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# PROPOSED RESOLUTIONS TO THE CONTROVERSIAL STANDARD OF GROSS NEGLIGENCE MANSLAUGHTER

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## Abstract

This paper begins with a discussion of the history of negligent manslaughter in New Zealand and its development from the standard of ordinary negligence to the current test of a "major departure" from the expected standard of care, as set out under s 150A of the Crimes Act 1961. The paper then examines failings in s 150A's current application, arguing that the "major departure" test has created injustices due to its strictly objective nature. Two examples of this are discussed in-depth, *Bawa-Garba v R* (UK) where a doctor was convicted of grossly negligent manslaughter for the death of her patient; and the decision not to prosecute the negligent engineers of the CTV building which collapsed in the Christchurch earthquake of 2011. The paper discusses three potential resolutions moving forward. It concludes that a more subjective interpretation of the wording of s 150A, which takes account of circumstances excusing or condemning a defendant's conduct, would prevent future injustices and be a reasonably open interpretation on the wording of s 150A.



**Key words:** gross negligence, manslaughter, major departure

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## 1. INTRODUCTION

Negligence is a standard applicable across multiple areas of the law, with far-reaching implications. To say a person is negligent is to say they have breached the duty of care that they owe in the circumstances and that this breach of their duty has caused loss to the person or persons to whom the duty was owed.[1] What constitutes a breach of a person's duty is assessed against the theoretical conduct of the reasonable person in the same situation, whose actions are those of a moral and conscientious person.[2] Such a concept is applicable in both civil and criminal contexts because of the breadth of acts and omissions that can be considered negligent.

The application of negligence in a civil law context is well-established and has remained relatively consistent since the elements of a duty to one's neighbour, a breach of that duty and reasonable foreseeability of loss were laid out by Lord Atkin in one of the most well-known cases in history, *Donoghue v Stevenson*.[3] However, the use of negligence in a criminal law context is much more contentious as convictions for negligence essentially hold people liable for criminal actions when they have merely failed to contemplate the consequences flowing from their actions, unlike recklessness or intention where there is knowledge or foresight of a risk.[4] One of the most contentious issues concerning criminal negligence is that of negligent manslaughter.

In this essay I will explore the issues created by the current standard of gross negligence manslaughter, with reference to two decisions which have caused significant controversy, *Bawa-Garba v R* (UK) and the decision not to prosecute the CTV building collapse in Christchurch. I will attempt to find a solution to the perceived injustices created by the current law which simultaneously gives effect to parliamentary intent.

### *1.1. Negligent Manslaughter in New Zealand*

There have been many articles and books published on the subject of negligent manslaughter[5] and they revolve generally around what standard of negligent manslaughter is fair. A profound question is whether there should be a negligence standard for manslaughter at all, as such a standard holds a person liable for a serious crime despite no intent to commit such a crime or even awareness of the risk of it being committed. There is criticism that negligence belongs to the realm of torts. However, Simester argues that whilst it is not as culpable as deliberate harm,

[1] Bill Atkin and Geoff McLay *Torts in New Zealand* (5th ed, Oxford University Press, Melbourne 2012) at 232.
[2] Glanville Williams *Textbook of Criminal Law* (2nd ed, Steven & Sons, London, 1983) at [89].
[3] Atkin and McLay, above n 1, at 240.
[4] Williams, above n 2, at 96.
[5] See bibliography.

negligent conduct is still serious enough to warrant criminalisation.[6] From a policy perspective, Glanville Williams pointed out that under utilitarian theory, knowing that a sanction is in place ought to increase the level of care people take.[7] Thus, it seems that negligence is necessary in criminal law as without it, people could act carelessly without fear of repercussions.

Negligent manslaughter is criminalised under the Crimes Act 1961. Section 150A(2) prescribes the test to be met for negligence as a "major departure" from the standard of care expected of people performing the legal duties laid out in ss 151 to 157. Whether there is a major departure is to be judged against the actions of the reasonable person to whom the relevant legal duty applies. Section 150A(1)(b) extends liability for breaching the duties in ss 151 to 157 to situations where failing to perform those duties results in culpable homicide under s 160. If a major departure from the prescribed standard can be proved, this will result in a charge of manslaughter. This requirement of a major departure accords with the requirement in the United Kingdom and Australia that negligent manslaughter be 'gross' and is more easily described by the epithet 'gross negligence'.[8]

The major departure requirement imports a higher standard to be found against defendants than ordinary negligence, which was previously required under the Act. Though there may seem to be some ambiguity in the degree of negligence that separates a major departure from ordinary negligence, this is a matter to be determined by the jury on the facts of each case.[9] There were minimal barriers to findings of negligent manslaughter under the lesser standard of ordinary negligence, and this was undesirable because manslaughter remains a highly stigmatised offence regardless of the severity of the actual punishment that follows.

