



Criminal Negligence and Patient Safety

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 The Canadian Healthcare Safety Symposium: Healthcare and the Law

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Alan Merry has financial interests in

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 The Canadian Healthcare Safety Symposium: Healthcare and the Law

R v Y

"The Crown says Dr Y is a highly trained, experienced, responsible man whom the Crown says made a mistake, through carelessness, on this one occasion"

1 NZLR 399 1990

NZ Crimes Act 1961 s 155

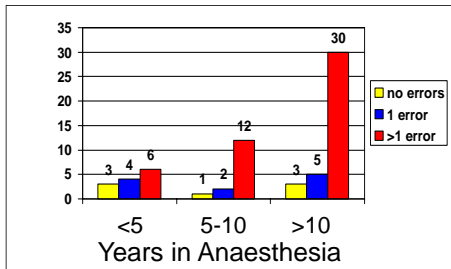
Every one who undertakes (except in the case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use **reasonable knowledge, skill, and care** in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty

Marshall v. Lindsey County Council

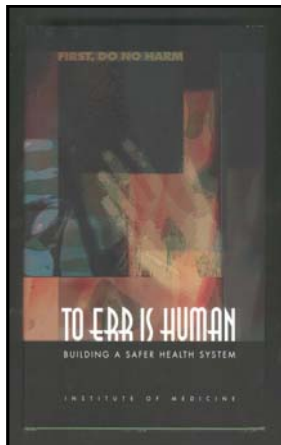
"What is reasonable... ..must depend on what people presumed to be reasonable constantly do."

[1935] 1 KB 516

Anaesthetists Admitting Drug Administration Errors



Merry and Peck NZ Med J 1995



Institute of Medicine

Too many people die each year as a result of medical errors

Manslaughter Charges Against Health Professionals in NZ

- 82 Anaesth CO2
- 90 Anaesth Drug swap
- 91 Dentist Sedation
- 91 Radiologist Drug swap
- 94 Nurse Infusion
- 95 Anaesth Air emb
- 97 Card surgeon Clamp
- 98 Card surgeon 3 cases
- 99 Anaesth Filter
- 02 Cosm surg Phenol

The Granny Test

**Australia
Code States**

"Defaults involving no moral blame at all are.. ..out of keeping with the conceptions of the purpose of the Criminal Code..."

R v Callaghan (1952) 87 CLR 115

**UK
Common Law**

"...the accused would have to have shown such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

R v Bateman (1925) 10 Cr App Rep 8

USA

In general - gross negligence

Canada

Criminal Code -

"wanton or reckless disregard"

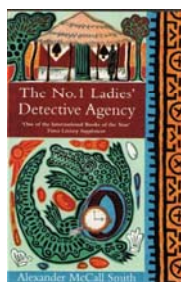
NZ Medical Law Reform Group

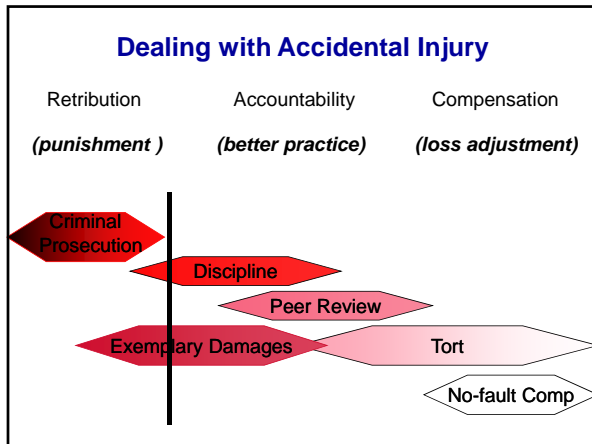
Criminal prosecution of error

- Unjust
- Ineffective

Improve

- Compensation for injury
- Accountability and safety





Vengeance, Punishment and the Culture of Blame

- Retribution
- Deterrence (utilitarianism)
 - Social value of the service regulated?
 - Effective?



