

The English law of involuntary manslaughter in cases where death arises from misuse of drugs is in need of reform.

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Abstract

This article analyses the application of the English law in cases where death arises from misuse of drugs, pointing out that the law in this area is inadequate. This stems from the fact that the rules of causation have been applied inconsistently and also because it is not always clear where a duty to act may be imposed. As a result, it is uncertain to what extent those who were involved with the deceased are responsible for the death and, therefore, liable for involuntary manslaughter. Some proposals for reform are also considered.

Palabras clave: homicidio involuntario; uso indebido de drogas; homicidio involuntario por negligencia grave; deber de actuar; homicidio involuntario por acción antijurídica y peligrosa; causalidad; responsabilidad penal.

Resumen

Este artículo analiza la aplicación de la ley inglesa en los casos en que una persona muere por el inadecuado consumo de drogas, señalando que la ley que regula esta materia es inadecuada. Esto deriva del hecho de que las reglas de causalidad se han aplicado de manera inconsistente y porque no está siempre claro cuando puede imponerse un deber de actuar. Como resultado, no se puede saber con certeza hasta que punto aquellos involucrados con el fallecido son responsables de su muerte y, por consiguiente, culpables de homicidio involuntario. También se consideran algunas propuestas de reforma.

Key words: involuntary manslaughter; drug misuse; gross negligence manslaughter; duty to act; unlawful and dangerous act manslaughter; causation; criminal liability;

1. Introduction

Unlawfully supplying class A drugs such as heroin and its subsequent uncontrolled misuse is associated with the risk of the user possibly suffering an overdose, which could cause

extremely serious health problems or even death. Where death is the result of taking drugs, the question of whether the supplier is liable for involuntary manslaughter arises. There is an obvious causal nexus between the supplier's conduct and the result. However, the fact that the supplier could be regarded as morally responsible for the death is not sufficient to establish criminal liability. In some cases, the rules of causation have been applied inconsistently.³⁰⁰ In others, the defendant was somewhat unpredictably deemed to be under a duty to act.³⁰¹ There is no doubt that the judiciary, being influenced by public and academic opinion, pursues a policy of punishing those involved in drug misuse "even if that means departing from established authority and twisting established legal principles".³⁰² As a result, the law of involuntary manslaughter has become rather tortuous and it is likely that in the future there will be cases where the outcome is unpredictable and might produce injustice. Therefore, there is a need for reform in this area of law. One suggestion, in relation to some of the proposals that have already been made, is discussed with reference to Spanish criminal law.

2. General Overview of the Law

At one point in the past, unlawful and dangerous act manslaughter was applied in cases whereby the supplier's unlawful act of supplying resulted in the victim's overdose and subsequent death, even though the drug was self-administered.³⁰³ However, this situation changed when the House of Lords stated that "the criminal law generally assumed the existence of free will" and "informed adults of sound mind were treated as autonomous beings able to make their own decisions on how to act".³⁰⁴ This meant that, a new intervening act performed by the victim, such as self-administering drugs, would break the chain of causation, since the supplier does not cause the victim to act in that way.³⁰⁵ Nevertheless, this argument only concerns unlawful act manslaughter and liability for gross negligence manslaughter is still a possibility that may arise – as analysed below.

Therefore, unlawful and dangerous act manslaughter is not applied simply for supplying class A drugs or assisting another person to self-administer them, notwithstanding the criminal liability that may arise from supplying the drugs.³⁰⁶ However, this law may be applied in cases where the person who has supplied the drug is also the person who has administered it to

³⁰⁰ R v Dalby [1982] 1 All ER 916; R v Kennedy [1999] Crim LR 65; R v Dias [2002] 2 Cr App R 96; R v Richards [2002] EWCA Crim 3715; R v Rodgers [2003] 1 WLR 1374; R v Finlay [2003] EWCA Crim 3868; R v Kennedy [2005] EWCA Crim 685; R v Kennedy [2007] UKHL 38.

³⁰¹ R v Evans [2009] EWCA Crim 650; R v Sinclair [1998] 148 NLJ; and R v Khan & Khan [1998] Crim LR 830, though the conviction was quashed due to a misdirection.

³⁰² Glenys Williams, "Gross negligence manslaughter and duty of care in drugs cases: R v Evans" [2009] Criminal Law review 9, p. 631.

