GROSS NEGLIGENCE MANSLAUGHTER IN GUERNSEY LAW

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This article analyses the development of the law of homicide in Guernsey, with particular focus on the offence of gross negligence manslaughter. This follows a recent trial in the Royal Court of Guernsey where the existence of this offence was questioned by the defence, then formally recognised and the elements of proof clearly defined.

Introduction

1 On 27 September 2019, after a four week trial in the Royal Court of Guernsey, two former mental health nurses were acquitted of a single joint count alleging manslaughter by gross negligence.

2 As the trial judge had commented in summing up the case, the offence had not been prosecuted in living memory. Indeed, the defence had questioned from an early stage of the investigation whether the offence was known to Guernsey law.

3 As might be expected, and before any decision was taken to prosecute, the criminal prosecution team at the Law Officers in Guernsey, of which the authors are members, undertook a full analysis of the history of the offence of manslaughter generally, and involuntary manslaughter, incorporating gross negligence manslaughter, in particular.

4 This article seeks to provide an overview of that research in order to assist practitioners who may encounter this complex area in the future. This research was provided to the defence during the case, leading to a concession that the offence was known to Guernsey law. Whilst this obviated the need for legal argument on this point, there were a number of other hearings regarding the elements of the offence. The judgments given by Finch, Judge of the Royal Court, who presided as trial judge throughout the case, in two such hearings, contain an important statement of the Guernsey law in this complex area and will be summarised in this article.

The facts

5 At about 02:42 on 12 October 2017 a 22-year-old woman was discovered dead in her room, having applied a ligature to her neck

whilst a voluntary inpatient on the adult mental health inpatient ward at the Oberlands Centre in Guernsey. At the time she was in the care of the two defendants who were nurses on shift on the ward, and it was accepted at trial that they had not performed observation checks on her for around 100 minutes. It was during that time that the ligature had been applied by the deceased. These checks were supposed to have been performed every 15 minutes. The prosecution case was put on the basis that the two accused had wilfully neglected their duty to perform these checks and so had caused the death. Amongst other things, this was based on the accepted evidence that both defendants knew at the time that the checks had to be done, and that neither accused had been busy during this time; rather the evidence showed them using their mobile phones, listening to music and talking to each other. Checks had also been missed for nine other patients. The defence case centred on a suggested inability of the prosecution to show a number of key elements of the offence, including causation. However before expanding on these aspects, it is important to set out the history of involuntary manslaughter in Guernsey law, and its relationship to the historical development of the law in England and Wales.

The historical position—Guernsey law

6 Although unlawful act manslaughter cases have been prosecuted in recent times in Guernsey, there was no recent evidence that the offence of gross negligence manslaughter had ever been prosecuted. As such, a "back to basics" approach was required in order to establish the current legal positon, and the starting point was to look back at manslaughter and homicide generally. It was hoped that from there an argument supporting the existence of the offence could be developed. The States Archivist, Dr Darryl Ogier, was approached for assistance in researching the historical basis for this offence in Guernsey law. His research traced the development of homicide in Guernsey law and it is important to summarise the results of that research.

7 Whilst it might be assumed that manslaughter has been part of Guernsey law for many hundreds of years it was important to find the evidence to support that assumption. A Privy Council order, issued to the Channel Islands on 30 November 1699, directed that—

> "His Majesty having since been informed that there was some mistake in the representation of that matter, and that, according to the law and ancient usage of that island, the Bailiff and Jurats, upon the trial of any person accused of the death of another, unless they find the offence to be murder, do not proceed to inflict capital punishment for the same, but do inflict lesser punishments, according to the nature and circumstances of the offence: His Majesty hath therefore thought fit in Council to

> order, that the said order of 23rd of June, 1698, for stay of execution in cases of murder, manslaughter and chance medley, until his Majesty's pleasure should be known, shall be restrained to cases of murder, and other cases where capital punishment is inflicted, where the said court shall think the offender fit object of His Majesty's mercy, and no other."[1]

This was considered important as it established that the Royal Court could reach a verdict other than murder in homicide cases.

8 The case of John McDugal was also traced—he was actioned by Law Officers—

> "*contre lui a se voir ajuger aux peine et punitions imposés par les loix pour avoir . . . depourvu de la crainte de Dieu felonieusement tué occis et meutri Roze Sargison sa femme . . .*"
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> ["Against him to see him sentenced to the penalty and punishments imposed by the laws for having . . . without the fear of God feloniously killed, slain and murdered Roze Sargison his wife . . ."]

He was sentenced to be burned in the left hand by the executioner at the cage,

> "*après preuve d'avoir le dit McDugal commis l'homicide appelé en Angleterre Manslaughter*."[2]
>
> ["after proof that the said McDugal committed the homicide in England called 'manslaughter.'"]

9 Dr Ogier established that the words "*felonieusement tué occis et meutri*" used in *McDugal's case* represented the standard formula in prosecutions for unlawful deaths whether alleged to be murder or not.[3]

10 It is also notable that as early as 1787 the Royal Court was looking to English law to label the offence committed as manslaughter.

