Medical Manslaughter and Medical Neglect

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In recent months it has been reported that some New Zealand doctors have declined to provide operations for some patients, because of their fears about the criminal law. The operations would have been "high-risk" ones, and it is reported that the doctors feared that they would be charged with manslaughter if the patients died.

These reports have appeared in the context of the medical profession's campaign to secure an amendment to law of manslaughter. It is claimed that good medical practice is being inhibited by the current law, whereby doctors may be convicted of manslaughter if patients die as a result of any negligent conduct on the part of the doctors. It would be in patients' interests, we are encouraged to believe, for the law to be amended, so that doctors would no longer be at risk of being convicted of manslaughter whenever they negligently cause the death of a patient. Instead the prosecution should have to prove that the doctors were reckless.

This article examines the legal position of doctors who decline to provide operations for patients, because of their fear of being charged with manslaughter if patients die. The current law of manslaughter will be examined first, and an attempt will be made to remove some of the misconceptions that are held about it.

Manslaughter

Since the Accident Compensation scheme was introduced, it has very rarely been possible for New Zealand doctors to be sued for negligence. However their negligent conduct can sometimes result in criminal liability.

If a patient dies in consequence of a doctor's negligence, the doctor can be convicted of manslaughter. If the patient is injured in consequence of the doctor's negligence, but death does not result, the doctor can be convicted of a lesser offence.

Prosecutions are far from common. Two members of the medical profession have been charged with manslaughter in the past decade, and one was charged in the previous decade. No members of the medical profession have been charged with the lesser offence for negligently causing bodily injury.

When one takes account of the hundreds of thousands of medical encounters which have given scope for negligence in the past two decades, and the thousands of cases where harm or death-inducing negligence has probably occurred, it is apparent that the risk of prosecution remains very slight.

There is little evidence to support the view that doctors are especially at risk when dealing with high risk patients. Two of the three prosecutions resulted from the deaths of low risk patients. In one case an anaesthetist administered carbon dioxide instead of oxygen to a boy with acute appendicitis. In another case a radiologist injected a totally inappropriate substance into a young man in the course of carrying out a myelogram.

One case did involve a high risk patient, and it is this case which has given rise to particular anxiety. When an emergency arose during an operation, the anaesthetist injected the woman with the wrong drug by mistake. He went by the label on the drawer of the trolley, and did not check the label on the packet, or the container, or the ampoule. It is arguable that in this case the jury gave insufficient weight to the need for speedy action in an emergency. However, the defence did not adduce evidence which supported the anaesthetist's conduct: the expert witness called by the defence said that he would always check the labelling. This expert evidence supported the view that the anaesthetist had failed to do what a reasonably careful anaesthetist would do in the circumstances.

There is no question of doctors incurring liability whenever there is an untoward happening, or simply because they make a decision which turns out to be wrong: their duty is to do what any reasonable practitioner would do in the circumstances. In the leading case the President of the Court of Appeal quoted from an earlier New Zealand case, in which it was said that:

> "a mere mistake or error of judgment which should in a civil action prevent an act or omission from being imputed as negligence is equally a good defence on a criminal charge involving negligence."

The President said that:

> "If a charge of manslaughter were brought against a medical practitioner based on wrong diagnosis or treatment the defendant would normally be entitled to a direction that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion, even though other doctors adopt a different practice."

The law does not discriminate against doctors. The section in the Crimes Act which imposes a duty on everyone who "undertakes (except in case of necessity) to administer surgical or medical treatment" imposes an identical duty on everyone else who undertakes (again except in case of necessity) to do "any other lawful act the doing of which is or may be dangerous to life". The section imposes on them all the same legal duty "to have and to use ***reasonable*** knowledge, skill, and care in doing any such act". They are all made similarly "criminally responsible for the consequences of omitting without lawful excuse to discharge that duty".

A similar duty is imposed by an adjoining section, which also applies to doctors in some circumstances. It applies to "everyone who has in his charge or under his control anything

whatever", or who operates or maintains anything "which, in the absence of precaution or care, may endanger human life". All such persons are under the same legal duty "to take ***reasonable*** precautions against and to use ***reasonable*** care" to avoid endangering human life. They are all made "criminally responsible for omitting without lawful excuse to discharge that duty".

Prosecutors have not singled out the medical profession for special attention. In recent years prosecutions based on these provisions have been brought against an aircraft pilot, a power boat driver, and a distributor of (allegedly) listeria-infected mussels, amongst others.

In the three cases where members of the medical profession have been convicted of manslaughter, the courts have not dealt harshly with the doctors. In the first case the doctor was fined $2500; in the two more recent cases the courts have discharged the doctors without imposing any penalty.

Although New Zealand's law of manslaughter is far from perfect, it is not as unfavourable to doctors as some believe. It has been in its present form for the past century, and recent cases have done little more than reaffirm long-established interpretations.

Refusal to provide operations

Refusing to provide operations is only one of several measures which some doctors are reported to have taken in response to recent concerns about the law of manslaughter. It is claimed that operations are being delayed while unnecessary tests are carried out, and that the risks are being explained in such a way that patients decline to give consent. These practices raise more complex issues than does the one on which it is proposed to concentrate here. This is the refusal to provide some operations for high risk patients, not for the patient's benefit, but because the surgeon or anaesthetist fears prosecution for manslaughter if death results.

In this context, the criminal law may prove to be a two edged sword. Doctors who refuse to provide operations, because of fears about the law of manslaughter, could be charged with manslaughter if a patient dies because of their failure to operate. This requires explanation.

New Zealand criminal law sometimes imposes on doctors a duty to provide necessary medical treatment. The Crimes Act provides that everyone who has charge of someone who is unable (because of sickness or any other reason) to withdraw from such charge, and is "unable to provide himself with the necessaries of life", is under a legal duty to supply that person with "the necessaries of life". These include medical interventions which are necessary to cure or alleviate a condition which threatens life or health. The person with charge of the patient is made criminally responsible for omitting "without lawful excuse" to perform this duty if the patient's death is caused, or life endangered, or health permanently injured, by the failure to treat.

Doctors are under a duty to provide their patients with treatment that any reasonable doctor would provide in the circumstances.

The qualification "without lawful excuse" is important. If a consultant surgeon has charge of a patient, and after taking all reasonable steps it proves impossible to find an anaesthetist who is prepared to assist, the surgeon would usually have a lawful excuse for omitting to provide that operation. However it is most unlikely that a court would accept that a surgeon had a lawful excuse if the surgeon simply accepted without demur an anaesthetist's refusal to participate because of fear about the law of manslaughter.

Where the statutory provision applies, a person can be charged with manslaughter if death is hastened by the omission to proceed. In other cases, where the statutory duty to supply the necessaries of life does not apply, doctors could still be charged with manslaughter if, "without lawful excuse", they fail to provide potentially life-prolonging treatment, and death is hastened in consequence. Doctors are under a duty to provide their patients with treatment that any reasonable doctor would provide in the circumstances. A doctor's fear about being charged with manslaughter, if something went wrong, would not amount to a lawful excuse.

Concerns about the criminal law should not be the reason why doctors provide, or refuse to provide, treatment for high-risk patients. Nevertheless, doctors who are tempted to refuse to provide operations for high risk patients, because of fears about the law of manslaughter, should not overlook the fact that they may sometimes be guilty of manslaughter if they omit to provide an operation and the patient dies.

In most cases, of course, patients will not die for want of operations. But where doctors are under a duty to provide medical treatment, and they omit without lawful excuse to do so, they could sometimes be criminally liable if patients' lives are endangered, or their health is injured, by the omission.