Gross negligence manslaughter: is prosecution of doctors always in the public interest and is specific prosecutorial guidance needed?

Abstract

There have been recent criticisms of the prosecution of doctors for gross negligence manslaughter (GNM) and the Crown Prosecution Service (CPS) has been under the spotlight. The CPS must make decisions to prosecute based on the evidential test and public interest test. There has been much attention on the evidential stage with a focus on how the CPS approach the threshold of GNM and the use of experts in this regard. The public interest stage by comparison has been subject to little scrutiny and it is time to redress that balance. It is not inevitable that the public interest test will be met in all GNM cases; the public interest test must be satisfied to support the decision to prosecute. It will be appropriate to consider the use of offence-specific prosecutorial guidance for assisted suicide and question whether this lends support to the use of such an approach to guide the exercise of discretion in GNM cases or points to a need for caution. If a specific policy was viewed desirable, the feasibility of the undertaking must be evaluated. There is a need to critically consider the circumstances that may lead to a conclusion that it is not in the public interest to prosecute and whether a policy could be constructed to facilitate this task.

Key words

Gross negligence, manslaughter, Crown Prosecution Service, public interest

Introduction

The prosecution of doctors for gross negligence manslaughter (GNM) has been criticised and as a consequence the decision-making process of the Crown Prosecution Service (CPS) is under the microscope. There has been much focus on the apparent unfairness of decisions reached and campaigns have been launched in protest against the inappropriate criminalisation of members of the profession who are simply trying to do their best.[1] It is certainly clear that there is a perception of unfairness but what is less certain is whether this perception is fundamentally correct or based on unsupported emotive responses to what appear to be ill-deserving cases, albeit it must be acknowledged that prosecutions are very limited in number. The recent Bawa-Garba case[2] can be identified as the spark leading to the recent resurgence of interest in this area. The case and the furore in its aftermath, which led to calls for reform will be explored.

The CPS is tasked with making the decision whether prosecution should commence. There are two stages to this process, the evidential stage and the public interest stage. The evidential stage

[1] J.Vaughan, "The case of David Sellu: a criminal court is not the right place to determine blame in complex clinical cases' 20 March 2018 available at www.blogs.bmj.com/bmj/2018/03/20/the-case-of-david-sellu-a-criminal-court-is-not-the-right-place-to-determine-blame-in-complex-clinical-cases/; S. Bosely, 'Doctors sign letter expressing worry over criminalisation of surgeon' *The Guardian* 6 August 2015 http://www.theguardian.com/society/2015/aug/06/doctors-sign-letter-expressing-worry-over-criminalisation-of-surgeon; A.Samanta and J. Samanta, "Gross negligence manslaughter and doctors: ethical concerns following the case of Dr Bawa-Garba'(2019) *Journal of Medical Ethics* 45: 10-14.

[2] This case is discussed below. Dr Bawa-Garba was convicted of GNM and received a two-year suspended sentence.

involves an initial evaluation of the evidence in order to determine the prospects of achieving a conviction. With regard to GNM cases, concerns have been raised about the approach taken at the evidential stage, for instance regarding the threshold for GNM and the role of experts to inform prosecution decision-making.[3] There is an understandable focus on the evidential stage given the complexity of the offence, so it is perhaps unsurprising that the public interest stage has received comparably little attention once the evidential hurdle has been passed.[4] It could be suggested that as the offence involves the death of the victim, it is inevitable that there will be a public interest in prosecution. Yet the public interest test must be applied in every case, so it is necessary to explore its application in the context of GNM and identify whether reform is possible to provide a solution to the perceived problems.

This article will critically consider whether the existence of a specific prosecutorial policy regarding assisted suicide lends support or points to a need for caution regarding the use of an offence-specific policy addressing the public interest test in GNM cases.[5] The calls for reform will also be addressed. They focus heavily on the demand for transparency in relation to how prosecution decisions are made and it will be argued that although transparency is necessary, this alone will not provide the solution if the underlying process is unsound. The need for realism in the quest for change must be emphasised. The difficulties when trying to identify factors to guide the exercise of discretion are very real. The 'culpability' of the offender is key when deciding whether prosecution will be in the public interest, thus how the requisite culpability is approached in this context requires careful attention. Three areas will be addressed to determine if expanded guidance can provide clarity in relation to the culpability factor: the need to distinguish between 'offence culpability' and 'public interest culpability', whether lessons can be learned from the approach taken to culpability in sentencing and whether causation can have a role in determining the decision to prosecute. Finally, the possibility that prosecution in inappropriate cases may actually harm the public interest will be carefully considered.

[3] See for example O.Quick, "Expert Evidence and Medical Manslaughter: Vagueness in Action' (2011) 38(4) *Journal of Law and Society* 496.

[4] D. Griffiths and O.Quick, "Managing medical manslaughter cases: improving efficiency and transparency?' (2019) University of Bristol Law Research Paper Series Paper 007 2019. Griffiths and Quick have concluded that 'more detailed guidance would be beneficial' (at 23) but their focus leans towards the need for further support in relation to determining the threshold of GNM with 'the identification of factors which might be associated (or not) with an assessment of gross negligence' (at 24). There is only brief reference to the use of prosecutorial guidance in relation to assisted suicide and Griffiths and Quick state that "Prosecutors were wary about comparisons…mainly because assisted suicide largely revolves around the consideration of public interest factors, and…involves a less complex and less varied set of circumstances'(at 23). By contrast, this article focuses on public interest and therefore the assisted suicide guidance will be closely considered.

[5] See O.Quick, "Medical manslaughter-time for a rethink?' (2017) *Medico-Legal Journal* Vol.85(4) 173-181 at 178. Quick briefly refers to the CPS guidance on factors for and against prosecution for assisted suicide and comments "one could argue, on the same basis, why not have similar guidance in this context.' Also see O.Quick, "Medicine, mistakes and manslaughter: a criminal combination?' (2010) *C.L.J.* 186,190. Quick asks "if Debbie Purdy can demand the publication of prosecution policy in relation to assisted suicide, then why deny doctors the same service for gross negligence?' This question is left unanswered. This article will now explore whether public interest guidance is desirable for GNM.

The prosecution of Dr Bawa-Garba for GNM: the case and the aftermath

The most recent focus on how doctors are treated in the criminal justice system where fault is alleged following a patient's death, stems from the conviction of Dr Hadiza Bawa-Garba for GNM.[6]

The offence of GNM

In *Adomako*[7] it was explained that GNM requires a breach of the duty of care owed to the victim and this breach must have caused the victim's death. If this can be established:

> "the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. 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'.[8]

Additionally, *Rose* confirmed it must be "reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death' and it should be stressed "a recognisable risk of something serious is not the same as a recognisable risk of death'.[9] The test to be applied is both "objective and prospective'.[10]

The case of Dr Bawa-Garba

Jack Adcock, a 6 year old child, died at Leicester University Hospital on 18 February 2011. He was cared for by Dr Bawa-Garba, a junior doctor specialising in paediatrics who had returned to work recently following maternity leave. Jack was admitted to the children's assessment unit and was initially treated for acute gastro-enteritis and dehydration. Following an x-ray he received antibiotic treatment for a chest infection but this diagnosis was incorrect. Jack was suffering a Group A streptococcal infection resulting in septic shock, tragically leading to his death. The prosecution made various allegations against her[11] such as her failure to spot obvious clinical symptoms, not providing antibiotics until four hours following the x-ray and failing to raise concerns with the consultant appropriately (although she did raise issues relating to blood gas results). Several issues were raised in her defence such as the difficulties associated with diagnosing sepsis and the fact the agency nurse caring for him had failed to provide the necessary information as to his progress. The

[6] Although Dr Bawa-Garba's case has triggered the recent focus on the operation of GNM, there have been previous concerns raised about prosecution of doctors, for example the case of Dr Sellu who successfully appealed his conviction. See *R v Sellu* [2016] EWCA Crim 1716.
[7] *R v Adomako* [1995] 1 A.C. 171.
[8] Ibid. at 187. This definition has been criticised due to lack of certainty and the circularity it creates.
[9] *R v Rose* [2017] EWCA Crim 1168 at para. 77
[10] Ibid at para. 78. Also, "The question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, not but for the breach' at para. 80.
[11] See R. Ameratunga et al, "Criminalisation of unintentional error in healthcare in the UK: a perspective from New Zealand' *BMJ* 2019: 364:1706 doi 7 March 2019. A summary of the prosecution and defence cases is set out in Table 1.

defence also stressed that she had been working a 13-hour shift without a break, without help from a senior house officer and had been responsible for children across different wards. The hospital's own internal review identified various system failures and did not isolate one root cause.

In 2013 Dr Bawa-Garba was charged with gross negligence manslaughter. She was convicted in November 2015 and given a two-year suspended sentence. She unsuccessfully applied for permission to appeal her conviction in 2016.[12] In June 2017 Dr Bawa-Garba was suspended from practice for one year by the Medical Practitioners Tribunal Service (MPTS). The General Medical Council (GMC) considered this was too lenient and challenged this decision. She was subsequently erased from the medical register in January 2018. Dr Bawa-Garba appealed and the decision of the MPTS was restored in August 2018.[13] Dr Bawa-Garba's case provoked an outcry amongst the medical profession. There were deep concerns about the steps taken by the GMC to secure her erasure from the medical register and the decision to prosecute a doctor who was simply doing her best in a highly pressured environment.

The aftermath

In February 2018 the Secretary of State for Health announced that a review into the application of gross negligence manslaughter in healthcare would be led by Professor Sir Norman Williams. This review would focus on how decisions were made within the legal framework; the issue of whether changes to the law were needed or desirable was outside the scope of the review. The review considered "information on and understanding of gross negligence manslaughter and the processes which apply to possible cases of gross negligence manslaughter involving healthcare professionals'.[14] Sir Williams informed the Secretary of State for Health "There is no doubt…that recent cases have led to an increased sense of fear and trepidation, creating unease within the healthcare professions. This has been compounded by a perceived arbitrariness and inconsistency in the investigation and subsequent prosecution of gross negligence manslaughter'.[15] The Williams Review concluded that: "Revised guidance to investigatory and prosecutorial bodies and a clearer understanding of the bar for gross negligence in law should lead to criminal investigations focused on those rare cases where an individual's performance is so "truly exceptionally bad" that it requires a criminal sanction'.[16]

The GMC also commissioned a fundamental review of the application of the law concerning GNM and made recommendations for change, with a focus on issues relating to process transparency.[17] The Reviews had very wide remit,[18] but the focus here is on the CPS decision to prosecute with

[12] *R v Bawa-Garba* [2016] EWCA Crim 1841.
[13] *Bawa-Garba v The General Medical Council* [2018] EWCA Civ 1879.
[14] Gross negligence manslaughter in healthcare. The Report of a rapid policy review June 2018 ('the Williams Review') at para 3.1. The Review also focused on reflective learning and lessons for healthcare professional regulators, but these aspects of the review largely fall outside the scope of this article.
[15] Ibid. at 5. See letter from Professor Sir Norman Williams to Jeremy Hunt, Secretary of State for Health and Social Care.
[16] Ibid. at 7.
[17] Independent review of gross negligence manslaughter and culpable homicide June 2019 ('the Hamilton Review').
[18] Ibid. See also the Williams Review n.14 above. Both reviews considered a wide range of issue such as use of experts, improving the quality of local investigations, investigations by coroners and professional regulation.

reference to the public interest stage in particular. There has been relatively little focus until now on the public interest stage of the decision-making process.