³⁰³ R v Kennedy [1999] Crim LR 65; R v Kennedy [2005] EWCA Crim 685.

³⁰⁴ R v Kennedy [2007] UKHL 38.

³⁰⁵ Ibid.

³⁰⁶ Misuse of Drugs Act 1971, s.4(1).

the victim who then dies. Firstly, administering class A drugs to another person is an action which by itself is considered a criminal offence under statutory law.³⁰⁷ Secondly, if the victim dies, the supplier is potentially liable for unlawful and dangerous act manslaughter, since administering a noxious substance is an objectively dangerous crime and also the cause of death.³⁰⁸ There also remains the possibility of the supplier being liable for unlawful and dangerous act manslaughter in cases where he or she has not administered the drug directly but has acted in concert with the person who has done so, with the result that the victim dies.³⁰⁹ A conviction in such a case would be problematic for the reasons considered below, especially if the supplier's involvement was minor.

The inconsistent and unpredictable way in which the law of involuntary manslaughter has been and may continue to be applied in cases where death arises from the misuse of drugs has created intense debate on whether this law is appropriate, proportionate, and in accordance with general legal principles, or otherwise flawed. Therefore, let us analyse this area of the law and consider its application in different case scenarios in an effort to identify the controversies that may arise and suggest some proposals for reform.

3. Unlawful and Dangerous Act Manslaughter

Unlawful and dangerous act manslaughter consists of the following five elements which have been developed in case law: the unlawful act must be a crime; the unlawful act must be objectively dangerous; the unlawful act must be a positive act as opposed to an omission; and the unlawful act must be the cause of death.³¹⁰ It is also required to prove the same *mens rea* as for the unlawful act but it is not necessary to establish that the defendant foresaw the result of the unlawful act.³¹¹

3.1. Case Scenario

Let us consider the potential criminal liability for unlawful and dangerous act manslaughter of a supplier who, having helped to prepare a heroin injection which is administered to the victim by someone else, is not longer present when the victim begins to show symptoms of overdose and dies.

³⁰⁷ Offences Against the Person Act 1861, s.23.

³⁰⁸ R v Cato [1976] 62 Cr App R 41.

³⁰⁹ Janet Loveless, *Criminal Law: Text, Cases, and Material* (Fourth Edition Oxford University Press 2014), p. 324.

³¹⁰ R v Lamb [1967] 2 QB 981; R v Church [1965] 2 All ER 72; R v Ball [1989] Crim LR 730; R v Lowe [1973] QB 702; R v Goodfellow [1976] 1 ALL ER 260.

³¹¹ DPP v Newbury and Jones [1977] AC 500; Mens rea literally means "guilty mind".

Firstly, administering a noxious substance to another person is an unlawful act which by itself constitutes a criminal offence.³¹² Hence, the counterarguments applied in other cases that self-injection is not an unlawful act or self-injection breaks the chain of causation could not be applied to this case.³¹³ Secondly, adverse effects, risks, and danger of non-medical and uncontrolled heroin use have been sufficiently tested and proved, thus the unlawful act can be considered objectively dangerous.³¹⁴ Thirdly, the assistance provided by the supplier to commit the criminal offence constitutes a positive act: therefore, the supplier can be regarded as a secondary participator in the administration of the drug.³¹⁵ Fourthly, medical evidence must prove that the unlawful act is the cause of death.³¹⁶ If so, the secondary participation in maliciously administering a noxious substance to the victim is an unlawful, objectively dangerous, positive act that caused death. Therefore, notwithstanding the victim's consent and acceptance of the risk, liability for unlawful and dangerous act manslaughter may arise.

This might be controversial because simply performing preparatory acts of heroin injection is only an indirect causative contribution that alone could not cause the victim's death, which could not have occurred but for the actions of the person who actually administered the drug. In addition, it should be taken into account that the onset of overdose symptoms takes place when the supplier is no longer present. Therefore, the supplier is not aware that the situation has become life-threatening to the victim, remaining ignorant of the overdose situation which unfolds beyond his control. However, as the House of Lords held in the case of *DPP v Newbury and Jones*, it is only necessary to prove that the defendant intended to commit the unlawful act; and there is no requirement to prove that the defendant foresaw that the act may cause death, or even harm.³¹⁷

4. Gross Negligence Manslaughter

Gross negligence manslaughter was established in *R v Adomako* and the elements listed below need to be proven to establish that this crime has been committed: the existence of a duty of care owed to the victim; the breach of that duty by the defendant; the breach of that duty must have caused the death of the person to whom the duty was owed; and that the defendant's negligence, in the opinion of the jury, amounts to a criminal offence.³¹⁸ In line

³¹² Offences Against the Person Act 1861, s.23; *R v Lamb* [1967] 2 QB 981.