11 Finally, there was the case of the *Law Officers v Gibson*[4] which resulted in acquittal. The brief facts found in a newspaper from the time were:

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[1] The three orders are recited at 271–272 of the *Second Report of the Commissioners appointed to inquire into the state of the Criminal law of the Channel Islands: Guernsey* (London, 1848)—referred to as the "1848 Report" in this article.

[2] Greffe: *Crime* 18/9. Emphasis added.

[3] This remained the case at the time of the 1848 Report: p. 271 para. 6126.

[4] 25 April 1870.

> "The said Gibson being at the time seated on the front of a cart laden with sand and drawn by two horses, with his feet resting on the shafts of the said cart, and having no reins in his hands, the wheels of the said cart having gone over the body of the said George Henry Palmer, causing contusions and wounds of which the said Palmer died on the evening of the same day."[5]

12 This was (or, more accurately, would have been if the accused had been found guilty) of course involuntary manslaughter meaning an unlawful killing without intent to kill or cause grievous bodily harm, but with sufficient fault to justify criminal liability. As will be explored, involuntary manslaughter was used in England and Wales, before the introduction of the statutory offence of causing death by dangerous driving, in prosecutions involving fatalities arising from road traffic accidents. However, whilst it could be established that involuntary manslaughter had been prosecuted in the past in Guernsey, it was considered further work was still needed to explore whether there were other cases whose facts were more akin to gross negligence manslaughter prosecutions seen in the modern day. Research was also required to see if there was any reference to it in Guernsey statute.

Guernsey statute

13 Put simply, there is nothing to be found in any legislation to assist with establishing gross negligence manslaughter as an offence known to Guernsey law. This may be because the offence also has no apparent statutory history in England and Wales.

14 The Homicide (Guernsey) Law 1965 contains no mention of manslaughter but deals primarily with the abolition of the death penalty. The Criminal Jurisdiction (Guernsey) Law 1986 deals with the matters set out in the title, but clearly acknowledges the overarching offence of manslaughter as being known to Guernsey law. The Homicide and Suicide (Bailiwick of Guernsey) Law 2006 deals with the defence of diminished responsibility but had already been considered part of Guernsey law since the decision in *Law Officers v*

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[5] *Comet* newspaper 27 April 1870. The defence here may well have had reference to the statement, closely matching the defendant's evidence in this case, given by G Jacob, *A New Law Dictionary* (4th edn, London, 1739) s.v. *manslaughter* "A man drives his cart carelessly, and it goes over a child in the street, if he see the child and yet drive upon him it is murder; but if he saw not the child, it is manslaughter. And if the child runs cross the way, and the cart runs over him, before it is possible to make a stop, it is *per infortunium*."

Harvey[6] (see further below regarding this decision). Notably section 2(3) states—

> "A person who but for this section would be liable, whether as a principal or as an accessory, to be convicted of murder is liable instead to be convicted of manslaughter."

15 Section 5(2) also acknowledges the offence of manslaughter but this statute is clearly dealing only with unlawful act manslaughter rather than involuntary manslaughter.

Further legal research on Guernsey law

16 In the absence of any statutory assistance recourse was had to Marshall's 1975 work *The Criminal Law of the Bailiwick of Guernsey*. He provides some useful analysis of manslaughter in the Bailiwick, most notably for present purposes: "Manslaughter may be wilful manslaughter, involuntary manslaughter or manslaughter due to gross negligence".[7] Although technically incorrect to separate out manslaughter by gross negligence as separate from involuntary manslaughter, it being one of the two recognised types of involuntary manslaughter (along with unlawful act manslaughter), the identification of this specific offence was invaluable in the research being undertaken at the time and helpfully Marshall then gives some substance to these comments.

17 He goes on to state that "Cases of manslaughter by the dangerous driving of a motor vehicle are now dealt with under the law of 1957".[8] Although the full title of this legislation is not given this is clearly a reference to the Vehicular Driving (Causing Death by Driving) Law 1957 which followed the English approach to motor manslaughter. Of course not all those offences which might formerly have been prosecuted as manslaughter would automatically be capable of being prosecuted under the 1957 Law, or *vice versa*, because the elements of the offences are different.

18 Marshall then refers to two earlier cases involving deaths caused by vehicles, one of which is *Officiers de la Reine contre Robert Gibson* 1870 (which has already been referred to above). As has been noted, this case was still a step away from showing gross negligence manslaughter as an offence known to Guernsey law, but the key information came from the next section—

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[6] Guernsey Royal Ct, Judgment 5/2001.
[7] *Op cit*, at 65.
[8] *Op cit*, at 66.