As the case of *Bawa-Garba v R* will illustrate, doctors are at special risk of charges for negligent manslaughter. The nature of the medical profession means the actions of doctors will impact upon human lives both more often and more directly than other actors. One issue with the area of negligent manslaughter is that whilst it is widely accepted that medical professionals will face negligent manslaughter charges more often, there has been no introduction of a separate standard for medical professionals which could take into account the peculiar considerations of their field. Instead, the law of gross negligence manslaughter has developed with a strong focus on medical professionals and has disregarded to a certain extent other people who are charged with

[6] AP Simester and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (6th ed, Bloomsbury, London, 2016) at 167.
[7] Williams, above n 2, at 91.
[8] M J Davies and J H Havill "Medicolegal Threat in New Zealand" (1994) 344 The Lancet 478 at 478.
[9] Karl Laird "The Evolution of Gross Negligence Manslaughter" (2018) 1 Arch Rev 6 at 7.

negligent manslaughter.[10] Indeed, as will be discussed further on,[11] the move from an ordinary negligence standard to the higher standard was largely driven by concern for medical professionals.

## 2. HISTORY OF NEGLIGENT MANSLAUGHTER IN NEW ZEALAND

### *2.1. Civil Negligence*

Our law regarding negligent manslaughter has not always been consistent with overseas common law jurisdictions. Before the introduction of the Crimes Act 1961, the law pertaining to negligent manslaughter was laid out in the Crimes Act 1908. Section 171 of that Act provided for a legal duty to take reasonable care, which determined that the standard to be applied was that of civil or causative negligence. This was affirmed by historical cases such as *R v Storey*, which applied the ordinary negligence standard under s 171 and held that the degree of negligence required for manslaughter convictions should be the same as that applied in civil cases.[12] In the earlier case of *R v Dawe*, Cooper J also applied s 171 and stated clearly that proving gross negligence was not required.[13] These cases and statute illustrate the intent of the courts and parliament to apply one uniform standard of causative negligence across both the civil and criminal areas of the law.

The new Crimes Act was introduced in 1961 with the offence of manslaughter laid out in s 160. The Crimes Act affirmed the earlier law by maintaining the ordinary civil negligence standard for manslaughter, a simple departure from the relevant duty of care.[14] *R v Yogasakaran*, a highly influential case concerning negligent manslaughter which is discussed below,[15] was decided in 1990 on the basis of this provision. However, whilst the court clearly upheld the negligence standard, the perceived injustice of imposing liability for an anaesthetist's careless error raised debate, particularly among medical practitioners, over whether there needed to be a change in the standard applied.[16]

### *2.2. R v Yogasakaran*

Yogasakaran was an anaesthetist who had trained in the United Kingdom but had recently begun working in New Zealand. During a routine surgery requiring administration of anaesthesia, a patient began suffering breathing difficulties. Yogasakaran administered what he believed to be the

[10] Laird, above n 9, at 9.
[11] See 2.5.
[12] *The King v Storey* [1931] NZLR 417 at 432.
[13] *Rex v Dawe* [1911] 30 NLZR 673 at 686.
[14] Crimes Act 1961, s 160.
[15] See 2.2.
[16] Duncan McMullin *Report of Sir Duncan McMullin to Hon Douglas Graham, Minister of Justice, on Sections 155 and 156 of the Crimes Act 1961* (1995) at [8.11].

appropriate drug, Dopram Hydrochloride. However, the drug was Dopamine Hydrochloride, and had mistakenly been placed in the section of the trolley labelled Dopram. The Dopamine was packaged similarly to the packaging of Dopram in the United Kingdom, where Yogasakaran had trained, and both drugs are colourless liquids. However, Yogasakaran failed to read the label on the ampoule itself, and later claimed this failure to check was due to the lack of time caused by the urgency of the situation. The administering of the wrong drug caused the patient to enter cardiac arrest and she died several days later.[17] The Court of Appeal found Yogasakaran guilty of negligent manslaughter, finding that a reasonable anaesthetist would not have breached their duty by failing to check the packaging of the drug, regardless of the circumstances.[18] Yogasakaran's application for leave to appeal to the Privy Council was refused, with the Privy Council stating that the court's decision was based on peculiar New Zealand policy into which the United Kingdom's courts would not interfere.[19]

*Yogasakaran* can be directly contrasted to the Canadian case of *R v Giardine*[20], where the standard to be met for manslaughter was gross negligence. Giardine, a surgeon, administered the wrong drug without checking the packaging. Giardine was not acting under urgency and would have had ample time to read the label. Regardless, the court held that gross negligence manslaughter was not made out.[21] This serves to demonstrate the severity of New Zealand law applying the ordinary negligence standard. Whilst Yogasakaran was acting under urgency and argued in court that he believed he did not have time to read the label, he was still held liable, though the urgency he faced seemingly makes his conduct more excusable than that of Giardine. These two cases illustrate how the differing standards have created diametrically opposed results to cases turning on similar facts.

### *2.3. Role of Accident Compensation Corporation (ACC)*

Though the standard of civil negligence drew controversy, a possible justification for maintaining the harsh standard was the introduction of ACC in 1972. By generally preventing civil claims being brought for personal injury, the Accident Compensation Act barred civil actions against doctors for medical misadventure, including gross negligence.[22] Consequently, ACC's introduction significantly altered the law of negligence by providing medical professionals with a degree of immunity. Patients could not sue doctors for negligent injury in civil lawsuits except for

[17] *R v Yogasakaran* [1990] 1 NZLR 399 (CA) at 401.
[18] At 405.
[19] David Collins "New Zealand's Medical Manslaughter" (1992) 11(2) Med Law 221 at 222, and McMullin, above n 16, at [3.21].
[20] *R v Giardine* (1939) 71 CCC 295.
[21] Collins, above n 19, at 223.
[22] Accident Compensation Act 1972, s 5.

exemplary damages, and by 1992, 18 years after the introduction of ACC, no successful action for exemplary damages had been brought against a doctor.[23] The substantially reduced ability to sue doctors under ACC created concern that doctors might work to lower standards because they did not have to fear lawsuits, thus increasing the likelihood of patients dying.[24] This arguably justified a harsher standard to create a balance by increasing the risk of prosecution for manslaughter. However, evidence does not support the assumption that the immunity from civil law claims has resulted in doctors working with less care.[25] Therefore, this was not a well-founded justification for maintaining the civil law standard.