Errors

- Experts make errors
- **Not carelessness**
- **Deterrence useless**
- **Medical practice is challenging**

Error - Definition

When you are trying to do the right thing but you actually do the wrong thing

Focus on process not outcome

Dr M - A Violation in Saskatchewan

- Ryan Braumberger - 17 (broken leg)
- Airway disconnection - out of room
- Falsified records and lied
- Pleaded guilty - 6 months jail

Williams 1995 Can Med Assoc J

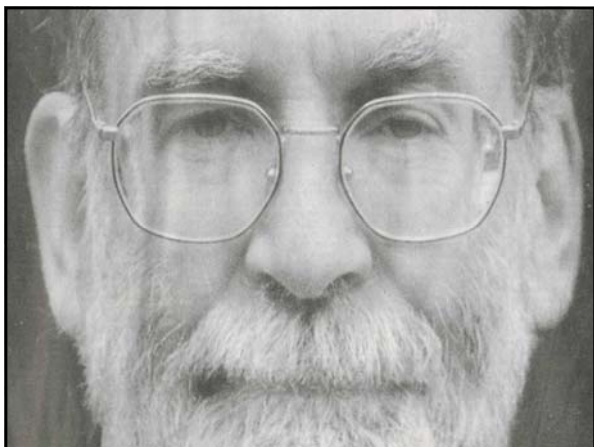
Violations - Definition

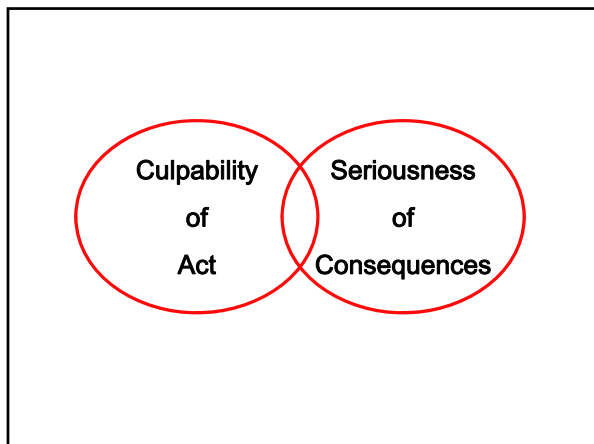
When you knowingly do the *wrong thing*

Focus on process not outcome

Violations

- Element of choice
- ***May be carelessness***
- ***Deterrence may be effective***
- Not always reprehensible
- Systems double-bind





Levels of Blame

- 1
- 2
- 3
- 4
- 5

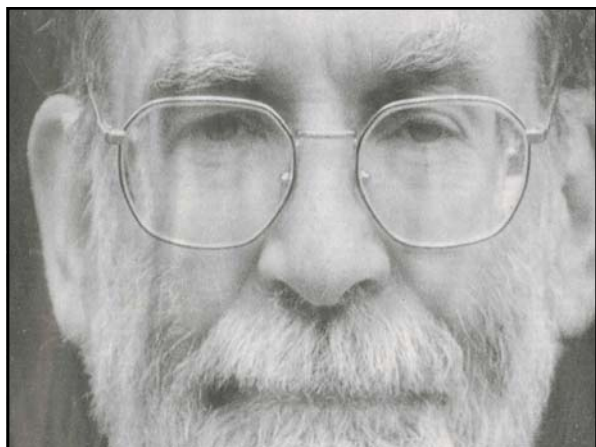
Merry and McCall Smith 2001
Errors Medicine and the Law

Levels of Blame

- 1 **Causal blame - anaphylaxis**
- 2
- 3
- 4
- 5

Levels of Blame

1 Causal blame -	anaphylaxis
2	
3	
4	
5 Sabotage -	wilful harm



Levels of Blame

1 Causal blame -	anaphylaxis
2	
3	
4 Recklessness -	uncaring violation
5 Sabotage -	wilful harm

**Dr M -
A Violation in Saskatchewan**

- Ryan Braumberger - 17 (broken leg)
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Levels of Blame

- | | |
|------------------------|----------------------|
| 1 Causal blame - | anaphylaxis |
| 2 Unavoidable - | genuine error |
| 3 | |
| 4 Recklessness - | uncaring violation |
| 5 Sabotage - | wilful harm |

R v Y

"The Crown says Dr Y is a highly trained, experienced, responsible man whom the Crown says made a mistake, through carelessness, on this one occasion"