CPS and the decision to prosecute

Where it appears an offence may have been committed it is not inevitable that a prosecution will follow. There is a discretion to apply and a public interest test is used to exercise this discretion when making the decision. The office of the Director[19] has involved the exercise of discretion when making decisions even before the CPS was established. In 1951 the Sir Hartley Shawcross, Attorney General stated: "It has never been the rule in this country… that suspected criminal offences must automatically be the subject of prosecution'.[20]

The CPS was established in 1985[21] in England and Wales as a national prosecution service with the Director of Public Prosecutions (DPP) as its head. It was intended that this would result in a consistent approach when deciding which cases should be prosecuted. The Code for Crown Prosecutors is produced pursuant to s.10 of the Prosecution of Offences Act 1985. The Code explains the principles prosecutors should follow when making decisions, setting out an evidential stage and a public interest stage. Both stages of the Full Code Test must be passed before a prosecution commences.[22] Applying the evidential stage of the test, prosecutors "must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction'.[23] It is obvious that it would not be appropriate to prosecute in the absence of reliable and credible evidence pointing towards commission an offence. The Code confirms that the prosecutors must then consider whether a prosecution is required in the public interest "in every case'[24] where there is sufficient evidence to justify a prosecution. The Code states:

> "It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour'.[25]

Significant difficulties arise as public interest is a nebulous concept and there is unlikely to be universal consensus as to how it should be applied in an individual case. There may well be competing public interests and disagreement regarding how competing interests should be weighed. Where decisions are purportedly made on the basis of the collective public interest, then the public have a legitimate and necessary interest in how this is achieved. It may be accepted that discretion needs to be exercised but there should be clarity about how this is done.

The DPP has previously acknowledged:

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[19] Prosecution of Offences Act 1879. See R. Daw and A. Solomon, "Assisted suicide and identifying the public interest in the decision to prosecute' (2010) 10 *Crim. L.R.* 737 regarding the historical background of the CPS and application of the public interest test.
[20] Hansard, HC Vol.483, col.679 (January 29, 1951)
[21] Prosecution of Offences Act 1985
[22] The Code for Crown Prosecutors 8th edition, October 2018 at para. 4.1.
[23] Ibid. at para 4.6
[24] Ibid. at para. 4.9
[25] Ibid. at para. 4.10.

> "there are risks attached to the exercise of discretion. Whilst, in appropriate circumstances, it can be a force for good, poorly exercised discretion can mask corruption and malevolence…It is the bad decisions which are taken on the basis of inappropriate factors- be they based on the offender, the victim, the offence, or indeed the personal views of the prosecutor- which may be hidden under the respectable cloak of discretion'. [26]

The way discretion is exercised must to be open to rigorous scrutiny. The Code sets out the factors that should be taken into account when considering whether it is in the public interest to prosecute. The Code provides[27] that prosecutors should consider each of the following questions:

(a) How serious is the offence committed?
(b) What is the level of culpability of the suspect?
(c) What are the circumstances of and the harm caused to the victim?
(d) What was the suspect's age and maturity at the time of the offence?
(e) What is the impact on the community?
(f) Is prosecution a proportionate response?
(g) Do sources of information require protecting?

Application to GNM

There is nothing inherently troublesome regarding the range of questions to be asked given these apply to all offences. For the purposes of prosecuting healthcare professionals for GNM this basic list will be of limited utility. Some questions produce an obvious response for instance, in relation to question (a) GNM is a very serious offence and (c) the harm caused is of the utmost seriousness, whereas questions (d) regarding age and maturity and (g) regarding protecting sources simply will not be relevant. That leaves three questions to address, which relate to the level of culpability, the impact on the community and whether prosecution is a proportionate response. The factors which appear in the code to assist in determining the suspect's level of culpability do not appear to help with the complex considerations which need to be assessed when the prosecution of healthcare professionals is considered. For instance, the Code tells prosecutors to take into account 'the extent to which the offending was premeditated' and 'whether the suspect has previous convictions'.[28] As the Code applies to decision-making for all offences it is "necessarily couched in wholly general terms'[29] yet the consequence is that the general code provides insufficient support to prosecutors considering cases of GNM in healthcare. All GNM cases are dealt with by the Special Crime Unit which is part of the Special Crime and Counter Terrorism Division within the CPS.

[26] "Public prosecution system annual lecture- the role of the prosecutor in a modern democracy', 21 October 2009 referred to in K.Sosa 'In the Public Interest Reforming the Crown Prosecution Service' Policy Exchange (2012) at 45-46.
[27] The Code for Crown Prosecutors, above n.17 at para. 4.14 .
[28] Ibid.
[29] *R (Nicklinson) and another v Ministry of Justice and others, R (AM) v Director of Public Prosecutions and others* [2014] UKSC 38, [2014] 3 W.L.R. 200 at para. 242, *per* Lord Sumption, referring to "the published criteria which were held to be inadequate in Purdy's case were exceptionally vague.'

If a doctor has committed a 'gross' breach of duty which results in a patient's death we would expect prosecution should commence and if relevant 'mitigation' exists this would be raised at sentencing, yet not every case will be so straightforward and there is a need to demonstrate an open consideration of public interest. There is nothing to suggest that public interest is to be assumed once the evidential stage is met such that the public interest stage is effectively bypassed in a GNM case. It is acknowledged that the gravity of the offence which involves a fatal outcome is likely to result in the conclusion that prosecution is appropriate, yet there is a need for genuine consideration of the reverse possibility before the conclusion can be justified. A test which is overwhelmingly weighted in favour is no longer a test, it is a conclusion dressed up as a test. If the test output is the same no matter what the input, it is purposeless. At the very least it is a test which is so heavily weighted in one direction that it seems to fail to provide a real, meaningful opportunity to exercise discretion in the opposite direction.

Following their study of CPS case files Griffiths and Sanders confirmed that they "found no cases where the CPS believed there was sufficient evidence yet explicitly exercised their discretion on public interest grounds, not to prosecute'.[30] They did however note that "discretion can often be disguised as 'judgement' about evidential sufficiency'[31] and suggest that there were cases where "prosecutors seem to be searching for something beyond that what we might term 'threshold gross negligence' to prosecute'.[32] They speculate that one reason which may operate "alone or in combination' was that prosecutors "have no wish to prosecute in cases where culpability is not substantially above the threshold, and so apply the 'public interest' test under the guise of the evidential test'.[33]

The need for transparency and a clear framework of relevant factors to address when applying the public interest stage of the Full Code test in GNM cases becomes apparent. The absence of such clarity has repercussions in terms of the openness and accountability of the decision-making of a public body. An offence-specific policy has been created to determine the public interest in prosecution in assisted suicide cases. It is appropriate to consider whether GNM merits a special approach too.

The special case of assisted suicide.

It is possible for the DPP to formulate offence-specific criteria to guide the exercise of discretion at the public interest stage of the prosecution decision-making process. This has been achieved in relation to assisted suicide[34], but not without criticism. At the outset, a key distinction must be

[30] D. Griffiths and A. Sanders, "The road to the dock: prosecution decision-making in medical manslaughter cases' in D. Griffiths and A. Sanders (eds), *Bioethics, Medicine and Criminal Law Vol.2* (Cambridge University Press 2013) at 119.
[31] Ibid.
[32] Ibid. at 145.
[33] Ibid.
[34] The Suicide Act 1961 s.2(1) provides an offence is committed if '(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide.'

drawn between assisted suicide and GNM.[35] In relation to GNM significant uncertainty exists when identifying the parameters of the offence and the application of the evidential standard. Even where poor conduct is identified this may not be 'bad enough' to constitute 'gross negligence' or it may be difficult to acquire the evidence to support serious allegations. The evidential stage is a difficult hurdle such that when it is crossed it may appear that the public interest test in relation to prosecution decision making is given comparably cursory consideration. By contrast, with assisted suicide there is clarity in the law, and there is little difficulty in satisfying the evidential standard where assistance is provided, so if prosecution is to be avoided, this rests on application of the public interest test. Accordingly, there has been a heavy focus on the operation of public interest in the context of assisted suicide which has largely been absent in GNM cases. There have been various legal challenges regarding assisted suicide both in relation to the prohibition of assisting suicide and the prosecution policy. Arguments challenging the prohibition of assisted suicide are of paramount significance and interest,[36]but it is the challenge to prosecution policy which is of particular relevance here.

In *Purdy* arguments were formulated to create an article 8 challenge relating to prosecution decision-making.[37] Under the Suicide Act 1961 the DPP must consent to prosecute an assisted suicide case.[38] Debbie Purdy suffered from progressive multiple sclerosis and claimed that she and her husband should be able to know what factors the DPP would consider when deciding whether to prosecute her husband should he assist her suicide in the future. She anticipated the time would come when she would wish to end her own life and she would then seek her husband's assistance to take her to Switzerland to use the Dignitas service. She accepted the DPP could not provide immunity from prosecution, but instead sought information about the likely attitude to prosecution. The House of Lords held that her article 8 rights were engaged. The DPP tried to argue that the Code for Crown Prosecutors issued under section 10 of the Prosecution of Offences Act 1985 provided the necessary guidance.[39] However, the House of Lords held that the Code did not "satisfy the article 8(2) requirements of accessibility and foreseeability in assessing how prosecutorial discretion is likely to be exercised'[40] and accordingly, what was a required was "a custom-built policy statement

[35]It must also be acknowledged that clearly both are very serious offences involving the death of an individual, however in relation to assisted suicide this is usually the result of a settled, voluntary wish of the victim.
[36] *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800; *Pretty* v *UK* (2002) 35 EHRR 1. Diane Pretty suffered from motor neurone disease and argued the DPP's refusal to grant her husband proleptic immunity from prosecution if he helped her to die and the prohibition of assisted suicide violated her rights under the Convention. The House of Lords held that Mrs Pretty's rights under articles 2, 3, 8 ,9 and 14 of the Convention were not engaged. Additionally, even if such rights were engaged, there were "ample grounds to justify the existing law and the current application of it' at para. 30 *per* Lord Bingham. However, the European Court of Human Rights held that article 8(1) was engaged but the interference could be justified by Article 8(2) as there would be no violation as "the interference in this case may be justified as 'necessary in a democratic society' for the protection of the rights of others' at para.67.
[37] *R (Purdy)* v Director of Public Prosecutions [2009] UKHL 45, [2010] 1 A.C. 345.
[38] Suicide Act 1961 s.2(4).
[39] Before the Court of Appeal decision in Purdy, the DPP had taken the opportunity to explain basis of his decision not to prosecute those who assisted in the suicide of Daniel James. However, as noted by A. Mullock, "Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?' (2010) 18 *Medical Law Review* 442 at 448 although the guidance in James was helpful "it did not provide sufficient clarity as to how the Code for Crown Prosecutors should be applied generally to a case of assisted suicide, or how the DPP exercises his discretion over the decision to prosecute'.
[40] *Purdy*, above n.37 at para.85, *per* Lord Brown.

indicating the various factors for and against prosecution'.[41] Following the House of Lords decision, the DPP issued a draft policy, setting out factors in favour of prosecution and factors which would go against prosecution. The CPS consulted widely in relation to the draft policy which was then modified and a final version produced in 2010.[42]

Assisted suicide was subject to further judicial scrutiny in *Nicklinson.*[43] It is appropriate to focus on the second appeal which related to the DPP's code.[44] Martin[45] would require assistance from a carer (other than his wife or family member) or from an organisation and he argued the policy was not clear as to the likelihood of prosecution in such circumstances. He sought an order that the DPP should clarify and modify the 2010 policy. The Court of Appeal held that "in certain respects' the 2010 Policy was "not sufficiently clear…in relation to healthcare professionals'.[46] The Court of Appeal gave the DPP permission to appeal and Martin permission to cross-appeal. Martin argued the 2010 policy did not comply with the foreseeability requirement and was "insufficiently clear in relation to the likelihood of prosecution of those individuals (other than relatives and close friends of the person concerned) especially including doctors and other members of the caring professions" who would be potentially prepared to offer assistance.[47]He also argued the policy "should be modified to make it clear that, at any rate absent any aggravating circumstances, such an individual would not be liable to be prosecuted'.[48] Lord Neuberger identified the question to be addressed in this aspect of the appeal was "does the 2010 Policy comply with the requirements of article 8, and hence section 6 of the 1998 Act, and in particular the requirement of foreseeability'?[49] The DPP's appeal against the Court of Appeal decision was successful.