### *2.4. Introduction of a Major Departure Standard*

Significant change was made to the law in 1997 with the introduction of the Crimes Amendment Act 1997 (No 88). This amendment brought in s 150A(2) of the Crimes Act, and thus the standard of a "major departure", to be applied to s 160 when negligence is alleged. In *R v Powell*, s 150A was held to apply to both unlawful acts and omissions in order to prevent artificial distinctions being created.[26] *R v Hamer* determined that the standard was objective, with what constituted a major departure being determined by reference to what the reasonable person in those circumstances would have done. Though the assessment of major departure under *Hamer* may take into account particular knowledge or expertise, it will not take into account personal characteristics.[27] Though this essay criticises the application of the major departure standard, it is clear that such a standard was intended to have, and indeed has had, positive effects when contrasted to the previous civil standard.

### *2.5. Policy Reasons for Changing the Law*

The introduction of a higher standard of negligent manslaughter to the Crimes Act was significantly influenced by policy concerns laid out in the preceding report penned by Duncan McMullin. One of the largest contributing factors was that the new law would be fairer to medical practitioners. McMullin found that a manslaughter standard that was harder to meet would lead to improved accident reporting as it would remove the fear of prosecution for more minor mistakes in situations like Yogasakaran's. Such a standard would also prevent defensive medical practices like refusing to undertake administration of risky treatments, and would incentivise medical practitioners to remain in, or come to, New Zealand.[28] Even discharge without penalty can have

[23] Collins, above n 19, at 225.
[24] Ibid.
[25] Ibid.
[26] *R v Powell* [2002] 1 NZLR 666 (CA) at [35].
[27] *R v Hamer* [2005] 2 NZLR 81 at [55].
[28] McMullin, above n 16, at [12.3].

severe consequences for medical practitioners because of the associated stigma, which may impact on a convicted person's ability to find further employment and thus affect their general welfare.[29] The significance placed on concerns relating to medical professionals demonstrates the way concern over negligent manslaughter's specific application to medical professionals has shaped the law.

Another policy reason for the change was that the amendment brought New Zealand's law in line with that of overseas jurisdictions. In the United Kingdom, a jury must determine whether the defendant departed so far from the ordinary standard of care that their conduct should be judged as criminal. This is known as the gross negligence standard, and it is the same in Canada and Australia.[30] The court in *R v Hamer* held by approving the United Kingdom case of *R v Adomako*[31] that the New Zealand standard, a major departure, is identical to this gross negligence requirement.[32] Consistency across common law jurisdictions is ideal because it allow judges to seek guidance from the judgments of overseas courts on the directions the law should take. This is particularly useful in areas with minimal litigation in New Zealand such as negligent manslaughter where the higher courts of New Zealand have not often had the opportunity to discuss the issue at length. The court in *R v Hamer*, in approving *Adomako* and relying on the Canadian case of *R v Creighton*,[33] illustrated the positive effect of bringing New Zealand's gross negligence law in line with overseas jurisdictions.

## 3. ISSUES PRESENTED BY THE GROSS NEGLIGENCE STANDARD

### *3.1. Application of s 150A*

Controversy over gross negligence manslaughter is inevitable because the standard holds people liable despite lack of intent to commit a crime or even foresight of the risk of a harmful outcome. As a whole, the Crimes Act has a general focus on culpable states of mind due to the severity of the offences within. Thus, negligent and grossly negligent manslaughter in particular have caused controversy for what might be a perceived inconsistency with the rest of the Crimes Act and the general approach of the law to serious crimes.[34] The assessment of a major departure is the root of much debate on the subject, as the uproar surrounding high-profile decisions on gross negligence manslaughter illustrates that the standard does not always create just results. The approach of the higher courts to the standard of major departure was exemplified in *R v Hamer*.

[29] McMullin, above n 16, at [3.27].
[30] At [4.2], [5.1] and [6.0].
[31] *R v Adomako* [1995] 1 AC 171 (HL).
[32] *R v Hamer*, above n 27, at [59].
[33] *R v Creighton* (1993) 105 DLR (4th) 632 (SCC).
[34] "Gross Negligence Manslaughter – Certainty of Definition of" (2004) 9 Arch News 2 at 2.