> "Manslaughter may be due to gross negligence or dereliction of duty . . . Gross negligence is criminal negligence: that is when an act which causes death which is not per se unlawful amounts to manslaughter because of a grave or gross negligence in the manner in which it was committed. The negligence must be of a very grave character: see Officiers de la Reine contre Maria Anne Patterson 1900 [a case of a midwife who ignorantly, rashly and feloniously neglected to do that which was necessary for the health of a patient who died of peritonitis after childbirth] and Officiers de la Reine contre Wilkinson 1895 [master of a vessel which caught fire near Les Roches Douvres abandoned the vessel leaving his passenger behind onboard]."[9]

19 Of these two cases, *Patterson*, was considered to provide a solid basis to establish the offence of gross negligence manslaughter. This was particularly important because the offence appears, at least in part, to have been committed by an omission. The report suggests that Patterson pulled too hard on the baby causing the mother to have a rupture of the uterus from which she died but there is reference to neglecting to do what was necessary for the health of the patient. In the gross negligence case of *R v Sellu*,[10] the patient died of a perforated colon after knee surgery, and the prosecution case was based on the standard of care provided over 24 hours, it being part of the Crown's case that the accused should have performed an operation to repair the perforated colon earlier than he did. Ultimately, and for other reasons, the appeal against conviction was successful in *Sellu* but it was certainly a case with some common features to that of *Patterson* in showing how such conduct (and neglect) could be considered to be gross negligence manslaughter where death resulted. Whilst all gross negligence manslaughter prosecutions must start by establishing a duty of care, and then a breach of a duty of care, prosecuting cases involving omissions to act are rare. It was also of note that the case involved failings by a medical professional. Whilst it is not stated in the Greffe records, the basis of criminal liability appears to have been the existence of the duty of care owed by the midwife, and the grave breach of that duty through (at least) a possible omission, this then having being considered to have caused the death of the patient. By comparison, the prosecution case in 2019 was built around the fact that the two nurses owed a duty to their patient, then that the agreed evidence showed the two nurses had failed to check on their patient for over 100 minutes, a window in which the deceased was able to apply a ligature that ultimately led to her death.

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[9] Marshall, at 66.
[10] [2017] 4 WLR 64.

20 Due to the apparent significance of the decision in *Patterson* further research was conducted of the Greffe strongroom records. The Greffe files contain the following entry (at 577)—

> "*Patterson ayant été appelé á la dite chambre comme sage femme pour donner des soins á Melissa Marks femme du dit Thomas Le Marchant, laquelle était dans les douleurs de l'enfantement, ignorament, témérairement, et félonieusement négligé de faire ce qui était necessaire pour la santé . . . [and later in the document at page 596] . . . Patterson condammée à étre bannie hors de ce Bailliage pour subir la servitude pénale pour trois ans sous la discipline prescrite par la législation du Royaume Uni; et aux frais, après avoir entendu les témoins desdits Officiers de la Reine*."
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> ["Patterson having been called to the said bedroom as midwife to do her duty to Melissa Marks wife of the said Thomas Le Marchant who was in the pangs of childbirth ignorantly temerariously and feloniously neglecting to do that was necessary for [the mother's health] . . . Patterson condemned to be banished from this Bailiwick to undergo penal servitude for three years under the chastisement prescribed by the legislation of the United Kingdom and to costs after having heard the witnesses of the said Crown Officers".]

21 This excerpt contains a number of important points. First, it clearly establishes the negligent conduct was treated as a crime (a felony), as opposed to a civil matter, and secondly it led to incarceration, which underpinned its status as a crime.

22 Before leaving Marshall's work it is worth noting a final paragraph—

> "Persons who are responsible for the health of others such as physicians and surgeons and experts in other fields must use all the care that is expected of their profession. Where a medical practitioner is on trial for manslaughter for grave negligence the Jurats must be satisfied that the negligence is great enough to attract criminal liability."[11]

23 This remains a key component of the offence, as will later be examined. However, before discussing the elements of the offence, it is important to explore the more recent homicide prosecutions in Guernsey to see if this would yield any evidence relating to the offence of gross negligence manslaughter.

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[11] Marshall, at 66.

Homicide prosecutions in Guernsey in the 20th and 21st centuries

24 A number of 20th century examples of murder being reduced to manslaughter were identified but still nothing akin to gross negligence manslaughter. These included *Tardif*,[12] *Tiley*[13] and *Le Prevost.*[14]

25 In the 21st century there have been a number of prosecutions for homicide, some of which resulted in a plea to manslaughter, or where manslaughter was the only charge brought:

- *Harvey v Law Officers*[15]—as noted further below, English jurisprudence was followed regarding the law of insanity whereby the court left open the option for the Jurats to find the accused not guilty of murder, but guilty of manslaughter on the grounds of diminished responsibility (although the accused was convicted after trial of two counts of murder).
- *Le Sauvage v Law Officers*[16]—although the accused was charged with murder a plea was accepted to manslaughter on the basis of diminished responsibility.
- *Rouget v Law Officers*[17]—the defendant was convicted of murder but it was accepted by the Royal Court (and not challenged on appeal) that despite the absence of any statutory provision the defence of provocation was available. As noted above the defence is now part of Guernsey statute. Of course by acknowledging the existence of the defence of provocation, unlawful act manslaughter was noted as a possible verdict.
- *Baker*[18]—this was a "single blow" manslaughter case where the accused pleaded guilty to this offence. There is no judgment available and the matter was not subject to appeal but it is further evidence that manslaughter is an offence well established in Guernsey law.

