as **R v Adomako**. Adomako's appeal was dismissed, and Lord Mackay gave the following analysis of the law:

... in my 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 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 occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.

The House of Lords stated that in order for liability for gross negligence manslaughter to arise there must be the common ingredients of all homicide offences, plus a risk of death, a duty of care, breach of that duty and gross negligence as regards that breach.

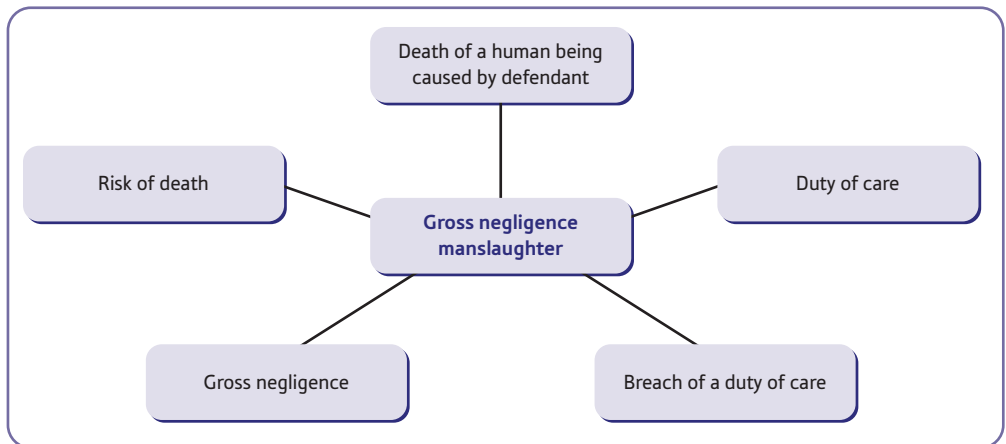
#### Legal Principle

**A person's conduct is grossly negligent if it falls below the standards of reasonable people to the extent that criminal liability should be imposed.**

In **R v Watts** (1998), the appellant's daughter was born severely disabled. An operation was performed to assist the child with her breathing, and a tube was placed in her throat and held in place with tape. When the child was 14 months old she was admitted to hospital for a few days. Her mother spent the last night before the child was due to be discharged at the hospital. The following morning she took a suitcase to her car and was away from her child's bedside for three-and-a-half minutes. When the mother returned the breathing tube was out of her child's neck and she was still and grey. She shouted for help but very shortly thereafter the child died. The mother was charged with murder, with the prosecution alleging that she had removed the tube before she had gone to the car. She was convicted of manslaughter and appealed against her conviction on the grounds that the judge's direction on manslaughter was inadequate as it had indirectly referred to the possibility of a conviction for gross negligence manslaughter, but had failed to mention the ingredients of this offence.



The Court of Appeal allowed the appeal. It ruled that where gross negligence manslaughter might have been committed, the trial judge had to direct the jury in accordance with the passage from **Adomako** cited above. He had failed to do this, and therefore the conviction was quashed.



**Figure 5.3** Gross negligence manslaughter

In **R v Willoughby** (2004), the Court of Appeal specified that the existence of a duty, breach and gross negligence was usually a matter to be decided by the jury. Once the judge had accepted that some evidence existed to support their existence, the jury then had to decide whether they actually did exist. Each of these criteria will be considered in turn.

## The common elements of homicide

The common elements of homicide offences need to be proved (and are discussed on p. 57).

### A duty of care

A duty of care in this context has exactly the same meaning as it has in the civil law of negligence. Lord Mackay stated in **Adomako**: ‘... in my 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’. The classic statement of where a duty of care is owed in negligence is provided by Lord Atkin in **Donoghue v Stevenson** (1932), where he laid down what has been called the ‘neighbour principle’:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This would suggest that, where a death occurs, the crucial test when deciding whether or not a duty is owed under the law of negligence – and also in relation to gross negligence manslaughter – is reasonable foresight that the claimant would be injured. In addition, following **Caparo Industries plc v Dickman** (1990), account will sometimes be taken of issues of public policy and whether the imposition of a duty would be just and reasonable. This was precisely the approach which was taken

by the trial judge in **R v Singh** (1999), and the trial judge's approach was expressly approved by the Court of Appeal. The issue as to whether there was a duty of care was treated as a question of law to be determined by the judge rather than the jury, which seems an appropriate approach as this is a technical area of civil law.