### *3.2. R v Hamer*

Mr Hamer, a former nurse, was charged with grossly negligent manslaughter after his wife's death. She had consumed a fatal dosage of his prescription medication and he failed to call the ambulance until 17 and a half hours later, despite being aware of her cyanose (blue lips) and laboured breathing in the hours beforehand. In the meantime, he had propped her up with pillows which partially blocked her airway. Several months later she died from brain damage which had been caused by oxygen deprivation from taking the drug. Mr Hamer had knowledge of the antidote to the drug but failed to inform ambulance staff of this when they arrived.[35]

The Court of Appeal used the opportunity presented by *Hamer* to clearly lay out the major departure standard in New Zealand law. The court affirmed *R v Adomako,*[36] holding that the test for a major departure was to be assessed by the jury against what the reasonable person would have done. The court elaborated that courts will not take into account the defendant's personal characteristics as part of the assessment of the circumstances mentioned in s150A(2), making the test wholly objective and taking the interpretation least favourable to defendants.[37] On the facts of *Hamer,* this meant the court refused to consider the actions of the reasonable person in light of Hamer's depression and addiction. However, the court did consider Hamer's medical knowledge as directly relevant to what he could reasonably foresee at the time of the breach, when he did not call the ambulance.[38] In regard to what constituted gross negligence, the court adopted the standard set out in *Adomako,* that the jury must determine whether the defendant's negligence was so gross as to justify criminal responsibility. Further, whilst a culpable state of mind is not required for negligence, it may be evidence of the grossness of the conduct to be assessed by the jury in some cases.[39]

Since the law has been brought in line with overseas jurisdictions, the court in *Hamer* was able to seek guidance from the Canadian case of *R v Creighton.*[40] In *Creighton,* the defendant injected the consenting deceased with an unlawful drug and did not seek assistance when she reacted to the drug.[41] The issue before the Supreme Court of Ontario was whether the test for gross negligence was wholly objective or contained subjective elements, and the majority led by McLachlin J found the test was entirely objective.[42] Lamer CJC, in the minority, considered that

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[35] *R v Hamer*, above n 27, at [7] to [11].
[36] Above n 31.
[37] *R v Hamer*, above n 27, at [37].
[38] At [55].
[39] At [29].
[40] Above n 33.
[41] *R v Hamer*, above n 27, at [30].
[42] At [31].

educational, experiential and habitual factors personal to the accused should be taken into account. He argued that the test should be of the reasonable person with the frailties of the defendant, so long as those frailties were out of their control, thus preventing intoxication and the like from being raised.[43]

The majority rejected Lamer CJC's proposed objective-subjective test, finding that a uniform standard ought to be applied to the reasonable person in all cases, unless the defendant's personal characteristics prevented them from understanding the quality or nature of the act.[44] The objective approach of McLachlin J was firmly approved in New Zealand by the court in *Hamer*, thus cementing the new similarities between the two jurisdictions and giving direction to future courts over the objective standard to be applied. The standard to which Hamer was held was that of the reasonable person in possession of his knowledge as a nurse. This accords with the approach in United Kingdom cases such as *Adomako* and New Zealand cases such as *Yogasakaran*, in which the courts considered the reasonable doctor and the reasonable anaesthetist respectively. The application of this standard demonstrates the narrow limits of what the courts will allow to adapt the reasonable person test.

### *3.3. Issues Raised by Objective Major Departure Test*

The interpretation of s 150A as a wholly objective test has caused controversy since *R v Hamer* was decided and has potentially obscured the meaning parliament intended upon enactment. There is much debate over whether gross negligence is the appropriate level for negligent manslaughter, as it has caused seemingly unjust results in high-profile cases both here and in the United Kingdom. One example of this is the decision of the Deputy Solicitor-General not to prosecute two negligent engineers for the high-profile collapse of the CTV building in Christchurch, where one instrumental factor was the minimal likelihood of being able to prove their negligence amounted to a "major departure". Another example is the decision of the Court of Appeal in the United Kingdom to prosecute Bawa-Garba, a doctor, for the death of a patient. Though not decided in New Zealand, the latter case is directly relevant because of the identical gross negligence standard applied in the United Kingdom. The impact of the *Bawa-Garba* decision has been felt deeply across common law jurisdictions and caused significant uproar.[45] It can therefore be seen as influential upon the development of our law on grossly negligent manslaughter. Both this case and the decision not to prosecute for the CTV building collapse have

[43] *R v Hamer*, above n 27, *a*t [36].
[44] At [31].
[45] Elizabeth Stuart-Cole "Medical Manslaughter: The Effect of Lay Findings of (Criminal) Gross Negligence on Professional Tribunals" (2018) 82(3) J Crim L 197 at 198.

caused significant discussion of the law by high level legal officers, demonstrating the importance of the issues they raise.

### *3.4. Bawa-Garba v R*

Hadiza Bawa-Garba was found guilty of grossly negligent manslaughter in a decision upheld by the United Kingdom Court of Appeal. The ensuing uproar and general feeling she should have escaped liability, particularly discussed by medical professionals, indicated that the standard of gross negligence was regarded as being unfair and too harsh in its application. Bawa-Garba was working as a doctor and Jack Adcock, the deceased, was a child who had been admitted as a patient. Adcock had Down's Syndrome and a heart defect, and due to a chain of failures he died of systemic sepsis on the same day he was admitted.[46] On the day of Adcock's death, Bawa-Garba was performing the work of multiple members of staff across three departments.[47]