26 This research confirmed what had been suspected—that there were no modern-day examples of gross negligence manslaughter, and so little to guide the Royal Court in 2019 in identifying the elements the prosecution had to establish in order to prove the offence. It was at this

[12] (1964) CA no. 1.
[13] (1973) CA no. 7.
[14] (1980) CA no. 16.
[15] 2000–02 GLR 189.
[16] 2007–08 GLR *N* [1].
[17] 2007–08 GLR 306 at para 58.
[18] Royal Court, 9 July 2010 unreported.

stage that it became clear that other sources and authorities would have to be consulted.

English law—the historical position

27 The relationship between the law of Guernsey and the law of England and Wales is stated in the seminal Guernsey Court of Appeal decision in *Wicks v Law Officers*:[19]

> "Guernsey is a separate jurisdiction and has its own legal system. It is, therefore, free to set its own sentencing levels as the Island's courts think appropriate for Guernsey. Guernsey no more has to follow sentencing practice in England than it has to follow sentencing practice in Scotland, Northern Ireland, Jersey or, for that matter, France; it can, of course, in exercise of its autonomy choose, but for the same reason of autonomy cannot be compelled, to do so. In our judgment, no authority is required to justify this elementary statement of the constitutional position which has been regularly stated on previous occasions."[20]

28 It should never be assumed that English law would be the correct reference point to determine the extent of Guernsey criminal law, and it never has been considered as such by the Royal Court despite, of course, being an invaluable and persuasive source.

29 Although an earlier example has already been given, the generally accepted starting point for when it was beyond doubt that Guernsey criminal law followed English law is the 1848 Commissioners' Report. This document has long been a reference point for criminal practitioners in the Bailiwick of Guernsey and contains the following of interest:

> "Question: In this Island, what is the definition of murder?
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> Answer: The English authorities are cited in cases of that kind."[21]

30 Much of Guernsey's criminal statute law is now based on English law which strengthens the argument in favour of consulting subsequent English jurisprudence. Indeed, whether statutory or common law is under consideration it has, within the last 20 years, become very common to follow English case law and this can be traced back for a number of years. On occasions this will also include following the common law and perhaps one of most notable example

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[19] 2011–12 GLR 482.

[20] *Ibid*, at para 16.

[21] The 1848 Report, para. 6127—This response was given by John De Havilland Utermarck, then HM Comptroller.

of this was in *Harvey*[22] where Sir de Vic Carey, Bailiff, ruled in favour of following English law in respect of the test to be applied for determining insanity in Guernsey Law (taking Guernsey law in a different direction to Jersey law at that time). The then Bailiff stated:

> "It appears that for some time prior to that the criminal law had developed in an unstructured way and the need was to have a clear criminal law with offences defined and categorized and the various glosses on such offences developed over the centuries in the English courts imported into Guernsey jurisprudence. Consequently, since 1848 one has witnessed the development of common law offences on parallel lines to those offences in England and also the development of local legislation dealing with the more common offences of dishonesty and other offences such as criminal damage that have been the creatures of statute mirroring English provisions. Jersey law, I accept, has not always developed in a similar direction."[23]

31 As explained in *Wicks*,[24] this does not of course mean that there should be any concession that English law has any binding precedent effect on Guernsey law. A clear example of this is found in *Law Officers v Bishop*[25] where Scots law was favoured over English law, when considering the breadth of the offence of being concerned in the supply of a controlled drug. Interestingly, English law later caught up to fall in line with both Guernsey and Scots law[26].

32 Drawing this all together it was clear that by this stage two solid conclusions had been reached. First, that the prosecution of past cases identified by Marshall (and confirmed by Greffe records) allayed any doubt on the part of the prosecution team that gross negligence manslaughter was an offence known to Guernsey law. Secondly, English law would be of great influence in allowing the Royal Court to identify the elements of the offence as applicable at the time of trial.

The historical basis of gross negligence manslaughter in English law

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[22] 2000–02 GLR 189.
[23] *Ibid*, at para 10.
[24] 2011–12 GLR 482.
[25] Royal Court, 30 May 2013, unreported.
[26] See the decision in *Martin* [2015] 1 WLR 588 as considered in *Blackstones* (2019) at para B19.48 where the Guernsey Royal Court decision in *Bishop* also receives a mention.

33 The decision of the English Court of Appeal in *R v Bateman*[27] provides a useful overview of the offence as it was known at that time, and cites earlier sources for the existence of the offence of manslaughter (*e.g. Hale's Pleas of the Crown*). It appears to be an early (if not the earliest) analysis of the elements that make up the offence, and has been cited in numerous decisions of the English Court of Appeal.

34 Critically the court set the benchmark for what degree of negligence had to be established stating—

> ". . . in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence 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 of punishment."[28]

This is now enshrined in element (5) of the offence in Guernsey law, as will be set out shortly.