In **R v Wacker** (2003), the Court of Appeal accepted that the 'ordinary principles of the law of negligence apply', but excluded one specific aspect of these rules as being inappropriate in the criminal law context. The defendant was a lorry driver who had been involved in a criminal conspiracy to bring illegal immigrants into the United Kingdom. He was driving a lorry from Holland to the United Kingdom. The lorry was designed to carry refrigerated goods and was airtight, with a vent that could be opened to allow air to enter. Sixty Chinese citizens were hidden inside the lorry. The defendant shut the vent for over five hours to try and prevent detection during the Channel crossing. When the lorry was searched by Customs officials, 58 people were found to have died from suffocation. The defendant was convicted of manslaughter. At his appeal he argued that under one of the ordinary principles of negligence, a person did not owe a duty of care to another person when they were both carrying out a joint unlawful activity (known in Latin as the principle of *ex turpi causa*). In this case, he and his victims were both carrying out the joint unlawful activity of smuggling illegal immigrants into the country. He argued that on the basis of the ordinary principles of negligence, and in particular the principle of *ex turpi causa*, he should not be criminally liable for the deaths of the illegal immigrants.

The Court of Appeal rejected this argument. While the ordinary principles of negligence applied, this did not extend to the principle of *ex turpi causa*. This was because the civil law and the criminal law had different roles and 'as a matter of public policy' it would not be appropriate to apply this principle to the criminal law. When Lord MacKay referred in **Adomako** to the 'ordinary principles of the law of negligence' he did not have in mind the principle of *ex turpi causa*, which was not relevant to the facts of the case before him. The duty of care for the people in the lorry arose the moment the vent was shut, and it was a continuing duty which continued until the vent was opened. The duty required the defendant to ensure that they had sufficient air to breathe. He had breached this duty and was liable for gross negligence manslaughter.

The approach taken in **Wacker** was approved and applied by the Court of Appeal in **R v Willoughby** (2004). In that case the defendant had recruited the victim to help him burn down a pub that he owned. He hoped to then claim the value of the pub from his insurers. They poured petrol over the building but this led to an explosion which both blew up the building and killed the victim. The defendant argued that he should not be liable because under the ordinary principles of negligence the defence of *ex turpi causa* would be available, but again this defence was rejected.

In **Willoughby**, the Court of Appeal accepted that there could not be a duty in law arising merely from the fact that the appellant was the owner of the premises. But the fact that the appellant was the owner, that his public house was to be destroyed for his financial benefit, he recruited the deceased to take part in this enterprise and that the deceased's role was to spread petrol inside were, together, factors which could in law give rise to a duty.

In **R v Khan and Khan** (1998), the Court of Appeal appeared to take a different approach to the meaning of a duty. It referred to cases where a duty will be imposed in the context of omissions (that were discussed on p. 16). However, the leading case of **Adomako** was itself a case involving an omission – the anaesthetist had failed to reconnect the patient's tube when it became disconnected – and the House of Lords made no reference to this line of cases. A distinction needs to be drawn between the general duty of care which is always required for gross negligence manslaughter and the specific duty to act, which will also need to exist for gross negligence manslaughter by omission.

In **Evans** (2009), the Court of Appeal stated that the question of whether a duty of care existed was a question of law for the judge. The jury was to be directed by the judge on what the law was and the judge could tell the jurors that a duty existed if they found certain facts, for example, that the defendant was a doctor and the victim was the defendant's patient.

In **R v Winter and Winter** (2010), the two defendants were father and son who were running a family fireworks business. They stored some exceptionally dangerous fireworks on the company's premises (a farm) in a metal shipping container. They did not have a licence to store these fireworks at all. Unfortunately, a fire broke out on the farm, and when the fire brigade arrived the son warned the firemen of the dangers of the fire reaching the container but did not tell them that the container contained exceptionally dangerous fireworks. The father simply said it contained wood. The fireworks caused an explosion which killed two men: a fireman and a cameraman employed by the fire brigade to film the fire. The cameraman had ignored a number of instructions from police officers and fire-fighters to withdraw from the site of the fire. The trial judge ruled that the defendants owed a duty of care to everyone on the site and surrounding area, including the two victims. They were convicted of gross negligence manslaughter. They appealed against their conviction in relation to the cameraman, arguing they did not owe him a duty of care. The appeal was rejected. It was reasonably foreseeable that civilian employees of the fire service might come on to the site of a fire. Even if the cameraman had failed to comply with an instruction to leave the site, the duty of care was still owed. Although such a failure might have been relevant in a civil case under the principle that the victim had voluntarily assumed the risk (*volenti non fit injuria*) and contributory negligence, this was not the case in criminal law.

