DRUG SUPPLY, SELF ADMINISTRATION AND MANSLAUGHTER: AN AUSTRALIAN PERSPECTIVE

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I. Introduction

In August 2009 Brian and Natalia Burns were found guilty (separate jury trials) of the manslaughter of David Hay. The prosecution's case against both defendants was based on two allegations. First, they caused the death of the deceased by an unlawful and dangerous act, that being the administration of methadone by injection to the deceased. Alternatively, they were liable for manslaughter by gross criminal negligence.[1] The NSW Court of Criminal Appeal (NSWCCA) on 1 April 2011 dismissed Natalie Burn's appeal against her conviction.[2]

At the beginning of February 2010, charges of murder and manslaughter were laid against Dr Suresh Nair.[3] In December 2010, Dr Nair pleaded guilty to the manslaughter of a Suellen Zaupa who died following the consumption of cocaine which Dr Nair had supplied during sex sessions at his residence. In return for this plea, the prosecution dropped its charge of murder in relation to Ms Zaupa as well as a further manslaughter charge involving the death of another victim, Victoria McIntyre.[4] On 26 August 2011, Dr Nair received a non-parole period of five years and three months for the manslaughter and cocaine supply convictions:

> The court had heard that Nair had done nothing to help Ms Zaupa as she lay dying from a cocaine overdose, which he had given her. He failed to call an ambulance or take her to hospital.[5]

Then, on 18 February 2010, a 22 year-old woman was charged with the manslaughter of ex-Socceroo, Ian Gray. The basis of the charge was that the accused supplied Gray with heroin and that he died in the presence of the accused as a result of a heroin overdose:

> Papers at Central Local Court allege Sherryn Davis caused the death of Ian Gray 'in circumstances amounting to manslaughter, to wit, an unlawful and dangerous act'.[6]

On 15 September 2010, however, the manslaughter charge was withdrawn:

> At Sydney's Central Local Court last week, prosecutors withdrew a charge of manslaughter and a second charge of administering or attempting to administer a prohibited drug to Gray.[7]

The reporting of the above cases also occurred around the same time as the Dianne Brimble case which received enormous coverage in the media. In 2002 Ms Brimble died from an overdose

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1 *R v Natalia Burns* [2009] NSWDC 232.

2 *Natalia Burns v R* [2011] NSWCCA 56.

3 Natasha Wallace, 'Nair to Face Court on Murder Count', *Sydney Morning Herald* (online) 5 February 2010 <http://www.smh.com.au/national/nair-to-face-court-on-murder-count-20100204-ngam.html>.

4 AAP, 'Nair to Plead Guilty to Manslaughter', *Sydney Morning Herald* (online) 23 December 2010 <http://news.smh.com.au/breaking-news-national/nair-to-plead-guilty-to-manslaughter-20101223-1963c.html>.

5 Paul Bibby, 'Sydney Surgeon gets Five Years' Jail for Prostitute's Fatal Drug Overdose', 26 August 2011 <http://www.smh.com.au/nsw/sydney-surgeon-gets-five-years-jail-for-prostitutes-fatal-drug-overdose-20110826-1jde4.html>.

6 Nick Ralston, 'Socceroo Death: Woman Denied Bail', 18 February 2010 <http://www.smh.com.au/national/socceroo-death-woman-denied-bail-20100217-odzb.html>.

7 AAP, 'Manslaughter Charge Over Socceroo's Death Withdrawn', 15 September 2010 <http://www.smh.com.au/national/manslaughter-charge-over-socceroos-death-withdrawn-20100914-15azi.html>.

of GHB, the drugs being supplied by Mark Wilhelm during a P&O cruise (the Brimble case). The unsavoury facts of this case are well-known, Wilhelm having had sex with Ms Brimble prior to her overdosing, her naked body being found on the floor of Wilhelm's cabin. It was not until 2009, however, that the trial of Wilhelm commenced, the prosecution proceeding with a preferred charge of negligent manslaughter (unlawful and dangerous act manslaughter in the alternative). On 12 October the prosecution dropped the negligent manslaughter charge due to its inability to prove both a duty of care and causation, thereafter proceeding on the alternative manslaughter charge and the drug supply charge. One week later, Wilhelm's trial was aborted due to the jury being unable to reach a verdict in one of the two charges laid. A retrial on both charges was set down for April 2010. On 21 April, however, the prosecution dropped the charge of manslaughter and accepted a plea of guilty to the supply of a small quantity of GHB. In commenting on these developments, Howie J, the original trial judge, stated that Wilhelm was responsible for Ms Brimble's death only in a moral or technical way and that he doubted that he was criminally responsible.[8]

All of these cases raise significant legal issues regarding the liability of a drug supplier for the death of a person who dies as a result of the self-administration of those drugs. In NSW, however, there would appear to be only one other self-administration drug case prior to those identified above, this being the unreported 1999 District Court case, *Quoc Cao*[9]. In addition, there is also relevant obiter from *McLean*[10] in 1981. As for other Australian jurisdictions, the only other relevant reported case is the Queensland case of *Stott & Van Embden*[11].