35 A further example is *R v Andrews*[29] which assists in understanding how the law developed. That was a case involving a road traffic fatality (commonly known as motor manslaughter) and shows there are similarities in the way English and Guernsey law developed in this regard, namely that cases that would now be pursued as causing death by dangerous driving were originally pursued as manslaughter cases. In that case the appellant was employed by the Leeds Corporation Transport Dept and was directed to take a van to assist a Corporation omnibus which had broken down. The appellant killed a pedestrian on route whilst undertaking an overtaking manoeuvre at speed. In giving the judgment of the Privy Council dismissing the appeal, Lord Atkin said—

> "of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and varying conditions. From the early days when any homicide involved penalty the law has gradually evolved . . . until it recognizes murder on the one hand, based mainly, though not exclusively, on the absence of intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on an absence of intention to kill but with the presence of an element of 'unlawfulness' which is the elusive factor. In the present case it is only necessary to consider manslaughter from the point of view

[27] (1927) 19 Cr App R 8.
[28] *Ibid*, at paras 11 and 12.
[29] [1937] AC 576, PC.

> of an unintentional killing caused by negligence, that is, the omission of a duty of care."[30]

36 This thus bears similarities to the case of *Gibson* (see above) which could be said to be a pre-motor vehicle example of motor manslaughter.

37 *R v Adomako*[31] remains the pivotal decision covering the elements of the offence and has been frequently cited since. The case was relied upon by Judge Finch in the Royal Court in establishing the elements of the offence in Guernsey law. [32]

38 Before exploring further the elements of the offence in current English law it is of note that there was a challenge to the offence in *Misra*[33] where it was argued that it offended the against the principal of legal certainty inherent in art 7 of the European Convention on Human Rights.[34] The Court of Appeal rejected that argument and indicated the law was clearly defined as stated in *Adomako*,[35] which helps to explain why this remains a significant reference point for the current state of the law, to which we will now turn.

Current English law

39 A useful starting point is the 2018 article by Laird "The Evolution of Gross Negligence Manslaughter",[36] as this refers to many of the important cases in the last 20 or so years. The article acknowledges the incremental development of the offence and the recent "significant development" by the Court of Appeal which is described as having "occurred solely with reference to healthcare professionals".[37] The article criticises this development of the law and certainly it has to be acknowledged that there has in recent times been a glut of appeals, many of which were successful, highlighting the difficulties that English judges are having in grappling with the necessary directions to juries in summing up. It is not within the scope of this article to

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[30] *Ibid*, at 581–582.
[31] [1995] 1 AC 171.
[32] *Law Officers v Prestidge and McDermott* [2019] GRC 053 and [2019] GRC 054.
[33] [2004] EWCA Crim 2375.
[34] An area which has its own Guernsey jurisprudence—see *Law Officers v Le Billon* (2011) Guernsey CA, Judgment 28
[35] [1995] 1 AC 171.
[36] K Laird, "The Evolution of Gross Negligence Manslaughter", *Arch Rev* 2018, 1, 6–9.
[37] *Op cit*, at 6.

rehearse all those decisions here, as the law was eventually clearly stated by the Royal Court in Guernsey. However, it is worth noting some of the concerns and providing references to those engaging in further research.

40 Laird refers to the offence as being in a state of flux and suggests that a statement of the law is needed from the Supreme Court to clarify the present state of the law which has resulted from its piecemeal development. It was also suggested the consequence of this was that—

> "doctors and other healthcare professionals are at greater risk of committing gross negligence manslaughter than most other members of society."[38]

41 Another article of interest is Spencer's "Prosecuting Medical Professionals for Manslaughter"[39] from 2019, which provides comment on element (v),[40] that is, the assessment of the degree of grossness of negligence noted above. Notably it acknowledges that the key issue of whether the conduct is "truly exceptionally bad" is left to the jury (or, in Guernsey, the Jurats).

42 A further article of note is "The Duty of Care in Gross Negligence Manslaughter"[41] from 2007, which questions whether the duty of care that must be proven is truly akin to the tortious duty of care in negligence.

43 "A Dangerous Situation: The Duty of Care in Gross Negligence Manslaughter" by Storey[42] looks at cases where a duty of care was imposed in cases beyond those involving medical professionals.

44 In his 2018 article, "Gross Negligence Manslaughter, Restaurant Owners and the Duty of Care" it is Storey again[43] who looks at the decision in *R v Zaman*[44], which was an important case to which the Royal Court of Guernsey made reference in order to identify the matters which have to be proved in establishing gross negligence

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[38] *Op cit*, p.9

[39] JR Spencer, "Prosecuting Medical Professionals for Manslaughter", *Arch Rev* 2019, 2, 9.

[40] See para 46 below.

[41] J Herring and E Palser, "The Duty of Care in Gross Negligence Manslaughter", Crim. L.R. 2007, Jan, 24–40.