## Breach of the duty of care

The defendant's conduct must have breached their duty of care to the victim. This requires that the defendant's act (or omission) falls below the standard expected of the reasonable person.

## Gross negligence

Traditionally, negligence lays down an objective test, in which a person is judged by the standards of reasonable and sober people. Lord Mackay in **Adomako** stated that he was not prepared to give a detailed definition of gross negligence and simply gave the key statement quoted above (p. 118). He also quoted with approval a well-known statement on the issue made by Lord Hewart CJ in **R v Bateman** (1925):

[I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused 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 crime against the State and conduct deserving punishment.

Lord Mackay did not provide a more detailed definition of gross negligence, as he was concerned that a jury would find such a definition incomprehensible. In **R v Misra and Srivastava** (2004), the defendant argued that the law on gross negligence manslaughter was, as a result, so uncertain it breached Art. 7 of the European Convention on Human Rights which requires the law to be certain, predictable and clear. The defence argued the jury was being required to decide what the law was as well as what the facts were. The Court of Appeal rejected this argument, stating that the jury was not required to determine what would be sufficiently gross to amount to a crime (which would be a question of law), instead it was required to decide whether the conduct was grossly negligent

(a question of fact). If it was, then an offence had been committed. In the words of the Court of Appeal:

On proper analysis . . . the jury is not deciding whether the particular defendant ought to be convicted on some unprincipled basis. The question for the jury is not whether the defendant's negligence was gross, and whether, additionally, it was a crime, but whether his behaviour was grossly negligent and consequently criminal. This is not a question of law, but one of fact, for decision in the individual case.

In practice, without a definition that could limit the scope of gross negligence, the offence can potentially be given a very broad meaning by a jury, much broader than the previous test of **Caldwell** recklessness.

Following the judgment of the House of Lords in **Adomako**, the Court of Appeal has sought to clarify the legal implications of the case. In **R v Lidar** (1999), gross negligence was given a very broad meaning. A person would fall below the objective standard required if they satisfied the old definition of **Caldwell** recklessness, but gross negligence was not limited to these states of mind. According to **Attorney-General's Reference (No 2 of 1999)**, a person can also be found to have been grossly negligent where a jury finds that their *conduct* has been sufficiently negligent – in this scenario there is no need for the jury to look at the defendant's state of mind at all; the focus is on the defendant's behaviour. Thus, where a company director has left railway tracks in a dangerous state of repair and allowed trains to run along them at full speed, this conduct could be found to be grossly negligent without looking at the director's state of mind.

The basic test for gross negligence is objective, asking whether a person's conduct has fallen below the standards of a reasonable person. In order to determine this question, the courts are prepared to look at a range of factors:

- the defendant's thoughts;
- a reasonable person's thoughts;
- the defendant's acts or omissions.

Any of these three factors can be used to decide the basic question of whether the defendant's conduct has fallen below the standards of a reasonable person. Thus subjective criteria (the defendant's actual thoughts), as well as objective criteria (a reasonable person's thoughts and the defendant's conduct), can be used to determine whether the objective test has been satisfied. While for **Caldwell** recklessness, the subjective limb amounted to a form of recklessness in itself, for gross negligence, such matters are merely evidence to decide whether the objective test has been satisfied.

In **R v Misra** (2004), the Court of Appeal approved the following direction by the trial judge:

Mistakes, even very serious mistakes, and errors of judgment, even very serious errors of judgment, and the like, are nowhere near enough for a crime as serious as manslaughter to be committed. . . concentrate on whether or not the prosecution has made you sure that the conduct. . . you have heard about. . . fell so far below the standard to be expected of a reasonably competent and careful [senior house officer] that it was something, in your assessment, truly exceptionally bad, which showed such an indifference to an obviously serious risk of the life of the deceased and such a departure from the standard to be expected as to amount, in your judgment, to a criminal act or omission and so to be the very serious crime of manslaughter.

In **Attorney-General's Reference (No 2 of 1999)**, the Court of Appeal stated that gross negligence was not a form of *mens rea* as it could be proved without the jury having to look at the state of mind of the defendant. This case arose from the unsuccessful prosecution of Great Western Trains following the Southall train crash in 1997. While the Court of Appeal accepted that gross negligence was not a form of *mens rea*, a person's state of mind could still be relevant to proving gross negligence. It could be relevant because **Adomako** requires the jury, when deciding whether