For many this lack of case law may seem surprising given the number of drug overdose deaths each year in Australia. In NSW in 2006, for example, there were 132 opiate-related deaths in those aged 15–44 years, 54 deaths associated with benzodiazepines and 28 deaths associated with psychostimulants. Psychostimulants include cocaine and amphetamines (eg GHB).[12] Given this number of deaths, it would not be unreasonable to presume that some of the individuals who supplied the drugs to any of these victims, or who assisted the victims with the consumption of these drugs in some other way, did so in circumstances that could have, potentially, given rise to manslaughter charges. In addition, it would not be unreasonable to presume that such individuals were known to the police.

Charges and convictions for manslaughter have been more common where defendants have actually administered (mostly by injection) drugs to the victims, but even these are rare. This article however, only briefly considers this type of manslaughter, its focus being on drug supply and self-administration.

Not only is there a scarcity of cases, a search of Australian law journals discloses only two legal analyses of this area, these being two law student works.[13] This is in stark contrast to the United Kingdom (UK) where the law has received much greater consideration. The recent cases (notably all from NSW) now provide an excellent opportunity to undertake a comprehensive analysis of the charge of manslaughter as a viable mechanism for the prosecution of a drug supplier for the death of a person who dies as a result of the self-administration of those drugs.

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8 Geesche Jacobsen, 'Brimble Death: Manslaughter Charge Dropped', 21 April 2010 <http://www.smh.com.au/national/brimble-death-manslaughter-charge-dropped-20100421-ssl4.html>. See also R v Wilhelm [2010] NSWSC 378.

9 *R v Quoc Cao* (1999) (Unreported, New South Wales District Court, Ford ADCJ, (October 1999) ('*Cao'*). A summary of the facts of the case can be found in J Schimmel, 'Heroin, Homicide and Public Health' (2002) 14 *Current Issues in Criminal Justice* 135.

10 *McLean v R* (1981) 5 A Crim R 36 ('*McLean'*).

11 *R v Stott & Van Embden* [2001] QCA 313 ('*Stott & Van Embden*').

12 Report of the Chief Health Officer, *The Health of the People of New South Wales* (2008) NSW Department of Health <http://www.health.nsw.gov.au/publichealth/chorep/>.

13 Schimmel, above n 9 and Paul Duke, 'Drug Dealers and Fatal Self-Administration in Australia: A Cause for Concern' (2008) 1(1) *Queensland Law Student Review* 12.

II. Manslaughter

In Australia, only a very small number of drug suppliers have been charged with and convicted of the manslaughter of those who have consumed the drugs that they have supplied. At common law, this has been in the form of unlawful and dangerous act manslaughter or negligent manslaughter. In terms of Australian Code jurisdictions there are similarities in terms of negligent manslaughter but differences when it comes to unlawful and dangerous act manslaughter. This is considered later, but in Code states, such as Queensland, charges have raised similar issues, most notably causation.

In NSW two drug related offences have formed the basis for unlawful and dangerous act manslaughter charges; aiding and abetting self-administration by the victim and administering prohibited drugs to a victim (usually by injection). The Brimble case appears to suggest an expanded approach but the outcome in the case casts considerable doubt on this.[14] In this regard, Howie, J's decision to allow Wilhelm to withdraw a guilty plea to s39 *Crimes Act 1900* (NSW) is significant.[15] Following what was a somewhat strange plea bargain which saw Wilhelm offer a plea of guilty to a charge under s39 in return for the dropping of the manslaughter charge, Howie J not only allowed the defence to withdraw the plea but stated that he would not have allowed it in any event.[16] The basis of the charge would have been that Wilhelm 'caused' Diane Brimble to take the drugs. As Howie J noted:

> I pointed out to the Crown that there were a number of cases which tended to suggest, at least to me, that what was required for the Crown to prove was that the accused stood in a position of authority or control over Ms Brimble so that he could, in effect, overbore her will and therefore cause her to take the drug. I had a good idea of what the evidence was, having been the trial judge, and I had difficulty in seeing, on the evidence that was at the trial of the accused, how it could be said that he had any authority or position of control over Ms Brimble whereby he could, in effect, cause her to take the drug.[17]

A. *Aiding and Abetting Self-Administration*

Cao appears to be not only the sole NSW case involving such a charge, but the only case Australia wide.[18] The legal basis for Cao's charge was that his supplying of the victim with a syringe made him a secondary party to the victim's self-administration of heroin, and, thereafter, a principle to the manslaughter of the victim.[19] Self-administration is a summary offence under s12, *Drug Misuse and Trafficking Act 1985* (NSW) and s19 makes a person who aids, abets,

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14 *R v Wilhelm* [2010] NSWSC 334 ('*Wilhelm*').