[42] T Storey, "A Dangerous Situation: The Duty of Care in Gross Negligence Manslaughter (Case Comment)", J Crim L 2016, 80(1) 12–16.

[43] T Storey, "Gross Negligence Manslaughter, Restaurant Owners, and the Duty of Care (Case Comment)", J Crim L 2018, 82(3), 201–205.

[44] [2017] EWCA Crim 1783.

manslaughter. This involved the death of a customer with a peanut allergy who had been served food containing peanuts. The article addresses a number of interesting aspects of the offence, particularly the need for the prosecution to prove both factual and legal causation, which will be addressed below.

45 There are two other articles[45] of note, relating specifically to drugs cases which usually involve death following the intravenous administration of heroin. It will now be considered how all of this led to the formulation of the law in the recent Guernsey case outlined at the opening of this article.

Jersey law

46 Although the law of our neighbouring jurisdiction did not figure in argument before the Royal Court of Guernsey, it is interesting in retrospect to cast an eye over the law of Jersey. The key case on gross negligence manslaughter is *Att Gen v Hall*.[46] The facts were, briefly, that the defendant, who had been drinking heavily over a long lunch, got into his car to drive away. He reversed into another car causing minor damage and, on driving up Ouaisné Hill, forced another car into the rain gutter as he drove round a corner on the wrong side of the road. On the Route des Genêts he failed to see, and struck a 15-year-old cyclist who was thrown into the air and killed. He was charged, *inter alia*, with manslaughter. The Bailiff gave a preliminary ruling, and held that the correct direction to the jury, in summary, was that, before they could convict, they must be satisfied that the defendant caused the death of the victim by his grossly negligent driving. Hall was convicted, and sentenced to 3 years' imprisonment.

47 On appeal, the Bailiff's direction that a very high degree of negligence was required was upheld, and the appeal was dismissed. The Court of Appeal reviewed the English authorities which had preceded and followed the Jersey case of *Renouf v Att Gen*,[47] including *R v Bateman* (medical manslaughter)[48] and *Andrews v DPP* (motor manslaughter).[49] The court cited with approval a passage from the judgment of Lord Atkin in *Andrews*—

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[45] D Ormerod and R Forston, "Drug Suppliers as Manslaughterers (again)", Crim LR 2005, Nov, 819–833 and G Williams, "Gross Negligence Manslaughter and Duty of Care in 'Drugs' Cases: R v Evans", Crim LR 2009, 9, 631–647.
[46] 1995 JLR 102 (Royal Ct) and 1996 JLR 129 (CA).
[47] [1936] AC 445; [1936] 1 All ER 936 (PC).
[48] [1925] All ER 45.
[49] [1937] AC 576 (HL).

> "The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets 'reckless' most nearly covers the case. It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all-embracing for 'reckless' suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify conviction. If the principle of *Bateman*'s case . . . is observed, it will appear that the law of manslaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent driving, though unhappily much more frequent, is to be treated as death caused by any other form of negligence: and juries should be directed accordingly.[50]

48 As will be seen from the following paragraphs, it seems that the law of the Channel Islands are marching very much in step.

[50] [1937] AC 576 at 583.

Guernsey law

49 In two judgments,[51] Judge Finch dealt with the competing arguments submitted by the prosecution and defence, concluding that "what P has to prove is now well established". He then set out the five elements of the offence, on which the Jurats were later directed in summing up. He stated that the requirements necessary to establish the commission of the offence of gross negligence manslaughter are as follows:

> "(i) in accordance with the ordinary principles of negligence, D owed the deceased a duty of care. A person owes a duty of care to someone where it is reasonably foreseeable that their acts or omissions will cause harm to another.
>
> (ii) D was in breach of that duty of care. The question of breach of that duty should be dealt with 'in the round' (*R v Zaman* [2017] EWCA Crim 1783 at paragraphs 46–48).
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> (iii) a reasonably prudent person of D's experience and position would have foreseen that their actions or omissions that made up the breach of duty exposed the deceased to an 'obvious and serious' risk of death.
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> (iv) the breach of duty either caused, or made a substantial contribution (or was one that was more than negligible) to the deceased's death. 'Significant contribution' is used in Zaman, paragraph 48.
>
> (v) the actions of D can correctly be characterized as 'gross' negligence and therefore criminal. The cases start with R v *Bateman* (1927) 19 Cr. App. R. 8 (as mentioned in the earlier judgment) and the conduct must be proved to show 'such disregard for the life or safety of others as to amount to a crime against the State, and conduct deserving punishment'. As Lord Mackay of Clashfern LC said in *Adomako* at 187:
>
> > 'The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad as in all the circumstances, as to amount in their judgment to a criminal act or omission.'
>
> In other words, conduct that was truly exceptionally bad and amounting to such a departure from the proper care expected as

[51] *Law Officers v Prestidge* [2019] GRC053 and [2019] GRC054.