1 NZLR 399 1990

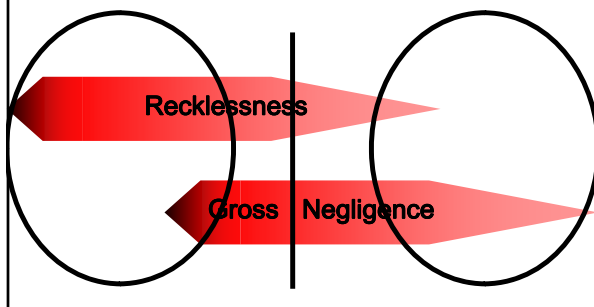
Levels of Blame

- 1 Causal blame - anaphylaxis
- 2 Unavoidable - genuine error
- 3 **Negligence** - **simple violation**
- 4 Recklessness - uncaring violation
- 5 Sabotage - wilful harm

Legal Expression of Violation-Error Continuum

Recklessness v Negligence

Legal Expression of Violation-Error Continuum

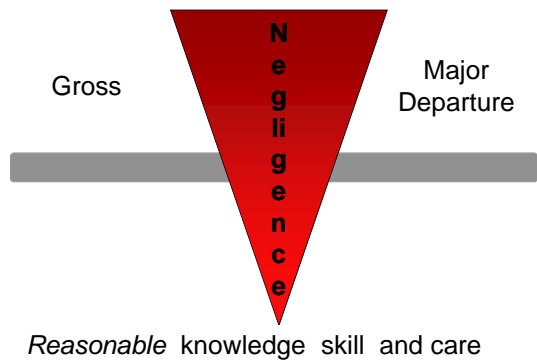


NZ Medical Law Reform Group

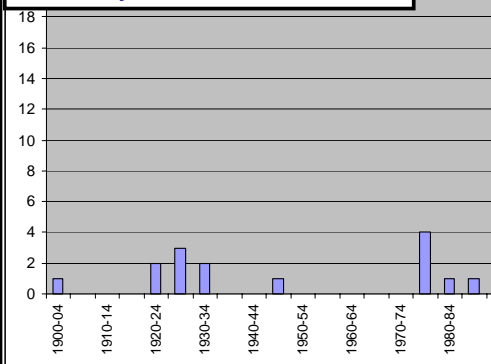
- Argument
 - **not** a “special case for doctors”
 - essentially legal and philosophical
 - underpinned by science of cognitive psychology

- Focus on patient
 - support appropriate accountability
 - promote safety

Sir Duncan McMullin: 1997



**UK Doctors and Manslaughter
Data by Ferner and McDowell**



Intrathecal Vincristine 1993

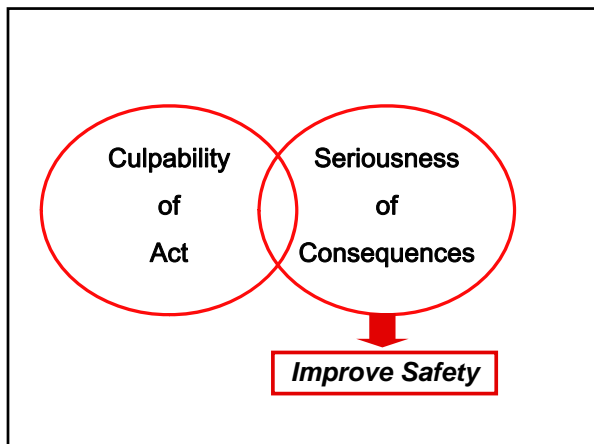
*“You are far from being bad men;
you are good men who contrary
to your normal behaviour on this
one occasion were guilty of
momentary recklessness”*

R v Prentice [1993] 3 WLR 927

Australia

- Dr Jayant Patel - extradited
- Professor Bruce Ward - hysterectomy
- Two nurses - postoperative care of a patient after back surgery
- Dr Suman Sood – abortion
- Dr Pegios – dental sedation





What Does the Injured Patient Want?

- Acknowledgement
- Apology
- Assurance others will not be injured in the same way
- Compensation

Try harder?

“The real problem isn’t how to stop bad doctors from harming, even killing, their patients. It’s how to prevent good doctors from doing so.”

Gawande 1999 The New Yorker