15 *Wilhelm* [2010] NSWSC 334, [29]. Crimes Act 1900 (NSW) s 39(1) A person is guilty of an offence if:

> (a) the person administers to another person, or causes another person to take, any poison, intoxicating substance or other destructive or noxious thing, and
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> (b) the poison, intoxicating substance or other thing endangers the life of, or inflicts grievous bodily harm on, the other person, and
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> (c) the person intends to injure, or is reckless about injuring, the other person.

16 *Wilhelm* [2010] NSWSC 334, [28].

17 *Wilhelm* [2010] NSWSC 334, [12].

18 In addition to NSW, Victoria (*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s75), South Australia (*Controlled Substances Act 1984* (SA) s33L), Western Australia (*Poisons Act 1964* (WA) s36) and Tasmania (*Misuse of Drugs Act 2001* (Tas) s24) all have drug use/self-administration offences.

19 Schimmel, above n 9, 136.*Cao* (1999) (Unreported, New South Wales District Court, Ford ADCJ, (October 1999).

counsels, procures, solicits or incites the commission of such an offence also liable for that offence.[20]

In his analysis of *Cao*, Schimmel notes the relevance of obiter in *McLean*.

> Roden J (with whom Nagle CJ at CL and Fisher JK agreed) suggested that where death occurs as a result of the administration of heroin, a person may be guilty in three circumstances: first, if the accused… injected the deceased; second, if the accused is 'present intentionally assisting or encouraging that act (principal in the second degree)'; or third, 'if not present he [sic] had counselled or assisted the act (accessory before the fact).[21]

Leaving aside any legal arguments as to whether Cao aided, abetted counselled, procured, solicited or incited the victim's self-administration of heroin, sections 12(1) and 19 of the *Drug Misuse and Trafficking Act 1985* (NSW) render unlawful the acts of anyone who does. But would such acts be unlawful and dangerous so as to cause the victim's death resulting from self-administration? In *Cao*, Schimmel notes Ford ADCJ's (the trial judge) early doubts as to whether the accused's acts were initially dangerous:

> [I]t is rather doubtful that it could be relied upon as a dangerous act on the part of the accused, merely in supplying a needle which the deceased then chose to use himself for the purpose of injecting himself with heroin.[22]

In directing the jury, however, Ford ADCJ had seemingly shifted from the dangerousness of Cao's act of supplying the syringe to the perceived dangerousness of the victim injecting himself with heroin. Schimmel rightly questions whether self-administration of heroin is dangerous and accordingly 'carrying with it an appreciable risk of serious injury.'[23] Statistically, the vast majority of heroin self-administration does not lead to serious injury, but this is all relevant to the act of the deceased.[24] The legal question in *Cao* should have been was his supplying of the syringe unlawful and 'carrying with it an appreciable risk of serious injury' and, as such, a cause of the victim's death? It is argued here that the answer must be no. Apart from Ford ADCJ's earlier doubts on this very point, the English case of *Dalby* supports this position. In *Dalby*, the accused was charged with unlawful and dangerous act manslaughter based purely on his supplying the victim with a controlled drug, the victim thereafter injecting himself with the drugs. Waller J read the judgment of the court stating that:

> [t]he difficulty in the present case is that the act of supplying a controlled drug was not an act which caused direct harm. It was an act which made it possible, or even likely, that harm would occur subsequently, particularly if the drug was supplied to somebody who was on drugs. In all the reported cases, the physical act has been one which inevitably would subject the other person to the risk of some harm from the act itself. In this case, the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous.[25]

As such, the act of supplying the drugs, or supplying a syringe as in *Cao*, seems neither dangerous nor a legal cause of death. What causes the harm, and is accordingly dangerous, is the victim's use of those drugs in a particular form and quantity.

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20 *Drug Misuse and Trafficking Act 1985* (NSW) s12(1): 'A person who administers or attempts to administer a prohibited drug to himself or herself is guilty of an offence.' *Drug Misuse and Trafficking Act 1985* (NSW) s19: 'A person who aids, abets, counsels, procures, solicits or incites the commission of an offence under this Division is guilty of an offence and liable to the same punishment, pecuniary penalties and forfeiture as the person would be if the person had committed the firstmentioned offence.'