³¹³ *R v Kennedy* [2007] UKHL 38; *R v Dias* [2002] 2 Cr App R 96; *R v Dalby* [1982] 1 All ER 916.

³¹⁴ *R v Church* [1965] 2 All ER 72; *R v Ball* [1989] Crim LR 730.

³¹⁵ Accessories and Abettors Act 1861, s.8; *R v Lowe* [1973] QB 702.

³¹⁶ *R v Goodfellow* [1976] 1 ALL ER 260.

³¹⁷ [1977] AC 500.

³¹⁸ [1995] 1 AC 171.

with this, let us consider two cases where liability for gross negligence manslaughter may arise.

4.1. First Case Scenario

Taking into account the elements stated above, liability for gross negligence manslaughter can arise where a child, who has self-administered drugs and suffers symptoms of overdose, is ineffectively looked after by his or her parent who does not seek help with the result that the child dies.

The general rule is that there is no liability for a failure to act, except for situations where there is a duty to act imposed by statute, by contract, or by common law. For instance, a parent is automatically responsible for caring for a child as a matter of law.³¹⁹ In this situation, if the child is in serious peril, the parent is expected to take reasonable steps to summon assistance which would “require only minimal action, minimal cost, minimal inconvenient and minimal effort”.³²⁰ It is for the medical evidence to show that the breach of the duty caused death. If so, it would prove that there was enough time for a medical unit to have saved the child’s life had it been called. Lastly, it is for the jury to decide whether the negligence of the parent showed such disregard for the child’s life as to amount to a criminal offence – though it is likely that they would consider it so.³²¹

Under certain circumstances, a duty to act is appropriately and justifiably imposed on those who are in a position to help. English law imposes in various ways a duty to ensure the welfare of children when they are still manifestly dependent on their parents.³²² In modern society, it is widely considered as morally justified to impose this legal obligation.

4.2. Second Case Scenario

Liability for gross negligence manslaughter may also arise where the supplier, after recognising the symptoms of overdose in the victim, does not seek help and the victim eventually dies, even if the drug has been self-administered.³²³ Let us consider the application of this law in this case, since there has been some debate over similar ones.

Firstly, it is for the judge to decide the existence of a duty of care as a matter of law.³²⁴ However, a duty of care can arise from the fact that the supplier, by providing the drug,

³¹⁹ R v Gibbons & Proctor (1918) 13 Cr App Rep 134.

³²⁰ R v Evans [2009] EWCA Crim 650.

³²¹ R v Bateman [1925] 19 Cr App R 8; Andrews v DPP [1937] AC 576; R v Evans [2009] EWCA Crim 650.

³²² Andrew Ashworth, “Manslaughter by omission and the rule of law” [2015] Crim. L.R. 8, p. 563.

³²³ R v Evans [2009] EWCA Crim 650.

³²⁴ R v Evans [2009] EWCA Crim 650.

created a state of affairs which later became life-threatening to the victim.³²⁵ Thus, the existence of a duty of care would probably be established. Secondly, although the breach of the duty must be determined by the jury, they would probably decide that the supplier's actions fell below the standard expected of a reasonable person and reasonable steps to save the victim's life were not taken.³²⁶ Thirdly, assuming that medical evidence shows that the person would not have died had reasonable steps to summon help been taken, then the breach of the duty would be considered the cause of death.³²⁷ And if so, the legal causation test would be satisfied as death would have been the result of the supplier's failure to act.³²⁸ Lastly, it is for the jury to decide whether the supplier's carelessness showed such disregard for the victim's life as to amount to a crime – though they would probably consider it so because the supplier's negligence can be regarded as gross.³²⁹

It is repugnant to our human nature and to our sense of decency that a person who could so easily have called for help simply did not do so; and this is what a person in that situation would be expected to do.³³⁰ However, finding the supplier guilty of gross negligence manslaughter for failing to rectify a dangerous situation that he is partly responsible for creating – especially taking into account that the victim self-administered the drug – seems a disproportionate and morally imposed conviction. In addition, since it is not always clear in which situations a duty to act may be imposed, placing responsibility for manslaughter on a person who could not know that a duty to act existed at the time he or she failed to act, might be questionable considering the principle of legality.³³¹

