

Medical Manslaughter

Abstract:

B Lyons
Department of Anaesthesia, Our Lady's Children's Hospital, Crumlin, Dublin 12

Abstract

On November 29, 2011 Dr Conrad Murray was sentenced to four years in prison after being convicted of the involuntary manslaughter of Michael Jackson. Expert witness statements indicated that Murray's actions were an extreme departure from the standard of care, particularly with regard to (1) inappropriately treating insomnia with a surgical anaesthetic (propofol); (2) failing to acquire sufficiently informed consent; (3) administering propofol without the necessary monitoring equipment; (4) delaying contacting the emergency services; and (5) making ineffective resuscitation efforts. Further medical evidence argued that Murray's care of Jackson contained "17 egregious violations", defined as acts that posed a foreseeable danger to the patient's life. These deficiencies, it was stated, constituted gross negligence.

Such events might seem remote from daily medical practice in Ireland. However, medical errors resulting in patient death are reported to be unfortunately frequent, even if such fatalities are rarely as dramatic, or as public, as that of Michael Jackson. Medical care is not necessarily straightforward, and any treatment outcome is dependent on clinician skill, the nature of the intervention, and on the pathological condition of the patient. Regardless of these latter two factors, a poor outcome still may occur through physician omissions or the commission of errors or violations. Merry and McCall Smith distinguish between errors and violations on the following basis: (1) errors are not deliberate, and result in unintentional actions and consequences; (2) violations, on the other hand, entail a deliberate deviation from accepted rules or norms. It was alleged that much of Dr Murray's professional conduct in this case fell into the latter category.

Gross Negligence Manslaughter

Deaths arising from medical care may attract the attribution of blame and occasionally lead to criminal proceedings. Ireland is unusual amongst common law countries in never having criminally prosecuted a healthcare professional for a fatal error which occurred in the course of their duty. The offence of gross negligence manslaughter does exist in this jurisdiction, and may be applied to any person where the death of an individual has occurred, and the accused:

either has not applied his mind to the task or has not taken such ordinary care as any responsible person would have felt compelled to take in the circumstances. The accused is held accountable because by the application of concentration the death of the victim could have been avoided.

With regard to a medical manslaughter, criminal liability imputes to the practitioner a level of disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment. In general, it indicates a great falling short of the standard of care of a reasonable person in the circumstances which is likely to result in death or serious harm. According to the Law Reform Commission (LRC):

5 In

the courts do not hold people criminally liable for every little careless slip-up they make which tragically leads to death, rather liability for carelessness is imposed in those extreme situations where the accused can justly be said to have been morally culpable in some way.

Cases of Gross Negligence Manslaughter

In contrast to Ireland, England and Wales have seen a number of doctors prosecuted for gross negligence manslaughter over the last 20 years. What is striking about these cases (and others which have been the subject of investigation but not prosecution) is their very routine nature. Perhaps it is the perceived low-risk nature of these cases that has motivated bereaved family members, coroners and prosecutors that for a death to have occurred there must have been a gross dereliction of care. Thus, prosecutions have followed events such as medication errors, including the administration of the wrong drug, or the right drug but at the incorrect site, or in the incorrect dose. Practitioners subjected to criminal investigation have included anaesthetists, general and orthopaedic surgeons, emergency physicians, general practitioners and haematologists.

11

In addition to the provision of medical care, there is also an obligation on doctors to protect the patient from harm, in so far as possible. Failure to protect from harm has given rise to gross negligence cases in a number of jurisdictions. In Canada, for example, an anaesthetist was imprisoned for criminal negligence after leaving the theatre during an operation to take a phone call. The anaesthetic circuit became disconnected and the patient, a 12 year-old adolescent with a broken leg, was left in a permanent vegetative state. In 2009, an Israeli anaesthetist was convicted of manslaughter and sentenced to 8 years in prison after she fell asleep during an operation. Her patient, a three year-old girl undergoing routine surgery, suffered a cardiac arrest and died during a routine elective procedure. In England and Wales the legal test for gross negligence followed the prosecution and conviction of a locum anaesthetist. During the appeals process, the House of Lords laid down the elements of manslaughter by breach of duty which need to be proven, including (a) an indifference to obvious risk, or (b) a high degree of negligence in attempting to avoid the risk, or (c) a running of the risk despite foresight, or (d) significant inattention to a serious risk. All of these pertained to obvious and important matters which a physician's duty demands that he should address.