21 *McLean* (1981) 5 A Crim R 36, 41 as cited in Schimmel, above n 9, 136.

22 As quoted in Schimmel, above n 9, 137.

23 Schimmel, above n 9, 141.

24 Schimmel, above n 9, 142.

25 *R v Dalby* [1982] 1 All ER 916, 919 ('*Dalby*').

This legal position is further supported by the Victorian Supreme Court's decision in *Demirian*.[26] In this case Demirian conspired with the victim to build a bomb. The bomb, however, exploded prematurely when the victim was setting the triggering device, killing the victim instantly. As a result, Demirian was charged and convicted of conspiracy to cause an explosion and murder. In allowing his appeal against the murder conviction and recording an acquittal, the Court also stated that there was no basis for liability for manslaughter;

> Demirian could not be guilty of manslaughter as an accessory unless Levonian as principal offender committed a crime by killing himself. Levonian did not commit a crime by unintentionally killing himself as there has never been a crime of self-manslaughter.[27]

This does not mean that aiding and abetting a drug offence can never form the basis for a charge of unlawful and dangerous act manslaughter. In *Lamb*, the NSWCCA considered an appeal against a sentence for manslaughter arising from a situation where the appellant and her co-defendant were charged with unlawful and dangerous act manslaughter following the injection of the victim with morphine by the co-defendant.[28] The co-defendant was charged and convicted (having plead guilty) as a principal in the first degree. Lamb was convicted as a principal in the second degree in that she assisted in the administration of the drugs to the victim.[29]

B. *Administering Drugs*

Lamb confirms the basis for unlawful and dangerous act manslaughter where the accused injects (or otherwise administers) the victim with dangerous drugs. As such *Lamb* follows the position taken in the UK in *Cato*.[30] In *Cato*, the accused and the victim injected each other with prohibited drugs over a number of hours. Both suffered serious complications as a result, but while the accused was apparently saved by some basic first aid administered by a house mate, the victim did not likewise respond and died from respiratory failure. Cato was charged and convicted of manslaughter arising from an unlawful and dangerous act, namely s23, *Offences Against the Person Act*, 1861 (24 & 25 Vict c 100).[31] In dismissing his appeal, the Court of Appeal determined that Cato was clearly guilty under s23, that this was unlawful and dangerous and that it had caused the victims death. The Court firmly rejected the appellant's submission that the administration could not be viewed as malicious due to the circumstances and as such s23 could not be proven:

> [e] ver since Cato it has been clear that if it is the supplier who administers the fatal drug to the victim (usually by injection), a manslaughter conviction inexorably follows.[32]

This is the settled position in NSW, but in the Australian Capital Territory (ACT) case of *Lagan*, Higgins J, in a trial by judge alone, appeared to depart from *Cato* in holding that:

> … it is apparent that, in the present case the intent shown by the evidence, was not to injure or to cause any pain or annoyance to Ms Earl. In fact, the only conclusion that can sensibly be drawn

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26 *R v Demirian* [1989] VR 97.

27 Ibid at 126.

28 *R v Tanya Lamb* (1997) (Unreported, New South Wales Court of Criminal Appeal, (Glesson CJ, Mason P and Dowd J), (3 April 1997) ('*Lamb*').

29 Ibid.

30 *R v Cato* [1976] 1 WLR 110.

31 *Offences Against the Person Act 1861* (24 & 25 Vict c 100) s23 states:

> Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable... to be kept in penal servitude for any term not exceeding ten years.

32 R Heaton, 'Dealers in Death' (2003) *Criminal Law Review* 497.

> from the evidence was that the administration of the heroin was intended to relieve Ms Earl's feelings of depression, to dull her awareness of emotional pain. That is, to 'help' not harm her.[33]

1. *Queensland*

The Queensland case, *Stott & Van Embden*, appears to be the only case outside of NSW which deals with the liability of a drug supplier for the death of a person who subsequently self-administers those drugs.[34] In *Stott & Van Embden* the defendants were originally tried for murder and in the alternative manslaughter. As to manslaughter, the prosecution alleged that the defendants had caused the victim's death by either i) injecting him directly or ii) handing him a syringe of heroin which he then self-administered. The jury found the defendants guilty of manslaughter. The basis for the defendants' liability under the first approach was negligent manslaughter. As to the second alternative, it was noted that s291 of the *Criminal Code Act 1891* (Qld) states: 'It is unlawful to kill any person unless such killing is authorised or justified or excused by law.'

