

Legal Commentaries regarding Involuntary Manslaughter
Is there a subjective limb for the test of reasonable foreseeability in Hong Kong?

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This commentary seeks to discuss the test of “reasonable foreseeability” in relation to involuntary manslaughter, which occurs where a person kills without intent to kill or cause grievous bodily harm. In light of the recent decision in *HKSAR v Lai Chun Ho* [2018] HKCA 858, in which the Court of Appeal has affirmed that the test of reasonable foreseeability only involves an objective test, the essay seeks to elaborate the recent debate regarding elements for manslaughter.

Introduction

In offence regarding manslaughter, the requisite intent (hereinafter "MR") that the prosecution has to prove beyond reasonable doubt is that the defendant was at fault by an “unlawful” or “dangerous act” or by “gross negligence”. This commentary delves into the later form of MR regarding the offence of manslaughter.

Liability for manslaughter by gross negligence is based on the causing of death by a breach of the duty of care. In the United Kingdom, the leading case is *R v Adomako* [1995] 1 AC 171, which the House of Lords reaffirmed gross negligence manslaughter.¹

The Requirements of Manslaughter by Gross Negligence

In UK, the test for gross negligence was further reformulated in *R v Rose (Honey)* [2017] 2 Cr App R 28. The test includes five requirements:

First Requirement: An existing duty of care to the deceased

There must be an existing or supervening duty (*Miller* duty) owed by the defendant to the deceased.

Second Requirement: A breach of that duty of care

¹ *R v Adomako* [1995] 1 AC 171

The meaning of negligence in term of manslaughter is elaborated by Lord Mackay at paragraph 187:

“The ordinary principles of the law of negligence apply to ascertain whether or not [D] has been in breach of a duty of care towards the victim who has died.”²

Third Requirement: An objective test of reasonable foreseeability

There is an additional limb which requires the prosecution to prove that it is reasonably foreseeable that the breach of duty gave rise to a serious or obvious risk of death. The objective foreseeability test was most recently re-affirmed in England and Wales in 2017 in the case of *R v Rose (Honey)* [2017] 2 Cr App R 28.³ The third limb of the test is arguably an attempt to narrow the scope of manslaughter by gross negligence.

What about the position in Hong Kong? It was once argued that the "objective test" or "reasonable man" test is not enough. In *R v Lai Chun-ho* HCCC 213/2016, Justice Juidiana Barnes has added an additional "subjective" element to the test that the prosecution must prove that the defendant's subjective state of mind was culpable in that the defendant was subjectively aware of the obvious and serious risk of death to the deceased.

Referring to a previous case that she has decided, in *HKSAR v Lai Shui Yin* [2012] 2 HKLRD 639, it was also held that the test for gross negligence was not only an objective reasonable man test, but the prosecution was also required to prove that the defendant's state of mind was culpable.

“[56] Instead, it is my ruling that the position in Hong Kong is different from that in UK. It is not enough for the prosecution to simply rely on the objective reasonable man test – with the judge directing the jury to take into consideration in the subjective state of mind of the defendant, both for and against the defendant – the prosecution has to prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased.”⁴

² *R v Adomako* [1995] 1 AC 171, at paragraph 187.

³ *R v Rose (Honey)* [2017] 2 Cr App R 28.

⁴ *HKSAR v Lai Shui Yin* [2012] 2 HKLRD 639, at paragraph 55.

The additional “subjective test” relied upon the approval by *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 192 of Lord Bingham’s “salutary principle”. This view of adopted in by Justice Barness in *Lai Chun-ho* at paragraph 33:

“[33] This underlying principle was that a conviction of a serious crime should depend not only on what the defendant had done (*actus reus*), but also whether the defendant’s state of mind (*mens rea*) was culpable.”⁵

However, this additional "subjective test" is rejected by the Court of Appeal in the appeal of *HKSAR v Lai Chun Ho* [2018] HKCA 858. The question to be determined in its appeal is whether it is sufficient for the prosecution to prove the fault element of gross negligence manslaughter on a reasonable man test of objective foreseeability only, or whether a culpable subjective state of mind is also required to be shown.

The Court of Appeal has reaffirmed that gross negligence involves and only involves an objective test. In its conclusion, McRae JA stated:

“[67] In conclusion, our answer to the Question of Law reserved is that ‘the breach of the duty by the defendant being capable of being characterised as gross negligence and therefore a crime’ is to be proved on the objective reasonable man test only, in accordance with the terms of this judgment. The prosecution is not required to prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased. Accordingly, the proper direction in each case should be based upon that set out in Direction 63A of the Hong Kong Judicial Institute’s Specimen Directions in Jury Trials.”⁶

Fourth Requirement: Causation

This requires the prosecution to prove beyond reasonable doubt that the specific breach of duty caused the death of the victim.

Fifth Requirement: The Breach constitutes Gross Negligence

This requires the breach of duty to be characterized as “gross negligence” rather than creating a minor risk of personal injury. In addressing its meaning, Lord Mackay held (at paragraph 187) that:

⁵ *HKSAR v Lai Chun-ho* HCCC 213/2016, at paragraph 33.

⁶ *HKSAR v Lai Chun Ho* [2018] HKCA 858, at paragraph 67.

“The jury will have to consider whether the extent to which the defendant’s conduct departed from the proper standard of care incumbent upon him, *involving as it must have done a risk of death to the patient* was such that it should be judged criminal [emphasis added].”⁷

He continued by stating:

“The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgement to a criminal act or omission.”⁸

Conclusion

The decision of *Lai Chun Ho* [2018] re-affirmed the position that the test of reasonable foreseeability only involves an objective test. The prosecution does not have to prove the subjective awareness or knowledge of the defendant of the obvious and serious risk of death to the deceased. The Hong Kong position is therefore consistent with the law of England and Wales.

For a clear summary regarding elements of manslaughter in Hong Kong, Direction 63A of the Hong Kong Judicial Institute’s Specimen Directions in Jury Trials is extracted below:

- “(1) that the defendant owed a duty of care to the victim;
- (2) that the defendant was in breach of that duty of care;
- (3) that the breach of the duty of care caused the death of the victim; and
- (4) that the breach of the duty of care constituted gross negligence, in that the circumstances were such that a reasonably prudent person would have foreseen a serious and obvious risk not merely of injury, even serious injury, but of death so that you, the jury, consider the defendants actions justify a criminal conviction.”⁹

⁷ *R v Adomako* [1995] 1 AC 171, at paragraph 187.

⁸ *R v Adomako* [1995] 1 AC 171, at paragraph 188.

⁹ Direction 63A, the Hong Kong Judicial Institute’s Specimen Directions in Jury Trials.

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