The test for gross negligence in Ireland is slightly different. The People (AG) v Dunleavy concerned a taxi driver who hit and killed a cyclist while driving on the wrong side of the road in his unlit car. In this case the Court of Criminal Appeal established that an accused could be convicted of gross negligence manslaughter where 1) The individual was, by ordinary standards, negligent; 2) The negligence caused the death of the victim; 3) The negligence was of a very high degree; 4) The negligence involved a high degree of risk or likelihood of substantial personal injury to others; and 5) The accused was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence. Although this was a case of motor manslaughter, the test formulated by the Court applies to all instances of manslaughter by gross negligence in Ireland. Whether the negligence in question is simple or gross is dependent on the perceived degree of departure from the standard of care. This leaves both prosecutors and juries with significant discretion in deciding whether to prosecute or convict. Determining whether negligence is a gross necessarily involves value judgments.

The vagaries of this discretionary situation may be seen in the following cases. In The People (DPP) v Cullagh accused was convicted of gross negligence manslaughter after a woman died when her chair became detached from a 20-year-old chairplane ride at the accused's funfair. He had bought the chairplane after it had been in an open field for 3 years. Although the accused could not have seen the specific defect that caused the accident, various parts of the mechanism were manifestly unsatisfactory and unsuitable. However, in the more recent case of The People (DPP) v Barden the skipper of the Pisces fishing boat was charged with several counts of manslaughter. Five people drowned when the defendant's unlicensed boat took in excessive amounts of water and capsized. The skipper knew that the vessel was not watertight prior to taking paying clients out on a fishing trip. Although there were ten people on board, there were only two life-belts, one life-jacket and no life-raft. The Marine Casualty Investigation Board stated that the boat was overloaded, unstable and insufficiently equipped with life-preserving equipment. Despite this the jury found the skipper not guilty on all five counts of manslaughter. On reviewing the case, the LRC commented that

14 the

it is possible that a differently constituted jury might have reached a different verdict as it was arguably grossly negligent and culpably careless to take a large party fishing in a boat which was known to take water when there was insufficient life-preserving equipment on board.

As stated previously, there have been no cases of gross negligence manslaughter involving the medical profession in Ireland. However, it is interesting to wonder what view a jury might have taken if the above were a medical case; if, for example, an anaesthetist knowingly started an elective case with a faulty anaesthetic machine and no resuscitation drugs or equipment with which to treat the patient when they got into difficulties, and the patient died. Whether doctors should be subject to criminal investigation or prosecution on the basis of events arising from them performing their professional duties is a subject of considerable debate. In the current climate of accountability one wonders whether all fatal errors committed by medical professionals in the course of their practice will remain out of the criminal courts. The LRC have stated that those who engage in dangerous activities such as performing surgical operations must take care. In any case it is difficult to argue that those, such as Conrad Murray, whose actions seem in serious breach of professional standards should be immune to prosecution.

Correspondence: B Lyons

References

1. Ryan H, Kim V. Conrad Murray's care of Jackson gross negligence, witness says. Los Angeles Times. October 12 2011. Accessed at <http://latimesblogs.latimes.com/lanow/2011/10/conrad-murrays-care-of-jackson-gross-negligence-witness-says.html>.
2. Weingart SN, Wilson RM, Gibberd RW, Harrison B. Epidemiology of medical error. Br Med J. 2000;320:774-7.
3. Merry A, McCall Smith A. Errors, Medicine and the Law. Cambridge: Cambridge University Press; 2001.
4. Charleton P. Offences against the Person. Dublin: Round Hall Press; 1992; 85.
5. Rv Bateman (1925) 19 Cr App R 8;1
6. Law Reform Commission. Involuntary Manslaughter (LRCCP 44-2007). Dublin: LRC; 2007.
7. Ferner RE, McDowell SE. Doctors charged with manslaughter in the course of medical practice, 1795-2005: a literature review. J R Soc Med 2006;99:309-14.
8. Testimony of Professor Adams regarding conduct of Dr John Adomako. Quoted by Lord Taylor in R v Adomako (sub nom R v Prentice) [1994] QB 302 at 332.
9. Ward D. (Jul 30, 1999) Man jailed over death at dentist's. The Guardian. London: p10. Also R v Yogasakaran [1990] 1 NZLR 399.
10. Dyer C. Doctors cleared of manslaughter. Br Med J. 1999;318:148.
11. BBC News. Inquest's 'unlawful killing' verdict. March 9, 2001. Accessed at http://news.bbc.co.uk/2/hi/uk_news/wales/673298.stm.
12. Williams LS. Anesthetist receives jail sentence after patient left in vegetative state. CMAJ. 1995;153:619-20.
13. [1948] IR 95.
14. (2000) 10(1) ICLJ 26.
15. Irish Times Report, 24 November 2005.