The prosecution's case was that the accused's unlawfully killed the victim when one of them prepared and handed to the victim a syringe of heroin which the victim then self- administered. As this was not 'authorised or justified or excused by law' then liability was established. Duke questions this conclusion and raises doubts as to the court's approach to causation.[35] On the basis of the second alternative, the facts were that a 27 year-old male, with a history of drug use, was given a syringe containing heroin by one of the defendants. In the absence of any evidence suggesting force, deception or mistaken belief, this informed adult victim then freely and voluntarily injected himself with the drugs. Looking at the individual judgements, McPherson JA concluded that there was nothing wrong with the trial judges direction that if the second factual basis for manslaughter was to be taken then the defendants would not be responsible for the death of the victim only if it was an accident, that is that the person supplying the drugs would not have reasonably foreseen the victim's death as a possible outcome.[36]

Atkinson J concurs but briefly, at least, considers the issue of causation:

> [32] At common law, mere supply would not itself be sufficient to constitute the *actus reus* of the offence of manslaughter because it is not an act which itself causes direct harm. Section 293 of the *Criminal Code*, however, provides the following definition of 'killing':
>
> > '... any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.'
>
> So, under the *Code*, a person is taken to have killed another if he or she causes the other's death, whether directly or indirectly.[37]

While acknowledging the difference between causation in Code jurisdictions to that taken by the common law, Duke contends that the difference is not that great so as to justify such a significant departure. He notes that:

> If what Atkinson J says is correct and a causal nexus can be established, the word 'indirect' would not only be seen as being responsible for incarcerating a number of drug dealers who find themselves entangled in cases of fatal self-administration, but for also bypassing the very foundation upon which the criminal law is based — individual autonomy and free will. Such a situation seems implausible.[38]

33 *R v John Lagan* [2001] ACTSC 131, [88] ('*Lagan*').
34 *Stott & Van Embden* [2001] QCA 313.
35 Duke, above n 13.
36 *Stott & Van Embden* [2001] QCA 313, [22].
37 Ibid [32].
38 Duke, above n 13, 21.

Indeed, if this is good law, even just in Queensland (and other Code jurisdictions with similar provisions[39]), then it is arguable that there should be many more prosecutions in self-administration cases, regardless of the difficulties in identifying the person(s) who supplied the drugs.

C. *Self-Administration and Causation*

Stott & Van Embden must also now be considered in light of the House of Lords decision in *Kennedy No.2*, even though this case is only strictly relevant to the common law.[40] In *Kennedy No.2*, the accused prepared a syringe of heroin and handed it to the victim who immediately injected himself. After a prolonged process of appeal, the certified question before the House of Lords was:

> [w]hen is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?[41]

The Court noted at the outset that:

> The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, and also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.[42]

In his analysis, Duke refers to the contrasting positions taken by Heaton and Williams concerning causation in self-administration manslaughter cases.[43] While Heaton considers that the best approach is to see the victim as comparable to a third party who intervenes and thus breaks the chain of causation, Williams sees merit in an adapted approach based on the natural consequences test. Duke notes that the House of Lords in *Kennedy No.2,* shows some preference for the third party approach but fails to clearly resolve the issue by undertaking any thorough examination 'of how cases of fatal self-administration fit into the wider law of causation.'[44] Duke is right about the need to more thoroughly resolve the issue of causation particularly when the Court's position on self-administration is hardly the essence of clarity, but the House of Lords response to the certified question before it was very concise.

The answer to the certified question is: 'In the case of a fully-informed and responsible adult, never.'[45]

Further to this, the House of Lords confirmed that *Dalby* is clear authority that:

> …where the charge of manslaughter is based on an unlawful and dangerous act, it must be an act directed at the victim and likely to cause immediate injury, however slight.[46]

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39 See, eg, s270 *Criminal Code Act 1913* (WA).
40 *R v Kennedy (No. 2)* [2007] 4 All ER 1083 ('Kennedy (No. 2)').
41 Ibid [2].
42 Ibid [14].
43 Russell Heaton, 'Principles? No Principles' (2004) *Criminal Law Review* 463 and R Williams, 'Policy and Principle in Drugs Manslaughter Cases' (2005) *Cambridge Law Journal* 463, as discussed in Duke, above n13,15–18.
44 Ibid 18.
45 *Kennedy (No. 2)* [2007] 4 All ER 1083, [25].
46 *Dalby* [1982] 1 All ER 916, 919.

In the case of 'a fully-informed and responsible adult', therefore, the supplying of the drugs is not an operating and substantial cause of the victim's death. Further, and in accordance with *Royall*, nor can it be said that death was a natural consequence of the accused's conduct, or that it was reasonably forseeable.[47] What remains unanswered is the legal position if a victim was not fully-informed, was not an adult, or there were other factors affecting the free-will of the victim. In such circumstances, it would appear arguable that self-administration by the victim may not necessarily break the chain of causation and if it can then be established that what the accused did was operating and substantial, a natural consequence or reasonably forseeable, then causation could be established.