Thus, in *Purdy* it was decided that the generic code did not provide sufficiently clear guidance and an offence specific policy was needed, but the Supreme Court in *Nicklinson* was not prepared to demand the 2010 assisted suicide policy was further clarified notwithstanding the fact there was potential scope to do so. The difficulties posed by the application of the generic code to GNM raise similar issues compared with assisted suicide, given that few of the factors listed are of much assistance and the issue of culpability is a thorny issue which, on the face of it, would merit further attention. It is appropriate to address whether detailed guidance would be an appropriate response to the difficulties faced in relation to prosecution decision-making regarding GNM. It is important to

[41] Ibid. at para. 86, *per* Lord Brown. See also Lord Hope at para. 56 that it was necessary to "require the Director to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding …whether or not to consent to a prosecution."
[42] Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, February 2010 updated October 2014, available at https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-assisting-suicide.
[43] *Nicklinson*, above n.29.
[44] In the first appeal, the claimants Mrs Nicklinson and Mr Lamb, argued that section 2(1) of the 1961 Act was a disproportionate and unjustifiable interference with the article 8 rights of those who wish to commit suicide but require the help of a third party. A declaration that section 2(1) was incompatible with the Convention was sought. This aspect of the appeal failed. The second appeal related to a challenge to prosecution policy.
[45] Martin was the name used in order to ensure privacy.
[46] [2013] EWCA Civ 961 at para 140, *per* Lord Dyson MR and Elias LJ. Note, Lord Judge would have dismissed Martin's appeal in this regard.
[47] *Nicklinson*, above n.29 at para 57, *per* Lord Neuberger.
[48] Ibid.
[49] Ibid. at para. 60, *per* Lord Neuberger.

consider the House of Lords and Supreme Court judgments carefully, especially if it emerges that any concerns would be equally applicable in the context of gross negligence manslaughter.

Article 8(1) is engaged in assisted suicide cases due to interference with 'victims'' rights.[50] GNM does not generate similar arguments and article 8(1) is not engaged, so it will not be an infringement of article 8 for the DPP to fail to provide more detailed guidance as there is no obligation to consider the requirements of foreseeability and accessibility under article 8(2). Yet, accessibility and foreseeability remain key aims in relation to any policy which shapes the application of discretion and represent important measures to 'test' the desirability of such a policy. The standards of accessibility and foreseeability should be employed to test the exercise of discretion regarding GNM to determine whether the status quo and continued use of the generic code is defensible or whether an offence specific policy is required. It would surely represent a disappointing standard if the basic thresholds of accessibility and foreseeability are not met. It could be argued GNM specific guidance should be provided of the DPP's own volition in response to criticism levelled against the use of broad, generic criteria in this area which involves difficult decision-making. Although the DPP would not 'have' to create offence specific guidance, it is appropriate to consider whether there is a 'need' to or indeed whether there are good reasons to avoid such an approach. There are lessons which can be learned from the assisted suicide experience and a note of caution can be detected.

- *Constitutional propriety*

In deciding that DPP should not be required to offer further clarification of the assisted suicide prosecution policy Lord Sumption held, "The pursuit of clarity and precision cannot be allowed to exceed the bounds of constitutional propriety and the rule of law itself'.[51] Additionally, Lord Hughes considered that if the DPP were to state in advance whether or not particular types of behaviour would lead to prosecution:

> "she is in immediate peril of crossing a constitutional Rubicon. She is in danger of doing one or both of two things. First she is likely to create an advance exemption from the law for a potential group of potential offenders. Second, she is likely in effect to modify the law as laid down in statute or common law. She has no power to do either of these things. Both are a breach of her constitutional position. She is the head of a branch of the Executive, albeit one with the degree of independence of a non-ministerial government department'.[52]

Although the offence of assisted suicide is set out in statute, similar concerns would be raised about the impact of detailed prosecutorial discretion regarding offences established in common law such as gross negligence manslaughter. Lord Sumption also held the Code and guidelines are:

[50] It should be acknowledged that Lord Hughes noted it is possible for other offences to potentially engage article 8, but we should not expect offence specific guidance as a consequence, ibid. at para.285 *per* Lord Hughes, "There may be a number of cases where the victim's article 8 interests are potentially engaged…If it be the law that she can be required to provide a statement of policy as to factors identifying who is likely to be prosecuted in this case, it is difficult to see why the same law does not apply to other offences'.
[51] Ibid. at para. 241, *per* Lord Sumption.
[52] Ibid. at para. 272, *per* Lord Hughes.

> "an exercise of executive discretion which cannot be allowed to prevail over the law enacted by Parliament. There is a fine line between, on the one hand, explaining how the discretion is exercised by reference to factors that would tend for or against prosecution; and, on the other hand, writing a charter of exemptions…The more comprehensive and precise the guidelines are, the more likely they are to move from the first thing to the second'.[53]

It appears the devil will be in the detail in relation to constitutional concerns about GNM specific criteria. The detail, parameters and effect of any proposed guidance would require close attention to ensure the fine line observed by Lord Sumption was not crossed. Of course, in Nicklinson the Supreme Court had to address whether *further* clarification of a pre-existing, detailed offence specific policy guidance was required. The concerns voiced should not necessarily deter the pursuit of an initial tentative attempt to lay down some preliminary GNM specific guidance.

Concerns were raised in the aftermath of the *Purdy* decision. Montgomery refers to the "constitutional tension between the arms of the state' and the risks which exist where the decision is made to require the DPP to "elaborate on his prosecution policy to such an extent as to change the basis of the criminal offence…this raises questions about the authority of prosecutors to legislate so as to make the law what they desire it to be, not what is actually is'.[54] Keown considers the assisted suicide policy has the effect of de facto decriminalisation with the result that "the argument for its decriminalisation de jure becomes all the stronger'.[55] This may well be a legitimate concern in relation to assisted suicide which has been subject to many legal challenges, but this argument applies with much less force regarding GNM. Although concerns have been expressed regarding the nature of the offence, the difficulties associated with the 'gross' threshold and issues surrounding mens rea, it is perhaps a step too far to suggest there should be no criminal offence where the gravest breaches of duty have resulted in a patient's death.

O'Sullivan argues that the offence was amended as a consequence of changes to prosecution policy which resulted in "grafting of motive considerations on to the *mens rea* of the offence.'[56] This may well be legitimate criticism of the effect of the assisted suicide policy, but that is not to say that other guidance will inevitably be susceptible to similar criticism. Alternatively, O'Sullivan argues that "even if the offence of assisted suicide has not in fact been amended, the impact of the Policy on the public's understanding of the particulars of the offence is the same as if it had been'.[57] Accordingly, CPS policy may create "a legitimate expectation of non-prosecution' and as a consequence 'this constitutes an *effective* amendment of the offence'.[58]Greasley also considers that although DPP policy does not change the constituent elements of any offence, this may still have such an effect in terms of public perception.[59]

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[53] See above n.51.
[54] J. Montgomery, "Guarding the Gates of St Peter: Life, Death and Law Making' (2011) 31 *Legal Studies* 644 at 664.
[55] J.Keown, "In need of assistance?' (2009) 159 *New L J* 1340 at 1340.
[56] C. O'Sullivan, "Mens Rea, Motive and Assisted Suicide: Does the DPP's Policy Go Too Far?' (2015) 35 *Legal Studies* 96 at 100.
[57] Ibid.
[58] Ibid. at 105.
[59] K. Greasley, "*R (Purdy) v DPP* and the case for wilful blindness' (2010) 30(2) *Oxford J Legal Stud* 301 at 326. It is "not relevant…that clarification does not modify the offence itself, so long as the public perception is that' it has.

It is difficult to discern how such concerns would apply to the operation of a GNM policy as much would depend on the content of the policy and the factors to be considered in reaching a decision. It would be inappropriate to include factors that could have the *effect* of amending the mens rea requirement of the offence. For instance, it would be wrong to add a factor which suggests 'recklessness' should be assessed when deciding whether a case should be prosecuted in the public interest.[60] It may be possible to construct factors which do not have this negative effect. For example, if a policy was drafted which listed 'sudden and unexpected workplace pressure contributing to incident' as a relevant factor this would have no impact on mens rea. Such a factor could have alternative impacts. It could lead to the *perception* that mistakes arising during such circumstances leading to a victim's death do not amount to GNM[61] or there may simply be an appreciation that although this could still be 'gross negligence', it would not be in the public interest to prosecute due to the special circumstances.

Montgomery argues "the basis for the prosecution discretion is not constitutive of the terms of the offence, but an application of the quality of mercy'.[62] He continues that where an offence is committed:

> "they [the offender] may appeal to mercy from the prosecutor…Here they are entitled to expect that decisions will be consistent rather than arbitrary, but they are raising questions relating to the public interest in enforcing the law, not seeking a dispensation from the rules prohibiting the acts. Creating such a dispensation, or immunity, would be to undermine the policy of the law'.[63]

On this basis, the effect of prosecution policy should not be overstated and there are risks if the consequences of a change in policy are misunderstood. O'Sullivan argues that even if prosecution policy resulted in a legitimate expectation that a case would not be prosecuted "the fetter can be discounted if the public interest reasons in favour of disregarding it are greater than those against'.[64] As Heywood reasons, the DPP "has only promised to follow his own policy in the decision making process; this is different from saying the policy creates a promise to, or not to, prosecute in a given situation'.[65] Essentially, any changes to prosecution policy regarding GNM will identify the factors the CPS will consider, but would offer no guarantees as to the outcome following such consideration. All factors would need to be carefully balanced on a case-by-case basis and notwithstanding the presence of a factor which may appears to point away from the need to prosecute, if countervailing factors exist the balance may still tip in favour of prosecution and accordingly, there is no de facto defence.