5. Possible Reforms

In some continental European systems, as opposed to the English system, there is a statutory offence that imposes a penalty for failing to assist those in danger. For instance, a penalty is mandatory in the Spanish Criminal Code on whoever does not assist a person who is unprotected and in manifest danger when able to do so without risk to himself or third parties.³³² In addition, the same penalties shall be incurred by whoever, being unable to

³²⁵ R v Miller [1982] UKHL 6; R v Evans [2009] EWCA Crim 650.

³²⁶ R v Adomako [1995] 1 AC 171; R v Bateman [1925] 19 Cr App R 8.

³²⁷ R v White [1910] 2 KB 124.

³²⁸ R v Dalloway [1847] 2 COX 273.

³²⁹ R v Evans [2009] EWCA Crim 650; R v Bateman [1925] 19 Cr App R 8; Andrews v DPP [1937] AC 576.

³³⁰ Williams, "Gross negligence manslaughter and duty of care in drugs cases: R v Evans" [2009] Crim. L.R. 9, p. 631.

³³¹ Ashworth, "Manslaughter by omission and the rule of law" [2015] Crim. L.R. 8, p. 563.

³³² Organic act 10/1995, dated 23rd November, on the criminal code (BOE num. 281, 24th of November 1995), article 195.1.

provide assistance, does not urgently call for outside help.³³³ This statutory offence could be considered fairer and more proportionate to the wrongfulness of the omission, instead of classifying those that neither helped nor sought help when they were expected to do so as criminals who have committed manslaughter.

Creating such a statutory offence has already been proposed, for instance, by providing a special regime within the framework of the Misuse of Drugs Act that would cater more specifically for the variety of circumstances that may arise.³³⁴ In a more recent proposal, three types of statutory offences are described depending on the seriousness of the omission; one, a version of the failure to protect offence, a serious offence with a long sentence of imprisonment; two, an offence focusing on the failure to take action in a recognised duty-situation, perhaps with a shorter sentence of imprisonment; and three, a broader offence of failing to assist a person in peril which would carry a lighter sentence – an offence that imposes a general duty to act such as the duty imposed in the Spanish Criminal Code.³³⁵

Creating legislation of this type would be an advantage as it would provide certainty on the application of the law, predictable judicial decisions, and more proportional convictions, thus complying with the rule-of-law and the principle of legality. None of these seems likely to be provided by the common law.

6. Conclusion

The common law has failed to solve the current problems relating to liability for manslaughter in cases where death results from drug misuse. In these situations, it is argued that those involved with criminal activity should be morally and legally at fault for the consequences of their conduct.³³⁶ However, the rules of causation – as with omissions – are challenged as being vague and inconsistent: although the rules of causation are based on common sense and policy, it has been argued that “the courts look for the desired result and then search for principles to back it up” – “policy, rather than legal principle, determines the issue”.³³⁷ At the same time, the current law creates uncertainty as to where duty-situations exist, and therefore the person involved may or may not be held liable for involuntary manslaughter for failing to assist the person who died – even though such a conviction could be argued to be disproportionate and contrary to the principle of legality.

³³³ Ibid, article 195.2.

³³⁴ Jonathan Rogers, “Death, drugs and duties” [2009] Arch. News 6, p. 6.

³³⁵ Ashworth, “Manslaughter by omission and the rule of law” [2015] Crim. L.R. 8, p. 563.

³³⁶ Loveless, *Criminal Law: Text, Cases, and Material* (Fourth Edition Oxford University Press 2014), p. 326.

³³⁷ Ibid, 66.

The law should be clear so that judicial decisions are more predictable, particularly in the context of serious criminal offences such as manslaughter. Since there is no relevant legislation available, judges have had no option but to apply the common law making every effort to comply with the rule-of-law standards.³³⁸ Nevertheless, the application of this law has led to an intense discussion on whether it produces injustice. Therefore, the need for urgent reform in this area of the law seems clear.

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R v Dalloway [1847] 2 COX 273

R v Dias [2002] 2 Cr App R 96

R v Finlay [2003] EWCA Crim 3868

R v Evans [2009] EWCA Crim 650

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