This is not to say that liability will never arise in drug supply and self-administration cases, but it is arguable that the better approach is negligent manslaughter, assuming that the circumstances give rise to such a charge.

D. *Negligent Manslaughter*

The first approach to the defendants' liability for manslaughter in *Stott & Van Embden* was based on the submission that one of the defendants had injected the victim with what was described as a large/strong dose of heroin.[48] In this regard, the jury was directed to consider negligent manslaughter under s 289 *Criminal Code Act 1891* (Qld).[49]

While this is clearly different to the common law where this would be dealt with by way of an unlawful and dangerous act, the case is significant as the only other reported Australian case of negligent manslaughter involving those who have supplied drugs.[50] In *Stott & Van Embden*, no complaint was made with regard to the direction on the first approach to manslaughter. The defendants had in their charge a dangerous thing, that being a syringe containing a large, strong dose of heroin. In injecting the victim they had failed in their duty of care to avoid danger and had 'caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.' As to the degree of fault required, 'his Honour summed up on criminal negligence in accordance with the decision in *Callaghan v The Queen*.'[51]

This latter direction is significant, *Callaghan* stating that, for the purposes of Australian Code jurisdictions, courts should follow the common law as to gross/criminal negligence.[52] At common law, *Nydam* states that gross/criminal negligence is proven where an accused breaches his/her duty of care 'in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.'[53] The difference between s 289 *Criminal Code Act 1891* (Qld), above, and the common law (as applied in NSW) is that the latter requires the initial identification and proof of a legally recognised duty of care.

Very recently, in *Burns*, the NSWCCA considered an appeal against a conviction for manslaughter resulting from the death of a victim who had consumed methadone supplied by the

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47 *Royall v R* (1991) 172 CLR 278 ('*Royall'*).

48 *Stott & Van Embden* [2001] QCA 313.

49 Duty of persons in charge of dangerous things:

> It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

50 The other case being *R v Natalia Burns* [2009] NSWDC 232 and *Natalia Burns v R* [2011] NSWCCA 56.

51 *Stott & Van Embden* [2001] QCA 313, [17].

52 *Callaghan v R* (1952) 85 CLR 115 ('*Callaghan*').

53 *Nydam v R* [1977] VR 430, 445 ('Nydam').

appellant and her partner.[54] The case is somewhat complicated by the fact that the prosecution's case was based on both unlawful and dangerous act manslaughter and negligent manslaughter, the basis for the unlawful and dangerous act charge being that there was evidence that the appellant and her partner had actually administered the drugs to the deceased. The charge of negligent manslaughter was based on the allegation that the appellant and her partner both owed the victim a duty of care which they breached by failing to provide reasonable assistance to the victim when he became ill as a result of consuming the methadone they had supplied. In addition, their failure to assist caused the victim's death.

On appeal it was argued that:

> Ground 1: His Honour erred in refusing to remove the charge of manslaughter by gross criminal negligence from the consideration of the jury.
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> Ground 2: His Honour erred in directing the jury that there was a duty of care owed by a supplier of drugs towards the drug recipient.[55]

In dismissing the appeal, the Court held that a duty arose in the circumstances of a voluntary assumption of care in circumstances of a helpless person.[56] Further to this, the Court also recognised that a duty arose from the fact that by supplying the drug the appellant created a danger to the deceased and that any person who deliberately puts another in danger has a legal duty to take steps to remove that danger.[57] In this regard, the Court cited with approval the recent English case of *Evans*[58] ultimately concluding that the trial judge's directions were in line with that case and therefore correctly reflected the law.[59]

In her analysis of *Evans*, Williams similarly identifies the above two approaches to the duty of care question. In *Evans*, Carly Townsend died of a heroin overdose at her mother's home. 'Her mother, Andrea Townsend and her half-sister, Gemma Evans, were charged with manslaughter by gross negligence in that they failed to render aid when it was clear that Carly had overdosed on heroin.'[60] While Andrea Townsend's duty arose from her maternal relationship to Carly, Evans's duty arose due to her being Carly's half-sister and that it was she who had obtained the drugs from a supplier and then handed them on to Carly.