The case against Bawa-Garba alleged that she breached her duty of care to Jack by inadequately assessing him, failing to respond to clinical findings or keep proper clinical notes, and failing to refer Jack's case to a consultant for further advice.[48] Action was also brought against Amaro, an agency nurse working in the ward, for failing to undertake and record regular readings of Jack's vital signs and oxygen levels, failing to maintain his proper fluid balance, and failing to relay her concerns to senior staff.[49] Both Bawa-Garba and Amaro were charged with gross negligence manslaughter under the gross negligence test from *R v Adomako* with the Crown Court at Nottingham finding they breached their duties of care to Jack in a way that was truly, exceptionally bad.[50]

Though there were numerous mitigating factors such as understaffing and high workloads, a 13-hour shift, failings of other staff, IT system failures and unavailability of data,[51] these factors did not prevent the charge of gross negligence being upheld. Bawa-Garba was given a two-year suspended sentence and in concurrent disciplinary proceedings was also struck off the register, as was Amaro,[52] though Bawa-Garba has recently been reinstated.[53]

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[46] *Bawa-Garba v R* [2016] EWCA Crim 1841 at [3] and [7].
[47] "Reviewing Criminal Responsibility of Doctors" (2018) 154 Crim LB 1 at 1.
[48] *Bawa-Garba v R*, above n 46, at [11] to [14].
[49] Linda Starr "Negligent Care Leads to Manslaughter Convictions" (2018) 25(8) ANMF 13 at 13.
[50] *Bawa-Garba v R*, above n 46, at [36].
[51] At [17] and [18].
[52] Linda Starr, above n 49, at 13.
[53] Ajanta Silva "UK Court of Appeal reinstates Dr Hadiza Bawa-Garba" (29 August 2018) World Socialist Web Site <www.wsws.org>.

The uproar around Bawa-Garba's case is almost unparalleled. An independent fundraising page online led by doctors raised over £360,000 from over 11,000 donors to appeal the decision and pay for leading lawyers.[54] More than 8,000 doctors signed a letter stating the ruling in the case would "lessen their chances of preventing a similar death." [55]

The public controversy, particularly in the medical community, centres around the fact that the court did not allow the realities of the public health system, the systemic failures and multiple pressures placed on the two professionals, to be considered in laying the charge of manslaughter.[56] Bawa-Garba's prosecution caused public outcry as it represented the seemingly severe state of the law towards medical professionals. The fear of conviction despite extenuating justifications is closely felt by the medical community in New Zealand, with the New Zealand Residents Doctors' Association issuing a notice attempting to allay concerns of medical professionals.[57]

The case of *Bawa-Garba* seems to suggest that the standard of gross negligence manslaughter is too easily met, as a major departure from the reasonable person standard was established despite easily recognisable pressures beyond Bawa-Garba's control. The case has raised discussion over whether medical practitioners require some form of exception to the current standard, in order to recognise the external factors placing pressures upon them which lead to greater likelihood of mistakes being made.[58] It would be preferable to do justice whilst still maintaining what parliament has intended the standard to be.

### *3.5. CTV Building Collapse*

At the opposite end of the spectrum to the case of Bawa-Garba is the controversial issue in New Zealand of the CTV building's collapse. This created public outcry because the Crown Law Office, represented by the Deputy Solicitor-General, advised against the Police's original decision to prosecute the engineers of the building for gross negligence manslaughter. Multiple factors influenced this decision and an ultimate technical bar was the year and a day rule under s 162 of the Crimes Act.[59] The most relevant factor to this essay in the decision not to prosecute is that the Crown Law Office determined that it was unlikely that the Crown Solicitor would be able to prove

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[54] Moosa Qureshi, James Haddock and Chris Day "Independent Legal Opinion on Dr Bawa-Garba Case" (26 January 2018) CrowdJustice <www.crowdjustice.com>.
[55] "Hadiza Bawa-Garba: Medics Rally Behind Struck Off Doctor" (29 January 2018) BBC <www.bbc.co.uk/news>.
[56] "Reviewing Criminal Responsibility of Doctors", above n 47, at 2.
[57] New Zealand Resident Doctors' Association *The Case of Bawa-Garba* (NZRDA, Auckland, 2018) <www.nzrda.org.nz>.
[58] Gareth Iacobucci "Health Secretary Orders Review into Use of Medical Manslaughter" (6 February 2018) The BMJ <www.BMJ.com>.
[59] Crown Law *CTV Investigation: Peer Review of Legal Opinion* (Wellington, 2017) at [7] and [32].

negligence to the major departure standard required by the courts.[60] This was despite being confident that the engineers were negligent, such that they would have satisfied the previous ordinary negligence standard.[61] It is clear from the resulting public upset and subsequent protest that the decision not to prosecute was felt as unjust and thus that the standard was too high or hard to prove.[62]

The six-storey office building known as the CTV building collapsed during an earthquake in Christchurch on February 22nd, 2011, killing 115 of the 151 people inside at the time.[63] The building had been constructed 23 years earlier in 1988. The firm contracted to engineer the building was Alan Reay Consultant Engineers (ARCE), whose director was Alan Reay. Reay allocated the structural engineering of the CTV building to his employee, David Harding, who was the only other engineer employed by the firm.[64] It was chiefly against Reay and Harding that charges of gross negligence manslaughter were intended to be brought.[65] Whilst alterations had been made to the building in 1990, it was found by Beca that these alterations did not preclude Reay and Harding's negligence from being a substantial and operating cause of the building's collapse.[66]

