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Thesis abstract

Responsibility for iatrogenic death in Australian criminal law

David J. Carter

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Iatrogenic harm is harm, including death, that arises in the course of medical or healthcare treatment and is caused by the application of treatment itself, rather than by the underlying disease or injury. Each year, some 27,000 deaths in Australian acute care hospitals are associated with iatrogenic harm. Such harm in its iatrogenic form raises for us, in an urgent contemporary setting, some of the perennial questions associated with moral and legal answerability and questions of the limits of medicine, the difficulty of healing and of the politics of care.

Criminal law, in the form of manslaughter by criminal negligence, has been heavily criticised whenever its deployment has been contemplated as a response to iatrogenic death. And yet, the doctrine both remains in place, and exerts a significant influence on the regulation and conduct of medicine and healthcare. To understand why criminal law, despite its rare use, has been subject to such strident critique, this thesis engages with the assemblage of ways of knowing (epistemology), of deciding (ethics) and of acting (praxis) known as the 'healthcare quality and safety sciences', or more simply, the 'patient safety movement', that has been its chief interlocutor.

Scholars in this field of patient safety generally maintain that manslaughter by criminal negligence should not be prosecuted, with many claiming that criminal prosecution promotes the very harm it purports to address. The first cluster of arguments mounted against criminal prosecution of iatrogenic harm claim that it is unhelpful or ineffective. As the argument goes, the threat of prosecution reduces transparency and discourages the reporting of error, consequently choking off the 'error wisdom' that would otherwise be collected from such instances of harm or 'near- misses'. By stifling this valuable error wisdom – the 'gold standard' of data for quality improvement – the criminal law needlessly obstructs quality and safety science-led efforts to reduce harm. In so doing, the criminal law *itself* is said to produce, or at least worsen, the very iatrogenic harm it aims to prosecute.

The second cluster of arguments against criminal prosecution assert that it is unjust. Leading scholars argue criminal prosecution should be based upon conscious and willed contributions to harm, all of which must arise due to a positive choice, or reckless disregard, on the part of the defendant-practitioner. When healthcare is understood as a complex, adaptive and socio-technical system, as the best learning of quality and safety science has it, no individual agent can avoid or prevent iatrogenic harm in a morally or legally relevant way. When the literature holds that what we are respon-

sible for can only be based upon what we choose, criminal culpability is impossible to imagine within the context of health care as constructed by the patient safety movement, for practitioners cannot 'control' nor really 'choose' within a self- organising, complex and adaptive system. For this reason, manslaughter by criminal negligence is singled out for particular critique, given that it does not use 'choice' as the definitive marker of criminal culpability by its eschewal of subjective forms of mens rea as the prerequisite for criminal liability.

In response to the charge made by the patient safety movement that criminal prosecution is both unhelpful and unjust, I argue that these calls for rejection of manslaughter by criminal negligence have not been sufficiently attentive nor responsive to the actual practices of criminal law in this field; not to the history of its use, to its particular understanding of human action in health care, or to its mobilisation in the courtroom. As this thesis shows, when these foundational aspects of law's actual practice in the field are more fully and critically engaged, they seriously destabilise the validity of claims that manslaughter by criminal negligence is unhelpful or unjust when applied to iatrogenic harm in the Australian setting. The thesis builds its argument in three sections, each providing a new account of the actual practices of criminal law in this field: firstly, as to the history of its use in Australia; secondly, as to its fundamental and animating 'logic'; and finally, as to its mobilisation in the Australian courtroom.

First, the thesis greatly extends previous work on the topic by developing new historical material. Drawing on new archival work, a newly expanded account of prosecution challenges claims of prosecutorial overreach, speaking instead to criminal law's judicious and consistent capacity to distinguish between culpable and non-culpable instances of harm. Then by offering an historical analysis of the emergence of iatrogenic harm in Australia during the 1990's, I show that, contrary to the dominant perspective of the literature, criminal negligence and the patient safety movement are in fact neither incompatible nor autonomous: rather, their histories demonstrate that they exist in a highly dynamic, mutually constitutive relationship, one that is productive for both the formation of the field of quality and safety practice, and of its 'object', iatrogenic harm. In the contemporary moment, 'law', far from being simply opposed to advancing healthcare safety, has been productive of it.

Second, the thesis offers a highly original theoretical analysis of what might be at the core of the ongoing conflict surrounding criminal law and its application to iatrogenic harm: the reliance upon choice by the patient safety movement to understand agency, action, causation and responsibility. Criminal negligence, which stridently opposes the use of 'choice' as the definitive marker of criminal culpability, is rejected on this basis. Yet, I argue, this mobilisation of choice is quite curious – and particularly so for proponents or supporters of the quality and safety sciences; for, taken as a whole, the discipline's major contribution has been to theorise the emergent properties of iatrogenic harm, human agency and action in a manner that denies the health practitioner's ability to choose as an autonomous subject, subject as they are to control by external forces, and existing in a state of severely attenuated freedom. In short, choice is simply not part of the discipline's way of seeing the world, however, that same litera-

ture uses criminal negligence's own rejection of choice (as the definitive marker of culpability) as reason to reject it. Using choice in this way, to deny the legitimacy of criminal law, represents a worrying slippage or dissonance internal to this literature, one that I argue represents a deep betrayal of its more fundamental commitments. I argue that this dissonance offers the opportunity to recognise that both the doctrine of manslaughter by criminal negligence and the discipline of quality and safety sciences itself – aside from its argumentation against criminal prosecution – have a great deal in common. Both eschew the centrality of choice, and instead theorise human agency, action and healthcare-related harm in a manner deeply suspicious, if not in outright denial, of the relevance or availability of personal, subjective control or choice.

Third, and finally, the thesis develops a novel reading of the deep workings of the doctrinal material itself. The doctrinal material or structure of the offence of manslaughter by criminal negligence has been charged with being problematically devoid of content, and circular in logic. I accept these descriptions of the doctrinal material as accurate. However, I present a theory of criminal negligence and of negligent culpability that emerges from these very 'inadequacies' of the doctrine. Closely reading the workings of the doctrine in recent case law, I argue that the doctrine of criminal negligence develops its very form and content through a process of drawing into itself the practices and standards of the area of human activity with which it engages; borrowing, reflecting and thus reinforcing what is particular to the field of practice, rather than imposing standards alien to it. At the same time, the doctrine maintains normative solidity and coherence by drawing upon its own 'internal normativity', all the while continuing to actively re-affirm the underlying values of the area of human activity with which it is engaged: in this case, medicine and healthcare practice.

In light of the new research, it can be no longer said that the offence of manslaughter by criminal negligence is overused in Australia in response to iatrogenic harm. Nor can it be said that law, and specifically criminal law, has been wholly unhelpful for progressing the agenda of the healthcare quality and safety sciences, or that manslaughter by criminal negligence operates with an understanding of human action and agency that is incompatible with the quality and safety disciplinary project. Finally, it can no longer be said that manslaughter by criminal negligence represents an unjust imposition of liability by imposition of standards alien to those of medicine and healthcare.

Dr David J Carter,
Faculty of Law,
University of Technology Sydney,
Sydney NSW 2007
AUSTRALIA

E-mail: david.carter@uts.edu.au