The appeal by Evans against her conviction was dismissed but Williams highlights a number of problems with the Court of Appeal's judgment, including causation.[61] Williams rightly notes that the House of Lords in *Kennedy* stated that:

> This appeal is concerned only with unlawful act manslaughter and nothing in this opinion should be understood as applying to manslaughter caused by gross negligence.[62]

But this does not avoid the extent to which the voluntary acts of the 'fully-informed and responsible adult' user break the chain of causation initially created by the existence of a duty of care. This may not have been an issue in *Evans* due to the age (16 years) of the victim, but Williams contends that this is not so much of a problem in cases of negligent manslaughter

54 *Natalia Burns v R* [2011] NSWCCA 56 ('*Burns*').
55 Ibid [89].
56 Ibid [97] and [98].
57 Ibid [105].
58 *R v Evans (Gemma)* [2009] EWCA Crim 650 ('*Evans*') as discussed in G Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: R v Evans' (2009) 6 *Criminal Law Review* 631.
59 *Burns* [2011] NSWCCA 56, [119].
60 Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: R v Evans', above n 51, 633.
61 Ibid 637–41.
62 *R v Kennedy (No. 2)* [2007] 4 All ER 1083, [6].

in any event. Omerod and Fortson suggest that in such situations, '[s]ince V's acts would be completed, the causation question could be circumvented'.[63]

Ormerod had also commented that:

> the argument that the victim's act breaks the chain of causation may be less compelling in the context of gross negligence. In unlawful act manslaughter cases based on s.23, V's voluntary self-administration precludes the prosecution establishing this element of the s.23 offence. In gross negligence, it might be argued that the whole of D's course of conduct is in issue and that as such there is no break in the chain of causation.[64]

The whole of an accused's course of conduct in circumstances, such as those in *Evans*, comprises the creation of danger through the supply of the drugs leading to a duty to remedy this danger by immediately seeking medical assistance following the victim's overdose. In this regard, a failure to seek such timely medical assistance is a cause of the victim's death and the victim's self-administration, while contributing to the death, does not break this chain of causation.

This does not mean that causation will never be an issue in negligent manslaughter cases involving the supply of drugs. In the recent NSW case of *Justins*, the accused supplied her partner with Nembutal, the victim subsequently consuming the drug and dying as a result.[65] At trial, Justins was found not guilty of murder but guilty of negligent manslaughter. The basis for her conviction was that the deceased had severe Alzheimer's disease and as a result lacked the capacity to make an informed decision about committing suicide.[66] As such, Justins owed the deceased a duty of care to determine that the deceased had a capacity to understand. On appeal, the NSWCCA held that there had not only been a misdirection as to the meaning of an 'informed decision', but that it was unlikely that a failure to enquire could constitute the conduct that caused the death.[67]

III. Conclusion

It would appear to be settled law in Australia that an accused commits manslaughter where he/she administers drugs to another and this person dies as a result of the administration of the drugs. In addition a person could aid and abet another in such administration and accordingly be liable for manslaughter as a secondary party.[68] In *Cao,* however, it was held that someone can aid and abet a victim's self-administration and that this can then be seen as an unlawful and dangerous act for the purposes of manslaughter. [69] This paper has argued that this is legally wrong. It is not only questionable whether aiding and abetting self-administration amounts to an unlawful and dangerous act, but such aiding and abetting self-administration through the supplying of drugs (or the means to use those drugs) does not cause the death of a victim who has 'freely and voluntarily self-administered' the drugs.[70]

Again citing *Dalby*:

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63 D Ormerod and R Fortson, 'Drug Suppliers as Manslaughterers (Again)' [2005] *Criminal Law Review* 819, as quoted in Willaims, above n 51, 639.

64 C Barsby and D Ormerod, 'Case Comment. Homicide: Offences Against the Person Act 1861 s 23' [2003] *Criminal Law Review* 555, as quoted in Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: R v Evans', above n 51, 639.

65 *Justins v R* [2010] NSWCCA 242 ('*Justins*').

66 Ibid [1].

67 Ibid [110].

68 *Lamb* (1997) (Unreported, New South Wales Court of Appeal, 3 April 1997).

69 *Cao* (1999) (Unreported, New South Wales District Court, Ford ADCJ, October 1999).

70 *Kennedy (No. 2)* [2007] 4 All ER 1083. Due to the fact that there is there is no offence of self-administration in the UK, it might be arguable that the courts could have come to a different conclusion had there been such an offence. In light of the emphatic ruling by the House of Lords in *Kennedy (No. 2)* [2007] 4 All ER 1083, however, this appears now to be irrelevant.

> …where the charge of manslaughter is based on an unlawful and dangerous act, it must be an act directed at the victim and likely to cause immediate injury, however slight.[71]

As such, in Australia (at common law at least) and the UK, there is apparent consensus that the mere supply of dangerous drugs can never ground a charge of manslaughter. Given the similarity in facts between *Kennedy*[72] and *Stott & Van Embden*[73] there must also now be some doubt as to the second grounds for manslaughter in this Queensland case.