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[60] The distinction between 'gross negligence' and 'recklessness' and whether 'recklessness' is a more appropriate mens rea has been the subject of much debate. See A. McCall Smith "Criminal negligence and the incompetent doctor' (1993) *Medical Law Review* 336

[61] It is of course possible that when 'all the circumstances of the case' are considered there may have been no offence committed, see *Adomako*, n.7 above. If the evidential stage is not passed there is no need to consider whether prosecution is in the public interest.

[62] Montgomery, above n.54 at 665.

[63] Ibid.

[64] O'Sullivan, above n.56 at 105.

[65] R. Heywood, 'The DPP's prosecutorial policy on assisted suicide' (2010) 21(3) *King's LJ* 425 at 439.

The validity of constitutional concerns will perhaps be dependent on the content of any new policy rather than the creation of an offence specific policy per se. The real risk lies in how the policy is perceived, rather than what it can legitimately do. It may be difficult to create factors militating against prosecution which will not result in de facto 'defences' at least in terms of public perception, if not in reality, where the practical effect of the policy is that the cases are not prosecuted where particular criteria are met. It has been argued that assisted suicide guidance has the effect of changing mens rea and gives the motivation of the perpetrator a prominence which does not feature in the offence itself. However, given the difficult article 8 issues surrounding the criminalisation of assisted suicide it is hardly surprising the prosecution policy had such a focus.

The existence of the constitutional tightrope should not detract from the need to at least explore whether the DPP could have a role to play in achieving openness and accountability in relation to exercise of CPS discretion. There are competing public interests at play and in terms of fairness the competing interests which would justify non- prosecution ought to be more clearly articulated. There is a fine line between promulgating offence specific policy (which may be considered desirable) and promulgating defences or proleptic immunity (which must be avoided). Whether this line is crossed will clearly depend on how such a policy is constructed, but surely this task should at least be attempted.

- *Purpose*

The purpose of expanded guidance needs to be clear as there may be a gulf between what exponents of the need for a specific prosecutorial policy seek and what they can legitimately expect. Different possible aims can be identified and their desirability must be determined.

Aim 1: to provide much needed guidance and reassurance regarding the likelihood of prosecution to those working in occupations or otherwise engaged in potentially hazardous activities which could result in fatal error.

Key concerns arise regarding whether this is a desirable aim. The potential benefits to prospective defendants are considered. Support for this aim in the context of assisted suicide is evident, given the existence of article 8(1) issues and the serious disquiet which exists in relation to the existence of the offence. Mullock refers to the fact that in assisted suicide cases the "Protagonists in the debate seem to enjoy public sympathy'.[66] Expanded assisted suicide guidance can be properly viewed as providing reassurance to those acting on a compassionate basis.[67] This will not necessarily arise in relation to GNM. Whereas potential defendants regarding assisted suicide will enjoy public sympathy, in cases of GNM there may well be public antipathy to what may be perceived as a pursuit of professional immunity.

It is difficult to identify what this aim would achieve in the context of GNM. The benefits of expanded guidance for assisted suicide are evident, for example this will enable family members to make an informed choice whether to assist their loved one on a trip to Dignitas. Detailed guidance then has the power to shape behaviour where an individual makes a positive, informed decision

[66] A. Mullock, "Overlooking the Criminally Compassionate: What are the implications of prosecutorial policy on encouraging or assisting suicide?' (2010) 18 *Med L Rev* 442 at 460.

[67] Although clearly factors in favour of prosecution were also identified it must be acknowleged that public perception of the guidance will focus on almost guaranteed immunity for compassionate family members.

whether to engage in potential blameworthy behaviour. This does not apply with the same force in relation to negligent conduct. It is self-evident that a doctor does not stop and pause before administering an injection or making a decision whether to conduct further diagnostic tests to consult to the CPS Code to determine the risks of prosecution if the wrong decision is made.

In any event, the Supreme Court has confirmed that provision of a 'warning' to potential defendants is not a legitimate purpose. Lord Neuberger held that the purpose of the DPP's code or policy "is not to enable those who wish to commit a crime to know in advance whether they will get away with it'.[68] Additionally, Lord Hughes confirmed:

> "the foreseeability which any citizen is entitled to expect in relation to the decision of a prosecutor whether or not to institute proceedings is no more but no less than the knowledge that the prosecutor will examine all the facts of any case where an offence has been committed and will decide whether or not it is in the public interest to proceed…the principle of legality does not extend to enabling potential offenders to avoid the application to them of a law which they may wish to avoid'.[69]

Aim 2: An expanded policy could facilitate openness and accountability in prosecution decision-making.

This aim is broader in nature and arguably more balanced with a focus on wider interests compared to aim one. It supports CPS accountability in respect of decisions to prosecute. The public must be satisfied about the fine distinctions made, in terms of which cases do or do not merit prosecution. The general code offers limited assistance in the application of public interest in complex GNM cases.[70] In the healthcare sector it is obvious doctors will have a vested interest in this issue, but it is also important there is public confidence in criminal regulation of the profession and the delivery of safe healthcare. There is a public interest in both ensuring doctors are not unfairly targeted nor given proleptic immunity. Public confidence in prosecution decision-making is vital given that decisions are purportedly made on the basis of the public interest. Lord Neuberger confirmed the purpose of the DPP code and any policy "is to ensure that, as far as is possible in practice and appropriate in principle, the DPP's policy is publicly available so that everyone knows what it is, and can see whether it is being applied consistently'.[71] Although this is a legitimate purpose, there is a need to be realistic in terms of what can be achieved 'in practice.'

- *Practicality: can we realistically achieve clarity and precision?*

When deciding that the general code provided insufficient assistance in the context of assisted suicide Lord Hope held "The judges have a role to play where clarity and consistency is lacking in an

[68] *Nicklinson*, above n.29 at para. 141, *per* Lord Neuberger.
[69] Ibid. at para. 278, *per* Lord Hughes.
[70] There is no suggestion an offence specific public interest policy is required in every case, for instance for common offences such as theft the general code works satisfactorily.
[71] See above n.68.

area of such sensitivity'.[72] GNM is also an area of great sensitivity as evidenced by the aftermath of the Bawa-Garba case and the criticism levelled against the pursuit of a criminal prosecution. GNM similarly lacks clarity and consistency and the problem is compounded as there are two problem areas which combine to produce a very uncertain picture. Uncertainty regarding the elements of the offence exists alongside a subsequent lack of clarity as to how prosecution discretion is exercised. Given we are unlikely to achieve clarity regarding the parameters of the offence, it would be appropriate to focus on the public interest stage of the prosecution decision to determine whether clarity might be possible. There is a need to consider whether a more detailed policy could help guide and justify the decisions reached. Greasley comments that "we can have consistency without clarification, the two being distinct matters' but concedes "there may well often be a correlation between clarification and consistency'.[73] The practice in relation to assisted suicide had been largely consistent with cases not being pursued where assistance was provided on a compassionate basis, whereas in GNM cases there have been concerns regarding the decision to prosecute some cases, so it is hoped that clarity may have a beneficial effect.

Expectations must be realistic. In *Purdy*, Lord Phillips held, "A law which confers a discretion is not in itself inconsistent with this requirement [of foreseeability], provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary'.[74] The House of Lords was prepared to find that the generic code did not provide 'sufficient clarity' in relation to assisted suicide such that an offence specific policy was needed, but there must also be a real opportunity to exercise discretion.

It will of course be impossible to envisage every relevant possible circumstance which would be relevant to a decision to prosecute and expectations must be feasible in this regard. Gaps will inevitably emerge, and the DPP cannot be expected to amend guidance in response to every potential variable. Such was the situation faced in the second appeal in *Nicklinson* in relation to Martin's challenge to the CPS assisted suicide policy. The Supreme Court unanimously decided *further* clarification of the details in the policy was not needed.[75] There are dangers when attempting to proscribe how discretion should be exercised. Lord Sumption held:

> "the pursuit of clarity and precision must be kept within the bounds of practicality. What is practically attainable…must depend on the range of people and situations to which it is expected to apply. It is not practically possible for guidelines to prosecutors to give a high level of assurance to persons trying to regulate their conduct if the range of mitigating or aggravating factors, or of combinations of such factors, is too wide and the circumstances affecting the weight to be placed on them too varied for accurate prediction to be possible in advance of the facts'.[76]

[72] *Purdy*, above n.37 at para.27, *per* Lord Hope. Lord Hope at para.27 acknowledged that in relation to assisted suicide 'the law, as it stands, could not be clearer' but 'the practice that will be followed in case where compassionate assistance of the kind that Ms Purdy seeks from her husband is far less certain'.
[73] Greasley, above n.59 at 310.
[74] *Purdy,* above n.37 at para. 41, *per* Lord Hope.
[75] There was a separate issue regarding whether an aspect of the guidance properly reflected the DPP's approach in light of subsequent statements by the DPP, but the Supreme Court indicated it was for the DPP to change the guidance to reflect this and it was inappropriate to make an order in this regard.
[76] *Nicklinson,* above n.29 at para. 240, *per* Lord Sumption.

Additionally Lord Neuberger considered "it is evitable that any policy issued by the DPP has to retain a degree of flexibility: each case has to be assessed after the event by reference to its own particular facts'.[77] There are risks associated with the pursuit of clarity where in reality this may be a futile endeavour. Where demands are made for clarity in relation to how the criteria will exercised, focus shifts to the construction of individual policies which will no doubt then be subject to separate challenges where gaps and ambiguities may be identified when they are subject to scrutiny and applied in individual cases. Lord Hughes noted his concern that "the criminal law is in danger of being diverted from the proper trial process into anticipatory applications for judicial review of the policy, made on hypothetical or uncertain facts by those who seek either to reduce the likelihood of prosecution or to increase it. Such a process subverts the criminal law and encourages satellite litigation'.[78]

The assisted suicide experience does not help build a case that an offence specific GNM policy ought to be attempted. In relation to assisted suicide there was a need to ensure compliance with article 8(2), given that article 8(1) was engaged and there has been significant public support for clarification of CPS policy regarding compassionate assistance of family members. For GNM the impetus for change arises on a different basis. A call for change is made by the medical profession who are understandably concerned regarding the prospect of criminal prosecution arising from the unintended death of a patient. However, from a public interest perspective it is difficult to identify a universal call for a prosecution policy which could be perceived as a call to provide immunity for a particular category of defendant. Within the Supreme Court judgments in Nicklinson there is a strong focus on 'practicality' (what we could do) and 'principle' (what we should do).[79] Even greater caution must be exercised regarding GNM when change to prosecution policy is contemplated in the absence of an article 8(1) interference to resolve. In relation to assisted suicide and the need to justify article 8(1) interference the House of Lords sailed close to the wind in terms of what was constitutionally acceptable.[80] It would be foolish to risk 'crossing the rubicon' in the absence of a need to comply with Article 8(2), but out of respect for the principles which underpin it. There is a risk of undesirable consequences despite laudable intentions. Overall, the assisted suicide example does not support the argument that there is a *need* for offence specific clarity regarding GNM prosecution policy. That is not to say it would not be possible to identify offence specific criteria, but they must be regarded as desirable.

The possible reform of public interest decision-making in GNM cases will now be examined. The calls for change which focus on transparency will be addressed first, before exploring more ambitious possibilities.