> to be truly reprehensible is therefore a crime. These formulations amount to very much the same (onerous) requirement."[52]

50 A number of additional comments can be made regarding the multitude of issues that were argued before Judge Finch during the course of this prosecution. First, the question in element (i) as to whether or not there is a duty of care is a legal matter on which the judge will direct the fact finders. In this case, as both nurses were at work on duty on the ward where the death occurred, it was conceded by the defence that the defendants owed a duty of care to their patient, the deceased. In some cases beyond an immediate doctor/patient relationship, the position may not be so clear cut, as is explored in some of the articles mentioned above. However, in this case, notwithstanding the aforementioned concession by the defence, Judge Finch was clear in his judgment on preliminary issues that:

> "The question of a 'duty of care' is covered in various cases, notably in R v Evans [2009] EWCA Crim 650 . . . In the case of a nurse/patient relationship (as with a doctor/patient relationship), the existence of a duty of care here should not, it appears, be in dispute. If, for some reason there is a dispute then the judge will be able to direct the Jurats that it is open to them to find a duty of care; and if the facts specified were established, a duty would arise. This is a question that, in my judgment, ought not to arise on the facts of the case as presently put forward, unless there is some compelling reason otherwise."[53]

51 The judge went on to say in his written directions to the Jurats that "It is not disputed that in law a nurse owes a duty of care to a patient". It was also conceded that by failing to do the checks there was a breach of the duty of care.

52 Element (iii) was highly contentious. A direction was given in accordance with the decision in *R v Rose (Honey)*.[54] This was frequently referred to in legal argument during the trial and is a good example of where the English trial judge went astray in his directions, culminating in a successful appeal. The vexed question for the Court of Appeal to consider was whether the reasonable foreseeability of death was to be decided by reference to what the defendant knew at the time of the breach, it being generally accepted to be an objective consideration. The trial judge fell into error in *Rose (Honey)* in concluding that this issue was to be judged not only by what the

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[52] *Law Officers v Prestidge and McDermott* [2019] GRC054, at para 14.
[53] *Law Officers v Prestidge and McDermott* [2019] GRC053, at para 16.
[54] [2017] EWCA Crim 1168.

accused knew but also by what they would have known but for the breach of duty. The Court of Appeal was quick to reject this approach stating:

> "The inherently objective nature of the test of reasonable foreseeability does not turn it from a prospective into a retrospective test. The question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, not but for the breach . . . The test of reasonable foreseeability simply requires the notional objective exercise of putting a reasonably prudent professional in the shoes of the person whose conduct is under scrutiny and asking whether, at the moment of breach of the duty on which the P rely, that person ought reasonably (*i.e.* objectively) to have foreseen an obvious and serious risk of death . . . in assessing reasonable foreseeability of serious and obvious risk of death . . . it was therefore not appropriate to take into account what the Defendant would have known but for his or her breach of duty."[55]

53 This was a critical consideration for the Royal Court as the accused had by their own admission not considered the deceased's recent medical history which was available to them in her patient records. The amount and content of information handed over to the defendants when they commenced their shift was disputed and so the defence case was presented on the basis that this additional information (in the medical history) could not be considered when assessing element (iii). In particular the defence contended that the defendants were not aware of all available additional information (*i.e.* beyond that given in the hand over) regarding the deceased's recent history of serious self-harm. The decision in *R v Rose (Honey)* has been the subject of academic comment as it clearly appears to take no account of negligent ignorance of potentially important information.[56] Whilst this is clearly the consequences of the decision, *R v Rose (Honey)* remains good law. In this case it meant the Jurats were in effect directed to consider the knowledge the defendants had, as opposed to that which it could be argued they should, as part of reasonable nursing practice, acquired by considering the available medical records. Clearly in many cases it may be difficult for the prosecution to establish exactly what information the defendants did know at the material time, but in this case it was easy to prove what the defendants had looked at, as the medical records are held electronically and each time they are viewed

[55] *Ibid*, paras 80, 84 and 94.

[56] For example see K Laird, "Gross Negligence Manslaughter: R v Winterton (Andrew) (Case Comment)", Crim LR 2019, 4, pp 336–339.

a digital trace is left. In the case of one of the nurses it could be established she had not used the system for a number of weeks. However, this provided little assistance to the prosecution in respect of this element given the decision in *Rose (Honey)* (as this could be disregarded).

54 Two final points remain to be made. First, gross negligence manslaughter has its roots in the general civil law of negligence but does not mirror it exactly (for example there is no need to prove pecuniary loss[57]). Reference has already been made to an article above which discusses this further.[58] This issue led to extensive arguments about causation and element (iv) during the trial. Indeed this aspect formed a substantial part of a submission of no case to answer by the defence after the prosecution case had closed. This was resisted and the case was allowed to proceed but it was raised again at the point of discussion about the proposed legal directions to be given to the Jurats. The question of factual and legal causation arose, with the defence submitting that a clear direction on factual causation incorporating the "but for" test was required.[59] The judge concluded that three of the most recent decisions[60] dealing with the elements of the offence had not required any specific direction on factual causation and so the standard direction to be found in the Crown Court Compendium 2019[61] was adopted (as set out above) meaning that the judge made no direct reference to "but for" causation. It would have no doubt formed an interesting discussion on appeal had there been a conviction as there is a dearth of case law covering the point despite it obviously being an essential element of proof. This would have been a particularly interesting discussion as defence counsel effectively repeated many of the submissions made in the no case submission and so expressly addressed factual causation by reference to the "but for" test causing the trial judge to provide additional guidance to the Jurats, in effect repeating the requirements of element (iv) as set out above. The issue was critical in the case because the medical evidence established that the deceased could have applied the ligature and died

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[57] See *R v Bateman* (1927) 19 Cr App R 8 and *Adamako* [1995] 1 AC 171.