An investigation by Police into the building's collapse found at first instance that both Reay and Harding's acts and omissions were a major departure from accepted practice and were substantial and operating causes of the death such that causation was made out.[67] The Crown Solicitor affirmed this view, though noting that the test of evidential likelihood of success had to be satisfied and that it was very finely balanced on the evidence.[68] However, the Deputy Solicitor-General, on behalf of the Crown Law Office, decided that the issues with proving a major departure and causation, combined with the obstacles presented by the year and a day rule and the finely balanced public interest test, meant that the likelihood of succeeding at trial was too low to warrant recommending prosecution.[69] On this advice, the Police made the decision not to prosecute.[70]

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[60] Crown Law, above n 59, at [7.2].
[61] At [39].
[62] Cecile Meier "Emotional Protest over CTV Decision in Christchurch" (10 December 2017) The Press <Stuff.co.nz/the-press>.
[63] New Zealand Police *CTV Building Criminal Investigation: Report for the Crown Solicitor* (2017) at 21.
[64] Crown Solicitor at Christchurch *Opinion Re Criminal Charges Following the Collapse of the CTV Building in the February 2011 Earthquake* (2017) at [20] to [22].
[65] At [11].
[66] At [90].
[67] New Zealand Police, above n 63, at 128 and 129.
[68] Crown Solicitor at Christchurch, above n 64, at [17].
[69] Crown Law, above n 59, at [7] and [9].
[70] Peter Read *Media statement: Outcome of Investigation of Collapse of the CTV Building* (Police Media Centre, 2017) at 2 and 3.

The CTV building collapsed because of multiple errors in its design. It was determined by the Police that appropriate charges could be brought either under s 155 or s 156 of the Crimes Act against Harding and Reay, as both sections were equally applicable. According to the Crown Solicitor, Harding breached his duty under s 155 where structural design of the CTV building constitutes the unlawful act, and under s 156 where structural design of the CTV building constitutes the inanimate thing. Reay would similarly be liable under s 155 where the unlawful act was structural design in conjunction with Harding, and under s 156 where structural design was under his control as ARCE's director, the undertaker of the contract and assigner of Harding to the design.[71] There were multiple aggravating and mitigating factors in the conduct of both men. The finely balanced nature of the issues is illustrated by the fact that the Police and Crown Solicitor, and Deputy Solicitor-General reached different outcomes in whether to prosecute.

Harding's structural design of the building relied on the ETABS programme, which measures seismic stability of buildings. However, because of the eccentric design of the CTV building, further calculations were required to supplement the ETABS programme. Harding's inexperience meant he was unaware that these calculations needed to be made. Under original runs of the programme, Harding realised a southern shear wall was necessary in order to bear some of the lode, and he incorporated this into the design. However, he made no further calculations for corner deflections, and the shortness of the south shear wall opposed to the north wall complex meant the building was off-centre to such an extent that the centre of rotation was actually outside the building. Any engineer with experience in multi-storey buildings would have recognised the issues of torsion created by the difference in heights between the opposing walls and been able to remedy this.[72] However, Harding was a civil engineer with no experience in multi-storey building projects like the CTV building, and was left to design the building without supervision.[73]

Reay's conduct also demonstrated significant breaches of his duty of care. Despite the fact Harding disclosed to him his lack of experience in such projects, Reay placed him in sole charge of designing the structure of the building. He left Harding without supervision, providing him with minimal training and no way of knowing that additional calculations were required to supplement the results of the tests run on the ETABS programme.[74]

The approach taken by the Police and followed by the Deputy Solicitor-General was an assessment of how Reay and Harding's conduct compared to the relevant standards of the day.

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[71] Crown Solicitor at Christchurch, above n 64, at [141] to [145].
[72] New Zealand Police, above n 63, at 53 and 54.
[73] At 128.
[74] At 52, 106 and 128.

Thus, their conduct was assessed against that of reasonable practising engineers at that time.[75] This 'standard of the day' was determined by interviewing almost every engineer in the country who had operated in the 1980s to determine what standard practice had been for relevant issues.[76] The Police found at first instance that Reay and Harding's conduct was a deviation from the standard of the day as it was the role of directors to ensure that work was properly overseen and that proper checks were made, and engineers should not take on projects they knew they were too inexperienced to complete adequately.[77]

The ultimate decision not to prosecute was based on the unlikelihood of meeting the evidential and public interest tests due to the insufficiency of the evidence, as well as the technical bar of the year and a day rule.[78] A significant reason for the finding that the evidential test could not be met (that there be a reasonable prospect of conviction) is because whilst it was acknowledged by all investigating parties that the engineers were negligent, it was unlikely that a major departure could be proved due to evidential difficulties with the standard of the day.[79] There were further concerns the evidence given had been affected by hindsight.[80]

The Deputy Solicitor-General, whose findings were instrumental to the outcome as they reversed the Police and Crown Solicitor's findings, laid out the test for major departure as whether a professional person holding themselves out as qualified to perform a task requiring a special skill exhibited the care expected of a skilled and informed member of their profession.[81] He said that Reay was negligent in failing to provide oversight, review or checking of designs. However, because he believed Harding could design the building, knowing of his experience with 2-3 storey buildings; because he sent Henry, the previous engineer, to consult on ETABS; and because Harding never gave him any indication he was struggling, the Deputy Solicitor-General found the allegation to be vulnerable.[82] It may seem that in considering such factors, the Deputy Solicitor-General is making the test for major departure more subjective. However, in *R v Hamer* the court held that knowledge must be assessed under the objective standard, when they assessed the knowledge Mr Hamer possessed as part of his training as a nurse.

