RESPONSIBILITY FOR IATROGENIC DEATH IN AUSTRALIAN CRIMINAL LAW

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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‘In gross negligence manslaughter, the jury…finds justice where the law cannot guide it.’[1]

- Alan Norrie

‘Nobody ever said that care would be easy’.[2]

- Annemarie Mol

[1] Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2001) 45.

[2] Annemarie Mol, *The Logic of Care: Health and the Problem of Patient Choice* (Routledge, 2008) 87.

ABSTRACT

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, I focus upon 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.

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.

In light of the new research presented here, 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.

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PUBLISHED WORKS

Chapter 1 of this thesis incorporates original published work arising from research undertaken during candidature that has been published in a peer reviewed journal: Carter, David J, 'Correcting the Record: Australian Prosecutions for Manslaughter in the Medical Context' (2015) 22(3) *Journal of Law and Medicine* 588.

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[3] Ibid 20.