[58] J Herring and E Palser, "The Duty of Care in Gross Negligence Manslaughter", Crim LR 2007, Jan, 24–40.

[59] See further: T Storey, "Gross Negligence Manslaughter, Restaurant Owners and the Duty of Care (Case Comment)", J Crim L 2018, 82(3), 201–205

[60] *Bawa-Garba* [2016] EWCA Crim 1841, *Zaman* [2017] EWCA Crim 1873 and *Kuddus* [2019] EWCA Crim 387.

[61] https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-July-2019-amended-1-August-2019.pdf

within the 15 minute observation check window between one check and the next. This led to the defence argument that factual causation in the "but for" sense was absent as even if the checks had been done as required the deceased could still have died.

55 A further matter which the court had to resolve was the defence argument that the court did not need to add any gloss to the requirement of the prosecution to prove that the conduct of the accused was a "substantial" cause of death. There is no doubt the English courts have not always been consistent, omitting in some decisions to expand beyond the word "substantial". However, the balance of recent case law was clear that "substantial" was defined as "more than negligible". To a lay person the word substantial could connote a major contribution to the death, and the defence were keen to avoid anything that might dilute this. It was equally important to the prosecution, this being a critical issue in the case, to persuade the court that the correct approach was to follow the balance of English cases to dispel any notion that the prosecution were required to prove the accused were the major, or most significant contributors, to death. This would clearly be very difficult in most cases, and particularly so in this case where the defence case was presented on the basis that the contribution of the defendants was, at worse, at the end of a long chain of failings by others.

56 The final aspect of the law requiring comment is that of element (v). As has been mentioned, the article "Prosecuting Medical Professionals for Manslaughter"[62] provides some commentary on this aspect and suggests that the state of the law is unsatisfactory in leaving such a critical element of the offence to the fact finders. Indeed, to the experienced prosecutor this looks awfully like the introduction to the elements of the offence something akin to the public interest test (found in any prosecutor's code[63]). Questions of whether the conduct is so "truly exceptionally bad" as to merit prosecution and punishment certainly opens up the possibility of different outcomes, depending on the make-up of the tribunal, where the life experiences the jury or Jurats bring to the court room will inevitably determine whether they think a person can be said to have committed a crime. This is a particularly difficult consideration for a lay person where they are called upon to determine the fate of a normally diligent medical professional who may have omitted to do something vitally important

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[62] JR Spencer, "Prosecuting Medical Professionals for Manslaughter", *Arch Rev* 2019, 2, 9.

[63] E.g. see the Law Officers of Guernsey's Code of Guidance at http://www.guernseylawofficers.gg/article/160958/Decision-to-Prosecute

leading to the death of a patient. Sympathies will clearly be roused further if there is any suggestion (as there was in this case) of that medical professional being burnt out through working additional hours.

57 One may ask, what else can the law do, in such a difficult scenario, than leave it to the good sense of the fact-finding tribunal to determine if the conduct was indeed a crime? It is suggested in the aforementioned article "Prosecuting Medical Professionals for Manslaughter" that—

> "a clear distinction could be made between slips—medical mishaps that result from simple human error, and violations—those resulting from a conscious decision by the medical professional to disobey an accepted rule of proper practice".[64]

55 One would hope such considerations would be factored in at the time of the decision to prosecute, but this remains a divisive and controversial area as shown by the well-known prosecution in *R v Bawa-Garba*,[65] where the defendant's conviction for gross negligence manslaughter and subsequent removal from the medical register caused much consternation and outrage across the medical profession worldwide. Equal consternation followed from the relatives and wider public when her appeal against removal from the register was successful. This case lead directly to the General Medical Council commissioning its own review which was published in June 2019, but whether any change in the law will occur remains to be seen. As *Wicks v Law Officers* illustrates, whether Guernsey will follow any changes also remains resolutely a matter for the courts of Guernsey to decide.[66]

Crown Advocate Chris Dunford is an Advocate of the Royal court of Guernsey. Sarah Watson has been called to the Bar of England and Wales and is a Prosecuting Lawyer in Guernsey. Both work for the Law Officers of the Crown in St Peter Port, Guernsey, and were responsible for the prosecution of this case.

The opinions expressed in this article are those of the authors and not representative of those of the Law Officers of the Crown or the States of Guernsey.

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[64] JR Spencer, at 9.

[65] [2016] EWCA Crim 2841.

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