### *3.6. Overarching Issue*

[75] New Zealand Police, above n 63, at 102.
[76] At 44.
[77] At 105.
[78] Crown Law, above n 59, at [9].
[79] At [38] and [39].
[80] At [38].
[81] At [43].
[82] At [44].

The issue illustrated by *Bawa-Garba v R* and the CTV building is that whilst the former suggests that the law is too harsh on defendants, the latter suggests the standard is too hard for prosecutors to prove. How can it be possible to have injustice at both ends of the spectrum? It is difficult to see how to devise a solution that would make the law fairer in both such cases. A simple uniform raising or lowering of the standard would result in unjust results one way or the other, so the standard is best to lie where it falls at gross negligence, which has numerous previously postulated benefits, and a solution must be found that creates exceptions to the general rule when justice calls for it. It is the unwillingness of the courts to consider the impact of external factors or the lack thereof when deciding whether there is a major departure that makes the result seem unfair. Such factors can be seen as excusing or condemning the defendants' conduct, but under the current objective standard will not be considered.

## 4. PROPOSED RESOLUTIONS

I propose three possible solutions to modifying the requirements of gross negligence manslaughter in order to reach more just results. These are A) a different requirement for medical practitioners, B) an excusatory defence, and C) a more circumstantial test for what constitutes a major departure.

### *A. A Separate Standard for Medical Practitioners*

The immediately obvious reasoning for the outrage in Bawa-Garba's case is the implications for medical practitioners. As mentioned above, there has been call for a separate standard for medical practitioners because the nature of their profession means they are more likely to face situations giving rise to culpable negligence claims. Reviews are currently being undertaken over whether such a standard is plausible.[83] A separate offence with a higher bar, or a defence of medical circumstances, is a distinctly possible solution to offset the harshness of findings against medical practitioners under the current law. However, whilst it is clear that medical professionals will see a much more direct link between their actions and the consequences, this does not take account of interactions between other professions and human lives, such as the negligent engineering of the CTV building.

The close relationship between a doctor's actions and the consequences does not necessarily equate to a higher level of pressure placed upon them. Whilst undoubtedly Bawa-Garba operated under pressures that the engineers of the CTV building did not experience, this is not to say that all medical professionals are constantly operating under pressure, or that other professionals are not. Each medical case will have individualised factors which impact upon the

[83] Gareth Iacobucci, above n 58.

professional's conduct such as number of staff available or amount of time to act, and such variation is equally applicable in other professions. It would be unjust if a uniform, higher standard was applied to medical practitioners only, when there will not always be factors justifying such a standard. This uniform approach would undoubtedly lead to the same issues currently faced by the objective assessment, that some medical practitioners would simply be more deserving of a lesser charge than others in the circumstances, whilst people in other fields who operate under significant pressures would be unfairly held to a higher standard.

Common law promotes the idea of certainty and granting one group of professionals a level of immunity from the current criminal standard would create inconsistency across professional fields which would be contrary to the fundamental principles of law. For the above reasons, it seems that a stronger reason for distinguishing between Bawa-Garba and the engineers is pressure, as this is something that professionals in all different sectors may experience and which may impact upon the level of care that they take.

### *B. Excusatory Defence of Pressure*

A defence of external pressures would respond to the substantial disparity in pressure placed upon on Bawa-Garba and the engineers of the CTV building. Such a distinction could be similar to a duress of circumstances analysis, though this is not currently recognised in New Zealand and applies only when the accused is facing a serious threat or risk to their safety.[84] Duress of circumstances itself would clearly not be relevant in most negligent manslaughter cases and would not alter the decisions of *Bawa-Garba* or the CTV building collapse. However, a similar defence could be advanced against a jury finding a major departure, that external pressures impacted on the defendant's capacity to take care and thus prevented them from complying with the law. As a defence, the onus would be on the defendant to raise evidence of such pressures. It would be for the jury to determine when extenuating pressures played a significant enough role to excuse the defendant from liability. A contrasting analysis of the situational factors impacting upon Bawa-Garba versus Reay and Harding determines whether availability of such a defence would alter the decisions made in those cases.

The level of care that Reay and Harding took with the engineering designs was lower than what would be expected because of their "no job, no fee" policy. This policy meant the client would not have to pay the engineers until the Council granted a building permit, which acted as an incentive for the firm to get the Council's approval as quickly as possible. Thus, time-pressure was placed upon Reay and Harding, which Harding stated was the reason for rushing the project.[85] This

[84] *Kapi v Ministry of Transport* [1992] 1 NZLR 227 (HC).
[85] New Zealand Police, above n 63, at 53.

concern over receiving payment does not provide the level of urgency that ought to be required to excuse a defendant's conduct, particularly when contrasted to Bawa-Garba's circumstances.

Multiple factors placed immense pressure on Bawa-Garba. Aside from the knowledge that human life was directly at stake, understaffing of the hospital, a long shift with no breaks, and delay in receiving test results due to IT failures all impacted upon Bawa-Garba and prevented her from taking the level of care that was expected of her.