The focus on transparency to address perceptions of unfairness

[77] Ibid. at para.139, *per* Lord Neuberger.
[78] Ibid. at para. 285, *per* Lord Hughes.
[79] Ibid. Lord Sumption refers to the importance of 'practicality' at para. 240 and 'principle' at para. 241.
[80] In Purdy, the HOL had been prepared to order the DPP to provide an offence specific policy on the basis Art 8(1) was engaged and there was therefore a need to comply with Art 8(2) requirements of accessibility and foreseeability. However the decision received subsequent criticism (referred to earlier)

The GMC's terms of reference for the review of gross negligence manslaughter identified one of its purposes was to "consider gross negligence manslaughter…in relation to the perceived vulnerability of the medical profession to charges of GNM'. [81] The subsequent Hamilton Review acknowledged "the perception of what happens in the investigation of GNM can be as powerful in influencing attitudes and behaviours as what actually happens'.[82]

What is apparent is that it is unclear as to how difficult decisions to prosecute are made.[83] An absence of clear information is a breeding ground for fear and misunderstanding. This is to some extent inevitable in an area of discretionary decision-making, but there is now a clear call for openness about the decision-making process. Consequently, there is a lean towards remedial measures with a focus on transparency. Perhaps it is hoped that if it is understood *how* a decision is made then fears of unfair treatment and selection will dissipate. Of course, the converse may well be true and transparency will display a need for more fundamental change. A focus on transparency is apparent in the calls for change and reform to date. The terms of reference of the Williams Review identify its purpose was to consider "how we ensure healthcare professionals are *adequately informed* about: where and how the line is drawn between gross negligence manslaughter (GNM) and negligence; what processes are gone through before initiating a prosecution for GNM'. [84] The Williams Review confirmed that a change in the law would not be forthcoming. It recommended a working group (involving various bodies including the CPS) should provide "a clear explanatory statement of the law on gross negligence manslaughter" and that "all relevant organisations, including, *if appropriate*, the Director of Public Prosecutions, should *produce or update* guidance on gross negligent manslaughter in light of the explanatory statement'. [85] The Williams Review considered such a step would "promote a consistent understanding of where the threshold for prosecution of gross negligence manslaughter lies'. [86] This related not only to an understanding of GNM itself but also when it will be prosecuted, which will encompass both the evidential and public interest stages of the Full Code Test.

There is a focus on the need to explain what is done rather than a call for change as to what should be done. The profession also demand openness, the response of the Royal College of Physicians of Edinburgh to the Williams review focused on the need for clarity and understanding, although admittedly they would be limited in their response by the parameters of the terms of reference.[87] The Hamilton Review sets out the following recommendation in relation to transparency:

> "Recommendation 20: The CPS (England and Wales) should consider what measures it could take to enhance the transparency and understanding of its decision-making process

[81] GMC, Terms of reference: Review of gross negligence manslaughter and culpable homicide at para. 1 March 2018
[82] Hamilton Review, above n.17 at para. 148.
[83] Research to date has focused on the evidential stage of the process and how the decision is made as to whether the breach is 'gross' and the use of experts in this regards, rather than the public interest stage.
[84] Williams Review, above n.14. See Terms of Reference at 54. My emphasis added.
[85] Ibid. at 18. My emphasis added.
[86] Ibid.
[87] Williams Review into Gross Negligence Manslaughter in Healthcare Comments from the Royal College of Physicians of Edinburgh (undated). The terms of reference had already made it clear the Review would not consider any changes to the law of gross negligence manslaughter.

(including how experts are recruited and use and disclosure of expert evidence) so as to provide reassurance about how decisions are made'. [88]

The recommendation contains specific reference to the use of experts in relation to the decision-making process which suggests a focus on the evidential stage of the prosecution decision where expert evidence plays a crucial role in determining whether the elements of the offence have been established. Yet the need for transparency cannot be restricted to one stage of the process only. Arguably there is equal, if not greater, need for transparency at the second stage of the process that purports to represent an exercise of discretion based on public interest. This does still fall within the remit of the recommendation, although it is perhaps unfortunate that it has not been specifically alluded to.

However, transparency can only ever be of limited utility in providing a solution to a perceived problem. There is clearly is a *perception* that the current system is unfair and that doctors are unfairly targeted.[89] Calls for transparency should lead to at least a tentative (if not universally accepted) conclusion as to whether this perception is correct.

If the perception is incorrect, then transparency should provide the solution. There are two possible solutions where the perception of unfairness is incorrect.

(i) Simple explanations as to what is done

Unfair perception requires correction, but perhaps little will be required to deliver the transparency needed to correct it. This could be limited to retrospective explanations of why particular decisions have been reached. Provided the CPS is able to explain how decisions are (fairly) reached at the public interest stage and the factors that are taken into account, then this may manage the situation. The status quo can be maintained and the inherent fairness of the system should provide the necessary reassurance. The reality is that there are a very low number of prosecutions and the dust may well settle.[90]

(ii) Production of further material to deliver transparency

The provision of reasons for past decisions may be insufficient as the only solution if this does not clearly demonstrate how the decision-making process operates and the production of further material may be needed to explain the public interest decision-making framework. Yet, moving from the status quo risks satellite issues and caution is required when considering what steps must be taken to ensure transparency. For instance, the production of a "clear explanatory statement" with updated guidance as recommended by the Williams report[91] will then be subject to scrutiny and commented on. Slight differences in terminology will be subject to further criticism and so it continues. If the status quo is fair this should be maintained so far as possible, there are risks associated with production of new material (as distinct from

[88] Hamilton Review, above n.17 at 58
[89] See n.1 above.
[90] See D. Griffiths and O.Quick, above n.4. Their report sets out data relating to the number of GNM cases in healthcare.
[91] See Williams Report, above n.14 at 18.

explanations of the basis of past decisions and admittedly a fine line may exist between the two) that could upset the status quo.

Alternatively, if the perception is correct then transparency only has limited utility. Again, different possible solutions must be considered:

(i) Acceptance of an unfair system in the absence of a viable alternative

It may be possible to provide a positive explanation for a system which has unfair elements. For instance, the 'transparency' process may illuminate a system where there is an absence of consistency in relation to application of the public interest criteria and discretion is broadly unfettered. Yet perhaps there is a reasonable explanation as there may well be an absence of a realistic alternative.[92] Essentially this results in the maintenance of the status quo but only where explanations as to why this is necessary are supported. The inevitable difficulties with a decision based on discretion at the public interest stage may have to be accepted.

(ii) The need for more significant change

It may be difficult to 'manage' perception without more significant change. Transparency in isolation clearly will not provide the solution if more substantial change is required. If the process is wrong and if reform is possible then the process requires a fundamental overhaul. Transparency it not the solution, but is a necessary first step to understand and identify next steps. The current focus on transparency should not be criticised, although it is not a panacea it will be an essential, albeit not a sufficient part of the reform process. It is the necessary precursor of more substantial change. Until we know what is done, we cannot challenge or put forward alternative suggestions as to how it should be done.

A need for realism in the quest for substantial change

If transparency shines a spotlight on flaws in the process, reform may be required. Criticisms of the outcomes of the prosecution decision-making process have been made, but there is little by way of meaningful analysis of how this can be addressed. There has been a focus on the role of expert witnesses in relation to decisions to prosecute and reform proposals are in evidence in this regard.[93] The role of experts is of more significance at the evidential stage of the prosecution decision-making process (in connection with determining whether the constituent elements of the offence are established), as opposed to the public interest stage. Key determinants which fall for consideration at the public interest stage are not matters to be decided with reference to 'expert opinion'. The opinion of an expert cannot be said to represent the public interest, which will involve consideration of wider issues. For instance, in relation to 'alternative methods of disposal' and how the public interest is best met, expert opinion can only be of peripheral relevance at best. Determinations relating to the scale of culpability may be relevant to decide whether there is a public interest in prosecution but an expert cannot purport to harness and be representative of the views of society.

- *Simple changes*

[92] Whether it is possible to develop public interest criteria further is an issue to be addressed in the next section.

[93] Hamilton Review, n.17 above. See recommendations 11-14 regarding experts and expert witnesses at 74-75.

A de facto policy of non-prosecution seems unpalatable, so the options which are potentially available must be explored. As a starting point, it is appropriate to consider the possibility of a more 'light touch' approach to avoid crossing the constitutional rubicon. It has been suggested that the Director of Public Prosecutions should be required to agree to the decision to prosecute. This would be a relatively straightforward change to implement. In Scotland there is a requirement for the Lord Advocate to authorise culpable homicide prosecutions. The Medical Protection Society response to the Williams review suggested that the decision to prosecute should be considered by the DPP, it recommended:

> "A requirement should be placed on the Director of Public Prosecutions to personally authorise all prosecutions involving a healthcare professional accused of GNM. They should also be under a requirement to issue a public statement on why the public interest is being served by that prosecution'. [94]

Of course, it could be considered unreasonable to single out the medical profession as deserving such an individualised approach. In any event, there would be concerns regarding the feasibility of the MPS' suggestions. It is easy to envisage the publication of a rather superficial public interest statement: it appears a doctor is grossly negligent (culpability established) and the patient is dead (the highest end of the spectrum regarding 'harm'). Explanations in individual cases may not clearly illustrate whether there is a clear, consistent approach underpinning those decisions. This proposal for reform was considered and rejected by the Hamilton Review. It noted that "some respondents have suggested to us that the Director of Public Prosecutions in England and Wales should sign-off any decision to prosecute a doctor for GNM" but recognised that this would "involve a process of delegation to senior decision makers so we are not persuaded that such a change would make any practical difference'.[95] This was a relatively superficial proposed solution in any event. It would constitute little more than a method of appeasement and this form of approval process may, at least initially, deliver comfort. However, the risk is this could simply result in a rubber-stamping exercise; the substantive criteria would remain the same. This would perhaps operate to manage perceptions but would only provide a meaningful solution if we were satisfied that the 'process' leading to the conclusion was sound. Of course, the corollary of this is that if the process is sound then the correct decisions ought to be reached and there is little to gain by this final approval process, the DPP (or realistically, those to whom the task is delegated) would be applying the same test as those who currently do so.

- *The need for a more robust solution*

A more substantive response may be necessary. The call for transparency may well unearth a public interest decision-making vacuum and little by way of meaningful explanation as to how public interest factors are employed. The BMA have pressed for more detailed prosecutorial guidance.[96] With attention largely centering on the elements of the offence itself, the public interest stage has

[94] Medical Protection Society Response to the Williams Review, Recommendation 2 (13 March 2018) www.medicalprotection.org/uk/articles/english-law-on-gross-negligence-manslaughter-in-healthcare-must-move-towards-scottish-position.
[95] Hamilton Review, above n.17 at para. 150.
[96] Dr C. Nagpaul, BMA council chair. BMA response to the GMC review of gross negligence manslaughter and culpable homicide (undated).

received comparatively little attention. Before the publication of an offence-specific policy regarding assisted suicide Daw and Soloman argued "the articulation of the public interest test has largely gone unnoticed. Given that it is this stage of the Full Code Test that relies less on the legal skills of the professional prosecutor in arriving at a judgment, this is perhaps surprising. After all, the exercise of discretion is potentially the most sensitive part of the decision-making process. Broad, unfettered discretion can lead to wholesale inconsistency'. [97] Such concerns resonate equally with the approach taken regarding public interest in relation to GNM. Yet the generic factors listed set out in the Code apply to *all* offences so the suggestion GNM merits special consideration must be justified. Calls for the creation of a narrow offence to be applied to healthcare practitioners have been rejected. Such arguments are equally applicable in the context of offence specific prosecution criteria for GNM. Although offence specific guidance has been produced previously, for example in relation to assisted suicide, this has not been without criticism.

