

The issue of whether the offence of gross negligence manslaughter is compatible with the European Convention on Human Rights was recently put to the test. **Michael Appelby** outlines what the Court of Appeal decided.

Putting conduct into context

MANSLAUGHTER

Since the publication a few years ago of *Work-Related Deaths: A Protocol for Liaison*, a manslaughter investigation by the Police will almost certainly take place when it appears that the death of a person at work is due in some way to the failures of the organisation.

The investigation will consider the role of front-line workers and also that of managers, including senior management. If there are no grounds for a manslaughter prosecution the matter will be passed over to the HSE to see if there have been any breaches of health and safety legislation.

The type of manslaughter that will be considered in work-related death cases will be gross negligence manslaughter. The leading case in this area of law is *R v Adomako* [1995] 1 AC 171, which said to be guilty of gross negligence manslaughter the jury must be satisfied that:

1. the defendant owed a duty of care to the deceased;
2. he/she was in breach of that duty;
3. the breach of duty was a substantial cause of death (i.e. something more than trivial); and
4. the breach was so grossly negligent that the defendant can be deemed to have had such disregard for life of the deceased that it should be seen as criminal and deserving of punishment by the State.

In a landmark decision given on 8 October 2004, the Court of Appeal in *R v Misra and Srivastava* was asked to consider if this offence is compatible with the European Convention on Human Rights (ECHR).

The defendant doctors were senior house officers responsible for the post-operative care of a patient who had undergone surgery to repair his patella tendon. The patient became infected with *Staphylococcus aureus* and died because the condition went untreated. The defendants were prosecuted and convicted on the basis that they had been grossly negligent because they failed to spot the signs of the condition and, as a consequence, did not treat it.



Illustration by Arthur Phillips

The defendants' lawyers argued that gross negligence manslaughter was an offence that lacked clarity and so was not compatible with article 7 of the ECHR. They argued that, in effect, the jury was being asked to consider whether any negligence found on the part of the defendants was so bad it was grossly negligent, and then to consider if it should be classed as a criminal offence.

Because of this, they contended, the offence lacked clarity, as it was not just up to the jury to determine whether the ingredients of the offence had been found (i.e. was the negligence gross and causative of the death) but also if such conduct, even if grossly negligent, should amount to a crime.

The Court of Appeal rejected this argument. It said that what the law required was not for the jury to consider whether the conduct of the defendant should be a crime but

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whether the conduct was grossly negligent and consequently criminal. Thus the law was clear and compatible with the ECHR.

To the public this decision will seem like the judges just playing with words. However, what this case confirms is the significance of this aspect of the offence.

Often a defendant's guilt comes down to not whether there was negligence but whether the negligence was gross. For this reason, when defending people charged with this offence it is important that their conduct is put into context. What may seem terrible to a lay person may be completely understandable to someone working in the same industry or profession. This may include calling people who carry out similar work to give evidence, or even experts in the industry, to explain the circumstances surrounding what occurred. ■