It is clear these two cases are differentiated by the amount of pressure placed upon the defendants, and that professionals in any field could be affected by significant pressures, depending on the circumstances. Thus, some way of taking account of external pressures would allow for more just results than the proposed medical exception above. However, whilst such a defence could be fairer to people like Bawa-Garba who are operating under pressure, it does not account for those at the opposite end of the spectrum who clearly are under no significant pressure but still fail to carry out their duty. These people, such as the CTV engineers, are still subject to the gross negligence standard. This therefore does not resolve the issue of injustice in the CTV case where the gross negligence standard could not be met, and thus only resolves one half of the issue. A successful resolution must consider extenuating circumstances or the lack thereof as a relevant inquiry in all cases of gross negligence manslaughter.

### *C. Circumstantial Inquiry*

A final potential solution is that the circumstances of the defendant be taken into account to a greater extent in assessing a major departure. As discussed, under the current objective test, the pressures that influence actions of defendants will not be considered by the jury when determining whether the charge of gross negligence manslaughter is made out. Pressures and extenuating circumstances are considered as mitigating factors solely relevant the severity of the sentence. Whilst this presents some level of justice to defendants, the fact of conviction of manslaughter can have drastic negative effects upon defendants' futures, especially in the medical profession, due to the stigma attached to such a serious charge. It would be fairer to defendants if extenuating pressures or the lack thereof were instead considered by the jury when they determine whether there is a major departure.

Under s 150A, the major departure from the reasonable person standard is to be assessed "in the circumstances." Some factors are considered currently, as illustrated in *R v Hamer*, but are limited to 'the reasonable person carrying out that duty'. In *R v Hamer*, this included his knowledge due to his history as a nurse, and in *R v Yogasakaran* the standard was that of the

reasonable anaesthetist. These two cases illustrate that the only subjective factors the law will graft onto the reasonable person is knowledge available to them and membership of a given profession.

Demonstrably, the courts have taken a very narrow interpretation of the wording "in the circumstances," both in the UK as illustrated by *Bawa-Garba* and in New Zealand as illustrated by *Hamer*. It is possible that a wider interpretation could reasonably be open to the courts on the wording of the statute, allowing circumstances such as pressures upon defendants or the lack thereof, to play a more substantial part in the reasonable person test. Rather than placing reliance solely upon the test of the reasonable doctor or reasonable anaesthetist, a jury could consider the reasonable doctor in an understaffed, under-supervised hospital, or on the contrary the reasonable engineer aware of his inexperience and able but not willing to seek supervision. Both of these assessments instantaneously sound more just, as they account for possible excuses for a defendant's conduct or the lack thereof. Though it cannot be said with certainty, it is possible that applying such a test would alter the result in *Bawa-Garba* or the decision not to prosecute in the CTV case. The lack of excuses for the significant errors made by the CTV engineers could constitute a major departure, whilst the multiple excuses for Bawa-Garba's omission could lessen the likelihood of finding a major departure. This proposed circumstantial standard is fair because it caters more to the individual merits of each case than the current standard. Such a varying standard cannot be said to either be too high a standard for prosecutors to prove or too unfair on defendants.

The issue with a circumstantial inquiry is that raised in *R v Hamer*, that including personal attributes would make the reasonable person standard too subjective. This creates the paradox of a reasonable person who is near identical in characteristics to the defendant, and thus is no longer the reasonable or objective person at all. However, a circumstantial inquiry would consider the extenuating pressures upon a defendant rather than characteristics. This differentiates it from the subjective test proposed in *R v Hamer* of including characteristics such as addiction or depression of which the court wholly disapproved. Rather, it is an objective assessment in light of the subjective circumstances. This is a common kind of test to import particularly in criminal law, and as discussed may be consistent with the wording of s 150A's 'in the circumstances.'

## 5. CONCLUSION

The law of negligent manslaughter has undergone significant development in New Zealand, developing from the civil standard of negligence to the requirement for a major departure from a prescribed standard of care. This change brought our law into line with that of overseas jurisdictions and created a standard that was harder to prove against defendants. However, this did not prevent the court in *R v Bawa-Garba* from convicting the doctor for grossly negligent manslaughter, regardless of external factors impacting the level of care she could reasonably take

in the circumstances. On the other hand, New Zealand Police decided not to prosecute the engineers of the CTV building which collapsed, because they were not confident a major departure would be established, despite a complete lack of justification for the errors made by the engineers. These two results have caused controversy and demonstrate injustices in the law of grossly negligent manslaughter which must be remedied.

There are many possible solutions reasonably open to create a more just test. The most effective of these solutions would be a consideration of the major departure from the standard of the reasonable person assessed in light of whether or not there are extenuating pressures placed on the defendant which serve to excuse or condemn their conduct. Whilst such a test still requires an objective assessment of whether there has been a major departure, what constitutes this major departure varies based on the relevant circumstances. Such a change would typically have to be enacted by Parliament. However, it would be possible for the Supreme Court to implement this resolution because it is technically consistent with the wording of s 150A of the Crimes Act, which provides the major departure standard. All that this resolution requires is for the courts to take a broader interpretation of the wording "in the circumstances" under s 150A of the Act.

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