Daw and Soloman also acknowledged the need for the public to "maintain their confidence in the process' and stressed "the relevance of individual public interest factors is a matter for all of us potentially affected by the decisions that flow from the exercise of that discretion'.[98] There is no accepted definition of public interest.[99] The public interest should encompass core, stable principles relevant for the public good, rather than exist as a pliable concept which shifts to accord with the perhaps more mercurial public mood. There is likely to be a lack of consensus as to what the public interest will demand. The multi-faceted nature of public interest in this area may mean the current CPS factors are not easily dissected into further subcategories or capable of expansion and it is difficult to identify what fresh criteria would assist. The 'public' will encompass the views and interests of doctors as well as patients and these may well pull in different directions. Public confidence is a vital aspect of public interest, but it is difficult to pre-empt how this will be best served in an individual case, let alone discern a comprehensive list of factors that will be relevant to facilitate this.

Even if the task of expanding prosecutorial guidance is undertaken, there remain inherent difficulties in terms of what a prosecution policy can legitimately achieve. Rogers argues in the context of assisted suicide guidance "we can see that it is very difficult for prosecutorial "public interest" guidelines to be clear *and* accessible, because clarity may tend to come at the price of concealing important nuances (thus undermining accessibility)'.[100] There are limits as to what can be achieved and expectations must be managed accordingly. Quick confirms "the offence is vague and vulnerable to the vagaries of discretion and discrimination'. [101] If the offence is vague, perhaps any offence specific prosecution policy will be similarly vulnerable too. It is difficult to define the 'gross' element of the offence and the task of determining 'gross' is left to the jury to determine on a case by case basis. Accordingly, maybe it should be accepted that the process to determine which of these cases

[97] R.Daw and A.Soloman,"Assisted suicide and identifying the public interest in the decision to prosecute' (2010) 10 *Crim. L.R.* 737 at 741.
[98] Ibid. at 742.
[99] Other areas of law have encountered this difficulty too. See *British Steep Corp v Granada Television Ltd* [1981] AC 1096 at 1168 "There is a wide difference between what is interesting to the public and what is in the public interest to make known."
[100] J. Rogers, "Prosecutorial policies, prosecutorial systems, and the Purdy litigation' (2010) 7 *Crim. L.R.* 543 at 552.
[101] O.Quick, "Medical Manslaughter: The Rise (and Replacement) of a Contested Crime?' in C. Erin and S. Ost (eds) *The Criminal Justice System and Health Care* (OUP 2007) at 37.

is selected for prosecution at the outset cannot be easily determined by reference to a comprehensive and exhaustive checklist. The boundaries of GNM have troubled the courts and academics alike, it would be foolish to suggest that that the task of categorising those cases which demand prosecution and those which do not will be any less challenging. In his analysis of prosecution decision-making Quick found "no real meaningful hierarchy of seriousness was adopted in relation to classifying errors as gross' and that there was an apparent reliance on 'gut instinct'. [102] If the CPS utilise 'gut instinct' regarding the elements of the offence which have a legal basis, it may inevitable that there will be recourse to gut instinct in relation to the public interest stage which is necessarily couched in terms of discretion.

There are risks associated with unfettered discretion and clarity should be sought when discretion is purportedly exercised with public interest in mind, yet there is a need to be clear regarding the feasibility of the undertaking. Earlier, three issues contained in the CPS public interest check-list which would merit further consideration were identified: the level of culpability, the impact on the community and whether prosecution is a proportionate response. These will now be addressed.

Public interest and culpability: The need for clarity in relation to the 'culpability' factor

If a case reaches the stage where the CPS must determine the public interest in prosecution, the evidential test must have already been met and the CPS have concluded the elements of the offence can be established. Culpability is then set out as one of the factors to take into account as part of the public interest consideration. It cannot be the case that the necessary culpability pointing towards the need to prosecute is automatically established or else there would be a presumption of culpability once the evidential stage is satisfied, and this would not appear as a factor to consider at the public interest stage. As it is a factor to consider when determining public interest, there must be culpability factors that militate against prosecution too. It would be helpful to articulate what those factors could be.

There are three areas to address which may help inform the approach to be taken regarding culpability:

- Once the elements of the offence can be established and the evidential stage is satisfied, we must, if possible, identify the 'extra' factors which are to be considered at the public interest stage;
- Culpability is also an issue at the sentencing stage, so lessons learned from the approach taken in sentencing could be incorporated here;
- The causation element of GNM could have a role to play in an analysis of the defendant's culpability at the decision to prosecute stage.

A comparison between 'offence culpability' and 'public interest culpability': key differences or more of the same?

[102] Ibid. at 38.

At the evidential stage, the CPS must assess the evidence in accordance with the *Adomako* test[103] to establish whether in view of 'all the circumstances' of the case a gross breach can be established and also whether it was 'reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death'.[104] There is no comprehensive list of factors which fall for consideration as part of the 'all the circumstances' and accordingly the weight and effect of factors which are considered are left to the jury. As determining whether the breach of duty should be characterised as gross is incapable of further clarification, it may be expected that the public interest assessment of culpability is left to the CPS to decide with strong reliance on instinct too. The discretion to be exercised at the public interest stage in determining the appropriate culpability worthy of prosecution may not be capable of the clarification that appears to be so elusive (and yet accepted) in relation to the offence itself.

Character

Whether the 'character' of the defendant could (or should) form part of the decision-making process must be addressed. The basis of the concerns regarding the use of 'character' to determine whether the defendant's breach is 'gross' may well resonate equally in relation to any attempt to utilise character assessment at the public interest stage of the prosecution decision-making process.

Quick comments that character may be relevant to criminal liability "through theorising that bad character is *itself* a good reason for invoking criminal punishment'[105] and that "as negligence is a moral term which goes to character, this attention to behaviour *and* attitude is legitimate in this context'.[106] The doctor's dishonesty, indifference or arrogance may be considered relevant on this basis. Alternatively, given the objective nature of the standard set in negligence this would appear to suggest the doctor should be judged without reference to personal characteristics.[107] This may be of less concern when factors are considered at the public interest stage and perhaps culpability can be considered on a more subjective basis with reference to the individual's particular circumstances.

Although, a need to be wary remains as perceptions relating to character pose risks and can lead to bias. Quick acknowledges that "attention to perceived negative character traits may unfairly tip the balance towards gross negligence'.[108] So if such character traits can influence the operation of the evidential stage in this way it would seem logical that the public interest stage could be similarly negatively influenced. If the doctor displays 'bad' character traits and behaviour is consequently considered to meet the gross threshold, it will be more difficult to identify why the doctor should not be prosecuted in the public interest. Conversely, if 'good' character traits steer away from the conclusion that the 'gross' threshold is met, the evidential stage is not satisfied and the public interest stage is not reached in any event. So if character does form part of the construction of the gross threshold, it is difficult to see how revisiting the issue in relation to public interest will produce a different outcome. If character should not form part of the consideration regarding whether the

[103] *Adomako,* above n. 7.
[104] *Rose,* above n. 9.
[105] O.Quick, "Medical manslaughter and expert evidence: the roles of context and character' in D.Griffiths and A. Sanders (eds), *Bioethics, Medicine and Criminal Law Vol.2* (Cambridge University Press, 2013) at 110. See also V. Tadros, "*Criminal Responsibility'* (Oxford University Press, 2007).
[106] Ibid. at 113.
[107] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583.
[108] Quick, above n.105 at 113.

gross threshold is met, this does not automatically mean it should not influence the public interest stage and therefore, if specific prosecutorial guidance is drafted the inclusion or exclusion of character factors would need to be addressed.

However, Quick goes on to acknowledge that character theory:

> "may be beyond the design and capabilities of the criminal process. Character is complex and an attempt to try and fully understand someone's character within the confines of the criminal process is arguably overly ambitious. This could operate unfairly in practice in that the same error could be regarded as reflecting culpable carelessness or suggest some mental defect (such as forgetfulness or stupidity) not worthy of criminal punishment, partly driven by assessments of character'.[109]

Such concerns apply not only if character is considered when determining the gravity of the doctor's breach, but also if character is to be a factor in the process to decide if the public interest demands a particular doctor should be to be prosecuted. There are doubts as to how effectively this could be done as CPS decision-making regarding public interest will be a paper-based analysis and there will be limits as to how thorough an investigation of the defendant's 'blameworthy character' could be. The prosecutor will have the benefit of expert evidence which may be influenced by assessment of the doctor's character[110] but it will be difficult to test the basis of this personal aspect of the expert's assessment of the doctor's conduct.

External factors

There may be some dispute as to whether personal characteristics should be taken into account, but by contrast it would appear less controversial for external factors to be considered. The 'special' pressures of working in the healthcare environment where the nature of the work means risks are routinely taken, and realistically must be taken if our healthcare system is to function effectively, may be a relevant factor to consider when exercising discretion at the public interest stage. Lord Sumption considered "the Directors published policy [in relation to assisted suicide] has deliberately and rightly not been framed by reference to categories of suspect'.[111] It may be difficult to put forward a case that the medical profession merit special consideration in constructing public interest criteria. Pressures on healthcare workers deserve recognition, even though the appearance of 'special treatment' may appear unpalatable and possibly unworkable. There is a risk satellite issues could be created in respect of who should benefit from any 'special rules' developed. Alternatively, any new prosecutorial policy could apply to all GNM cases and the criteria would not be drafted with such specificity that they could only apply to the healthcare sector. Factors such as 'special' workplace pressures are not unique to the healthcare sector in an event.

Recent reviews in relation to GNM have, however, acknowledged the particular problems arising in this professional field. Sir Norman Williams stated in his letter to the Secretary of State for Health

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[109] O. Quick, "Medicine, mistakes and manslaughter: a criminal combination?' (2010) *Cambridge Law Journal* 186 at 194-195.

[110]See Quick, n.105 above, at 112. Following Quick's empirical research with experts and how they apply the gross negligence test he concludes "whilst experts do make assessments of character in evaluating gross negligence, it is difficult to observe precisely how this creeps into their overall evaluation'.