The problem of causation arising from a charge of manslaughter by unlawful and dangerous act, however, 'may be less compelling'[74] where the charge is negligent manslaughter. *Stott & Van Embden* is an important case but it is a Code case where liability for negligent manslaughter was based on the defendants administering drugs to the victim, not self-administration. The recent English case of *Evans*[75] and NSW case of *Burns*[76] now provide the basis for the approach to negligent manslaughter that would be taken at common law in Australia. This is not to say that liability is easily established. First, it must be established that an accused had a duty by way a voluntary assumption of care in circumstances of a helpless person. Alternatively, or as well, that a duty arose from the fact that by supplying the drug the appellant created a danger to the deceased and that any person who deliberately puts another in danger has a legal duty to take steps to remove that danger. Such a duty is not necessarily easily established. *Wilhelm* is proof of this.[77]

It must then be proven that a breach of such a duty caused the victims death:

> in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.[78]

The leading NSW case of *Taktak* would suggest that this may also be difficult to prove.[79]

In Australia, establishing the liability for manslaughter of a drug supplier where the victim self-administers the drugs is accordingly problematic to say the least. The rarity of charges, let alone convictions, is testament to this. What the cases to date tell us is that liability will only arise in specific circumstances such as those arising in *Burns*.[80] This includes that the accused is present at the time of the self-administration and the subsequent, resultant life-threatening condition of the victim, this in turn reinforcing the existence of a legal duty of care. In the case of Dr Suresh Nair, for example, one of the prostitutes who was present at the time of the death of the victim stated that she and the victim 'used a rolled-up $50 to snort numerous lines of cocaine, supplied by Nair, which she described as "strong .... it was close to pure"'.[81] She later noticed her colleague shaking uncontrollably but when she told Nair something was wrong he said she just needed to sleep and gave her a sedative. '"I'm a doctor, trust me, she will get better," she said Nair told her.[82] But the witness said blood and saliva came out of Ms Domingues-Zaupa's mouth and she turned purple.'[83]

Accordingly, and at common law at least, negligent manslaughter stands as the most appropriate means of prosecuting drug suppliers where those who self-administer the drugs

71 *Dalby* [1982] 1 All ER 916, 919.
72 *Kennedy (No. 2)* [2007] 4 All ER 1083.
73 *Stott & Van Embden* [2001] QCA 313.
74 Barsby and Omerod, above n 57.
75 *Evans (Gemma)* [2009] EWCA Crim 650.
76 *Burn* [2011] NSWCCA 56.
77 *Wilhelm* [2010] NSWSC 334. See also Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: R v Evans', above n 51, 637–8.
78 *Nydam v R* [1977] VR 430, 445.
79 *R v Taktak* (1988) 14 NSWLR 226 ('*Taktak*').
80 *Burns* [2011] NSWCCA 56.
81 Bibby, above n 5.
82 Ibid.
83 Ibid.

supplied die as a result. Wilhelm, however, demonstrates the limitations of such charges.[84] Assuming that the Australian criminal justice system has an interest in prosecuting drug suppliers for offences in such circumstances (in addition to the obvious offences of drug supply), then questions arise as to whether any alternative approaches currently exist under Australian law or whether consideration should be given to enacting new offences. A thorough analysis of this would extend the scope of this paper too far but certain possibilities are worth mentioning. Both Victoria (s22 Crimes Act 1958 (Vic) [85]) and South Australia (s29(1) Criminal Law Consolidation Act 1935 (SA)[86]), for example, have what could be called 'endangerment' offences. These offences appear, at least, to avoid problems with causation, but, having said this, both require proof of subjective states of mind. In addition, a major question is whether supplying drugs is conduct 'that places or may place another person in danger of death'[87] or 'is likely to endanger the life of another'[88]?[89] On the face of it, at least, such offences appear to be a possible means of prosecution.

84 *Wilhelm* [2010] NSWSC 334.

85 *Crimes Act 1958* (Vic) s22:

> A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence. Penalty: Level 5 imprisonment (10 years maximum).

See also s23.

86 *Criminal Law Consolidation Act 1935* (SA) s 29(1) states:

> Where a person, without lawful excuse, does an act or makes an omission—
>
> (a) knowing that the act or omission is likely to endanger the life of another; and
>
> (b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered, that person is guilty of an offence.
>
> Maximum penalty:
>
> (a) for a basic offence—imprisonment for 15 years;
>
> (b) for an aggravated offence—imprisonment for 18 years.

See also ss29(2) and (3).

87 *Crimes Act 1958* (Vic) s22.

88 *Crimes Act 1958* (Vic) s 29(1).

89 There are no specific cases relevant to these provisions, but as to the notion of endangerment, see *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43.