[111] *Nicklinson,* above n.29 at para. 246, *per* Lord Sumption.

that although healthcare professionals cannot be "above the law" it is clear "that for the sake of fairness, the complexity of modern healthcare and the stressful environment in which professionals work must be taken into consideration when deciding whether to pursue a gross negligence manslaughter investigation'. [112] The Williams Review recommended "Systemic issues and human factors will be considered alongside the individual actions of healthcare professionals where errors are made that lead to a death, ensuring that the context of an incident is explored, understood and taken into account'.[113]

Such factors may well guide the approach to the application of the public interest test to the individual who has been targeted as having responsibility where their involvement must be considered in light of the surrounding context of the incident. The Royal College of Physicians of Edinburgh recommended:

> "There should be a set of standards for which data is collected and assessed for every prosecution in a healthcare setting. These should include but not be limited by: number and skill mix of staff; number and complexity of patients; presence or not of safety procedures including safety brief, multidisciplinary huddle, escalation policy; has individual/s accused recently returned from career break and if so, what support/induction was offered; were all staff present familiar with the unit or had they been adequately inducted; availability of senior decision maker/s and their communication with team if not on site'.[114]

Such factors ought to be considered as relevant when addressing whether the defendant's breach is gross 'in all the circumstances'. If extreme, relevant circumstances lead to the conclusion this element of the offence is not established then the evidential stage will not be passed. If the conclusion is drawn that the offence can still be established notwithstanding the presence of external factors, the case will progress to the public interest stage and there may still be scope to revisit such factors and employ them as a subsequent 'filter' to determine whether it is in the public interest to prosecute. Given the complex factors in the Bawa-Garba case such as her recent return from maternity leave to work in an unfamiliar and understaffed unit, there were concerns that she even faced prosecution. It is unclear what further factors could have resulted in the conclusion that it was not in the public interest to prosecute.

Earlier the example of 'sudden and unexpected workplace pressures contributing to incident' was suggested as an example of a factor which could be identified as relevant when considering public interest. The recent pressures on hospitals during the COVID-19 crisis would be an example where the need to take into account such pressures when determining public interest is clear. Although this may still not be straightforward; a factor will only identify an issue which requires explicit consideration rather than confer 'blanket immunity'. If a hospital doctor made a fatal error at the height of the crisis where the ward was at capacity, understaffed due to staff absence with COVID-19 and the treatment used was experimental in nature, it may well be appropriate to conclude that it would not be in the public interest to prosecute. Although, admittedly in such an extreme example when the circumstances of the case are considered, this may not be viewed as gross negligence in

[112] Williams Review, above n.14 at 5-6.
[113] Ibid. at 7.
[114] See above n.87.

any event.[115] In less extreme variations of that scenario, the decisions may be more difficult. As the crisis subsides and COVID-19 becomes part of the status quo and a challenge for the NHS in the foreseeable future, there may be legitimate questions as to whether this would remain a 'sudden and unexpected' pressure. If it does remain a relevant factor its significance may reduce in weight. There will be a need to draw distinctions between cases. If one doctor makes a grave error on a fully-staffed but over-capacity ward and another doctor makes a similar mistake on a under-staffed but under-capacity ward, the distinction between the culpability of the doctors is problematic. There will be a need for case-by-case consideration of the application of the relevant public interest factors. The potential for arbitrary distinctions is very real, but perhaps inevitable where such discretion is exercised.

Where 'all the circumstances' have already been considered to decide whether the defendant's conduct constitutes gross negligence, it is difficult to identify what 'extra' criteria could be employed when making the public interest decision. It is difficult to see how 'new' factors could be found and considered to determine the defendant's culpability at the public interest stage which were not relevant when determining the grossness of the breach. Rather may have to be the case that the 'same' factors are revisited. If so, it is difficult to envisage a situation where despite 'all the circumstances' of the case the breach is considered gross, yet those same circumstances result in the conclusion that it is not in the public interest to prosecute. Surely if all the circumstances point to gross negligence, this will also result in the necessary culpability in relation to public interest. If 'all the circumstances' suggest the defendant's conduct does not amount to a gross breach, then the evidential stage is not met and the CPS do not have to consider whether it would be in the public interest to prosecute in any event.

Yet, it is apparent that 'culpability' is revisited again in relation to sentencing.

A comparison between 'public interest culpability' and sentencing culpability

It may be possible for lessons to be learned from the approach taken regarding sentencing and relevant factors may be incorporated in the public interest stage. Yet, these issues may be best left for the sentencing stage as it may be misplaced to attempt to use factors that would justify mitigation in sentencing to prevent prosecution at the outset. Alternatively, if there is significant disparity between the decision to prosecute and the extent of mitigation, this may cast doubt on the decision that it was in the public interest to prosecute. Dr Bawa-Garba only received a two-year suspended sentence. However, account should be taken of the current manslaughter sentencing guideline.[116]Even where there are factors indicating lower culpability the 'category range' is one to four years' custody with a starting point of two years' custody.[117]

In *Nicklinson* Lord Sumption held:

> "an important element of discretion is introduced at two stages of the criminal process. The first is the discretion of the Director of Public Prosecutions whether to prosecute…The

[115] See *Adomako*, above n.7.
[116] Sentencing Council, Manslaughter Definitive Guideline, November 2018.
[117] Ibid.

second is the discretion of a sentencing court upon conviction. These discretions are *closely related*….The public interest test depends on the presence of factors mitigating culpability, in other words on the *same factors* that would be taken into account by a sentencing court if there were a conviction.'[118]

Since the Nicklinson decision both CPS and sentencing council guidance has been updated, but culpability remains an issue to be addressed at both stages. Lord Sumption suggests the discretions are 'closely related' but not identical, notwithstanding the fact that the same factors (relating to culpability) are considered. Culpability will be assessed at each stage but with a different purpose resulting in differences in application and effect. Thus it can be viewed as legitimate for a range of 'mitigating' factors to be considered and a conclusion reached that a prosecution should still be pursued, yet when these factors are revisited in sentencing they may well result in a reduction of the severity of the sentence.

The Sentencing Council issued amended guidance for manslaughter cases effective from 1 November 2018.[119] Perhaps some of the detail set out in the sentencing guidelines could be imported into the public interest stage to provide assistance to identify relevant culpability factors. Quirk, commenting on the previous sentencing framework, had suggested that medical practitioners should not be "immune from the consequences of their actions, but it should not be beyond the capacity of the authorities to create a sentencing framework that reflects this spectrum of culpability and the particular circumstances in which doctors work'.[120] Culpability may justify prosecution but still point towards the need for leniency at the sentencing stage to take into account the spectrum of culpability.

The sentencing guideline sets out characteristics which provide "indications of the level of culpability that may attach to the offender's conduct; the court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence'.[121] An example of a factor indicating high culpability is where "the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct'.[122] By contrast, where "The negligent conduct was a lapse in the offender's otherwise satisfactory standard of care" this will be a factor indicating lower culpability.[123]

In relation to factors reducing seriousness or reflecting personal mitigation the following factors appear:

- 'For reasons beyond the offender's control, the offender lacked the necessary expertise, equipment, support or training which contributed to the negligent conduct

[118] *Nicklinson*, above n.29 at para. 236, *per* Lord Sumption. My emphasis is set out.
[119] Sentencing Council, above n.116.
[120] H Quirk, "Sentencing white coat crime: the need for guidance in medical manslaughter cases' (2013) 11 *Crim. L.R.* 871 at 881. Note since this time the Sentencing Council Guideline has been amended in relation to manslaughter.
[121] Sentencing Council, above n.116.
[122] Ibid.
[123] Ibid.

- For reasons beyond the offender's control, the offender was subject to stress or pressure (including from competing or complex demands) which related to and contributed to the negligent conduct
- For reasons beyond the offender's control, the negligent conduct occurred in circumstances where there was reduced scope for exercising usual care and competence
- The negligent conduct was compounded by the actions or omissions of others beyond the offender's control.'[124]

Those seeking to challenge the prosecution of doctors would perhaps hope that the existence of the above factors would point to no offence even being committed. Yet, the appearance of such factors in relation to sentencing presupposes that the defendant's breach of duty had been considered gross by the jury for the case to reach the sentencing stage. It is arguable these factors could be imported into the public interest stage, to at least be considered. There may well have been 'competing or complex demands' to justify non- prosecution in an appropriate case. Clearly, such criteria would have to be carefully applied on a case-by-case basis.

Culpability and causation

It can be questioned whether there is consensus as to what is meant by culpability at the public interest stage and whether it is sufficiently broad to encompass an evaluation of causal contribution. If a narrow approach to culpability is used, the focus will concentrate on the defendant's breach as it is the issue which is, at least in theory, largely within the defendant's control. If a broader and more holistic approach to culpability is taken in terms of responsibility, then causation perhaps should be encompassed when assessing the extent and impact of the defendant's culpability for the patient's death. If this broader approach to culpability is employed, there may be less inclination to prosecute where the causal significance of the defendant's conduct is at the lower end of the spectrum.

It is clear that "causation is a complex are of law where the search for a comprehensive test of causation or set of principles has proved to be elusive.'[125] A defendant does not need to be the sole cause of the patient's death in order for causation to be established. The first step in addressing causation is the but for test, there must be a factual link between the defendant's act or omission and the patient's death.[126] The causation enquiry must then continue as there is a "distinction between 'cause' in the sense of sine qua non without which the consequence would not have occurred, and 'cause' in the sense of something which was a legally effective cause of that consequence.'[127] Determining causation becomes a complex task where there are various potential factors at play but it is evident that "Where there are multiple legally effective causes…it suffices if the act or omission under consideration is a significant (or substantial) cause, in the sense that it is not de minimus or minimal. It need not be the only or principle cause.'[128] Where an intervening

[124] Ibid.
[125] *R v Wallace (Berlinah)* [2018] 2 Cr. App. R. 22 *per* Sharp LJ at para. 52.
[126] Ibid. at para. 53 "It is trite that the first step in establishing causation is the "but for" analysis'. See A. Simester and G. Sullivan, 'Causing Euthanasia' (2019) *L.Q.R.* 135(Jan) 21, 25 "In the criminal law, the "but for" test is generally an unhelpful distraction, save in the context of omissions.'
[127] *R v Hughes* [2013] UKSC 56, at para 20.
[128] Ibid. at para. 22.

event occurs[129], it must be determined whether the causal connection between the defendant's act or omission and the patient's death is broken. In *R v Cheshire* it was held that although the intervening event[130] was "the immediate cause of death, the jury should not regard it as excluding the responsibility of the accused unless…[it] was so independent of his acts, and it itself so potent in causing death, that they regard the contribution made by his acts as insignificant.'[131] In *R v Wallace* a three-step approach was identified to address whether the chain of causation was broken by the intervening event.[132] The Court of Appeal stated the but for test must first be established before considering whether the defendant's act "was a significant and operating cause of death" and finally, if so the jury should go on to address whether the intervening event was reasonably foreseeable.[133]

In *Bawa-Garba* the jury was directed in the following terms, "Each defendant will be guilty of the offence only if her gross negligence caused or significantly contributed to Jack's death…What the prosecution has to show is that the negligence of the defendant whose case you are considering at least significantly contributed to Jack's death….Once again, how big a contribution has to be in order to qualify as significant is left to your good sense, although it must be more than trivial or minimal'.[134] Causation was established notwithstanding the presence of other factors which are likely to have had causal significance such as low levels of staffing.

A defendant's breach of duty may have different 'types' of causal impact in respect of the patient's death: no causal impact, the sole cause or a partial cause (and as a 'partial' cause this could involve a spectrum of possibilities ranging from minimal to significant contribution). Some may argue that the criminal law should be involved in all three situations as it is a matter of chance whether the defendant's gross breach results in death and the defendant's conduct deserves criminal censure. Yet, the fatal consequence of the breach is a necessary ingredient of the GNM offence. There is no offence where a defendant's breach *could have* caused the victim's death, only where it *did.* If the defendant's conduct has no causal impact, there is no offence and it attracts no attention from the criminal law. There may be an argument that a breach which has limited causal impact but still satisfies the requirements of the offence, does not inevitably have to face the full wrath of the criminal law if it is not in the public interest to prosecute. If there is a comparison between someone playing an intentional but minor part in a large scale gang attack and a doctor playing a minor part in a patient's death when the other blameworthy factors placed the doctor in that position (such as

[129] This could be an act by the victim or a third party.
[130] The intervening event in question was negligent medical treatment. The victim in that case had been taken to hospital for treatment for gunshot wounds and suffered fatal treatment complications.
[131] *R v Cheshire* (1991) 93 Cr. App. R. 251 at 257-258 *per* Beldam LJ. Beldam LJ also confirmed "It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's act can fairly be said to have made a significant contribution to the victim's death. We think the word 'significant' conveys the necessary substance of the contribution made to the death which is more than negligible'.
[132] In this case the victim had been subjected to an acid attack which resulted in horrific injuries and died in Belgium after the injection of drugs by a doctor following his euthanasia request.
[133] *Wallace*, n.125 above at para. 86 *per* Sharp LJ. See A. Simester and G. Sullivan, n. 125 above. They state "It seems clear a jury need not always discharge task (iii). Not all causal paths must be reasonably foreseeable' at 25 and submit that "the attempt by Sharp L.J. to turn *Wallace* into a foresight-of-suicide case was misconceived' at 26.
[134] *R v Bawa-Garba* [2016] EWCA Crim 1841. Bawa-Garba sought to challenge the direction to the jury, but the Court of Appeal rejected this challenge following a consideration of her application for permission to appeal.

inadequate staffing and training) as a matter of public interest these two cases may be viewed very differently.

If the causation requirement is met, but only on the basis that the defendant's conduct only just meets the threshold of a more than negligible contribution, in an appropriate case the conclusion maybe reached that the public interest is not best served by prosecution, especially where any concurrent causal factors are not subject to scrutiny of the criminal law. As a matter of instinct, this may not accord with the public interest and fair allocation of responsibility; it is questionable whether the defendant *should* be responsible. Events often do not have a single or 'root' cause, yet the nature of the causation test does isolate an incident to deem it deserving of criminal censure. Although that may be good application of the law as it stands, it does not inevitably follow that there is a public interest in prosecution.

Public interest: an alternative to prosecution in the public interest?

In the checklist of factors to consider to decide whether it is in the public interest to prosecute, both the impact on the community and whether prosecution is a proportionate response appear. There is a need to address whether the public interest would be better served by an alternative to criminal sanction. It is possible for the public interest to be harmed by the pursuit of prosecutions against doctors if this could have a detrimental effect on the ability of the heath service to learn from mistakes. If the aim is to prevent future harm, then perhaps prosecution of doctors is not the best way to achieve this. The Hamilton Review confirmed:

> "A blame culture does not encourage candour when things have gone wrong and is inimical to learning. Our aim, as set out in our terms of reference, has therefore been: 'to encourage a renewed focus on a fair and just culture, reflective practice, individual and systemic learning (with a view to enhancing patient safety) and the provision of support for doctors in acting on concerns." [135]

If development of a just culture[136] could be hampered by the commencement of prosecution in the particular circumstances of an individual case, this could be a factor which militates against prosecution in view of the wider public interest implications.

The Hamilton Review forward suggests "Criminal justice and a just culture do not seek the same outcome'.[137] This is not inevitably the case. The aims of the criminal justice system are diverse. Prevention of harm and fair allocation of blame are aims of the criminal justice system, but it must be acknowledged that it may not be the best route to sanction poor conduct. Much work has been conducted within the NHS to create a 'just culture' and if fear of criminal prosecution hampers attempts to deliver safe healthcare, this is a relevant factor. This is not to suggest there should be a de facto policy of non- prosecution of doctors, but it must be acknowledged that the notion of public interest is complex and multi-faceted. A careful balancing exercise must be undertaken to

[135] Hamilton Review, above n.17 at para 22.
[136] A just culture guide, available at https://improvement.nhs.uk/resources/just-culture-guide/
[137] Hamilton Review, above n.17 at 4.

determine what may be gained and lost. The public interest in prosecution may be outweighed by the public interest against.[138]

There is an interesting point to note in the NHS 'A just culture guide'.[139] A checklist of questions is set out and the first question asks 'Was there any intention to cause harm?' If the answer is 'yes' the recommendation is to "Follow organisational guidance…This could involve…referral to police...' By contrast, where the answer is 'no', the checklist is directed towards a list of supplemental questions relating to health of the staff member, the use of agreed protocols/accepted practice, training/supervision and mitigating circumstances with alternative recommendations in place depending on the outcome of such questions. The possibility of referral to the police does not appear in any of the recommendations that arise in response to these supplemental questions, the reference to referral to the police *only* appears where there was 'intention to cause harm.' This is significant.

If the doctor is considered to be deserving of censure but there is concern regarding the wider implications of involvement of the criminal law then different routes to deliver accountability may be preferable. For instance, the GMC fitness to practise process may deliver the accountability demanded but better address the aims of a just culture. Such an approach is not without precedent. When allegations were made that doctors had performed terminations of pregnancy on the basis of gender in breach of the Offences Against the Person Act 1861,[140] the CPS determined that prosecution was not appropriate and that this was a matter that could be properly addressed by the GMC. The CPS had concluded that although there was sufficient evidence to prosecute, it was not in the public interest. Jenny Hopkins, Deputy Crown Prosecutor for London stated, "Taking into account the need for professional judgment which deals firmly with wrongdoing, while not deterring other doctors from carrying out legitimate and medically justified abortions, we have concluded that the cases would be better dealt with by the GMC rather than by prosecution'.[141]

The failure to prosecute has been subject to much criticism.[142] It has been noted that "if a medical professional committed a sexual offence on a patient, the CPS would never say it was not in the public interest to prosecute as they may be disciplined by their regulatory body'.[143] Although clearly professional regulation will generally not be a substitute for the criminal process, this comparison

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[138] Public interest may well involve competing public interests and a balancing exercise must be undertaken. Such an approach is taken in medical confidentiality cases where competing public interests exist. See *W v Egdell* [1990] 1 All ER 835.

[139] A just culture guide, above n.136.

[140] There may be some dispute whether a defence could potentially be available under section 1(1) Abortion Act 1967.

[141] Referred to in C. Dyer, 'Prosecutors defend decision not pursue doctors over sex selection abortions' *BMJ* 2013;347:f5465.

[142] J. Bingham and C. Newell, "Gender abortions: criminal charges not in the 'public interest' says CPS' *The Telegraph* 4 September 2013 www.telegraph.co.uk/news/uknews/law-and-order/10287574/Gender-abortions-criminal-charges-not-in-public-interest-says-CPS.html; J. Bingham, "Gender abortions: CPS accused of double standards after putting pro-life campaigners on trial' *The Telegraph* 7 September 2013 www.telegraph.co.uk/news/uknews/law-and-order/10292249/Gender-abortions-CPS-accused-of-double-standards-after-putting-pro-life-campaigners-on-trial.html.

[143] L. Perrins, 'The Crown Prosecution Service should stick to the law and not choose which ones to enforce' https://www.cps.org.uk/blog/q/date/2013/09/06/the-crown-prosecution-service-should-stick-to -the-law-and-not choose-which-ones-to enforce/

does miss a crucial distinction if we consider this in the context of GNM. Sexual offences involves very different mens rea. Where a doctor intentionally commits a sexual offence we seek punishment and there is a need to bring the defendant within the remit of the criminal justice system. Where instead there is no intentional conduct on the part of the doctor and the incident raises competency type issues, perhaps with system errors playing a strong part when the incident is subject to a root cause analysis and learning will prevent future harm, professional regulation may be considered a feasible substitute.

The Hamilton Review doubted the viability of the fitness to practise route as an alternative as it was "forward looking' and not about punishment.[144] Perhaps it should be conceded that diversion to this route is inappropriate where the criminal justice aims of retribution and punishment are sought, but if the focus is on the alternative aims of deterrence and public safety then the alternative disposal route may be tenable. It may be the appropriate solution where the defendant's conduct falls at the lower end of the spectrum regarding culpability with concurrent external factors present which may have also had causal impact, but which fall outside the remit of the criminal justice system.

Conclusion

It has been made clear that the GNM offence will not be reviewed so if a doctor is to avoid the criminal justice system where a 'gross' breach of duty resulted in a patient's death, the only solution is to address prosecution policy. It may not always be in the public interest to pursue a prosecution for GNM where the evidential test is met. There is a need for transparency in relation to the way decisions will be made, not just retrospective justification for decisions already reached. A specific prosecutorial policy which focuses on GNM and the relevant public interest factors could be employed. A cautious approach must be taken following the lessons which can be learned from the assisted suicide experience. Legitimate questions remain as to constitutional propriety, legitimacy of purpose and the practicality of such an endeavour.

Difficulties will be encountered as satellite issues in respect of the content of such a policy will inevitably emerge. 'Culpability' is a key area where clarity would be desirable. This is problematic given the nature of the GNM offence already demands that 'all the circumstances' are considered when deciding whether the breach of duty should be characterised as gross negligence in accordance with tests set out in *Adomako* and *Rose*. If the evidential stage of the Full Code test is satisfied, it is difficult to identify what further factors could be applied to prevent the public interest hurdle being crossed. There are difficulties associated with the use of character as this could result in bias and inconsistency. There is scope to revisit the circumstances in which the incident took place at the public interest stage and the COVID-19 crisis illustrates the potential for special pressures to influence views as to where the public interest should lie. Views on this will not remain constant however and the emphasis and weight to be given to such factors may ebb and flow. Construction of a comprehensive list of factors which would be of potential relevance in any given case does prove problematic. Issues which may be considered relevant already feature as mitigating circumstances in sentencing, which presupposes a prosecution should commence notwithstanding the presence of such factors. Yet there may be situations where such issues are not only relevant in

[144] Hamilton Review, above n.17 at para. 163.

sentencing but may in an appropriate case have earlier significance to steer away from the need to prosecute, particularly where any subsequent sentence would be at lower end of the spectrum. There is a need to build some flexibility and latitude into any policy to embrace factors that may come to light as relevant in particular cases. A careful line must be drawn between guiding discretion and restricting or fettering it.

There may be scope for the causation element of GNM to emerge from the shadows and provide a possible solution. It may not always be in the public interest to prosecute where the doctor's breach has only limited causal significance, especially where various external factors which are not subjected to criminal enquiry contributed to the patient's death. In any event, as a wider public interest point there is a need to balance the competing interests at play. Retribution and punishment may be pursued but this may hamper the development of a 'just culture' in healthcare and the public interest may be better served by pursuing alternative routes of accountability. There is no easy solution and no consensus as to what the public interest will demand. There is clearly an appetite for reform (at least from the defendant's perspective[145]), but the difficulties associated with the task of creating a GNM prosecutorial policy make this a less than palatable endeavour.

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[145] Advocates for change may hope this will result in fewer prosecutions in what are perceived to be undeserving cases. There is no guarantee this will be the outcome. If cases were not prosecuted in the past due to the 'gut instinct' of the prosecutor, then an offence specific prosecutorial public interest policy and 'guided discretion' could have the opposite effect.