Criminalising Medical Malpractice

The criminalisation of healthcare malpractice has become a highly topical and somewhat controversial question in recent years. Studies have demonstrated that in England and Wales, the trend towards holding healthcare professionals to account for malpractice is rapidly growing, abolishing the deference doctors enjoyed decades ago. The changing attitude of judges to claims for clinical negligence has been well documented. The role of the criminal process in England and Wales has been less fully analysed with the criminal law playing a very limited role until recently in the regulation of poor healthcare practice. In contrast, in France, the criminal process has for a long time been invoked more readily to respond to cases of healthcare malpractice, which involved even mere errors.

This book compares English and French criminal law responses to healthcare malpractice and considers what lessons the French model can provide for potential reform in England and elsewhere. The book takes the HIV-contaminated blood episode as a primary example of the different approaches France and England have in dealing with healthcare malpractice. Kazarian emphasises the impact of rules of substantive criminal law and criminal procedure on the way in which healthcare malpractice is criminalised in a given country.

This book explores the key lessons to be drawn on whether the criminal process is an appropriate means to respond to instances of healthcare malpractice. It proposes that features of French criminal law and criminal procedure might be useful to counteract healthcare malpractice.

Mélinée Kazarian is a lecturer in law at the University of Southampton. Mélinée's research interests are in medico-legal, criminal and comparative law issues, in particular the question of the criminalisation of negligence in the common law and civil law traditions. She has published widely on recent medico-legal debates, focusing on a comparative analysis of French and English criminal responses to healthcare scandals. She has been involved in different research projects which aimed to offer a comprehensive analysis of the role of the criminal justice system in regulating healthcare practice and ethics in the UK.

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A Comparative Perspective

Mélinée Kazarian

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<i>Acknowledgements</i>	x
1 Introduction	1
<i>'Responsable mais pas coupable'</i>	1
<i>The over-criminalisation of healthcare malpractice?</i>	3
<i>Aims and methodology</i>	6
<i>Assessing the role of criminalisation in healthcare practice</i>	10
<i>The criminal process and healthcare in England and Wales</i>	12
<i>Criminalising healthcare malpractice in France: a product of legal tradition</i>	14
<i>Rethinking criminal liability for healthcare malpractice</i>	18
<i>The structure of this book</i>	21
2 Healthcare negligence in French and English criminal law	24
<i>Introduction</i>	24
<i>Data on criminal prosecutions involving healthcare professionals</i>	25
<i>A wider use of the criminal law in France</i>	26
<i>When is negligence a crime in France and England and Wales?</i>	28
<i>Individual criminal offences</i>	31
<i>Homicide</i>	33
<i>Non-fatal offences against the person</i>	39
<i>Corporate criminal offences</i>	42
<i>A victim-oriented approach to causation?</i>	46
<i>Conclusion</i>	49

3	Criminal proceedings for healthcare negligence in France and England and Wales	51
	<i>Introduction</i>	51
	<i>The role of victims</i>	52
	<i>Constitution de partie civile</i>	52
	<i>Advantages for victims of medical negligence</i>	55
	<i>The role of prosecutors</i>	58
	<i>The role of investigators</i>	61
	<i>The trial phase: the role of judges and juries</i>	66
	<i>Conclusion</i>	68
4	Contaminated blood: a tale of two scandals	70
	<i>Introduction</i>	70
	<i>Background</i>	71
	<i>Victims of the tainted blood scandal in England and Wales</i>	74
	<i>The ‘Langstaff Inquiry’</i>	75
	<i>Systemic failings or culpable omissions?</i>	76
	<i>The blood supply organisation</i>	76
	<i>Knowledge on HIV and hepatitis C</i>	78
	<i>Self-sufficiency</i>	81
	<i>Public health measures</i>	82
	a) <i>Donor screening and HIV-testing</i>	83
	b) <i>Heat treatment (and supply) of contaminated blood stocks</i>	86
	<i>Information to patients</i>	88
	<i>Blood collected from French prisons</i>	90
	<i>Possible criminal charges</i>	91
	<i>Fatal and non-fatal offences against the person</i>	91
	a) <i>GNM</i>	92
	b) <i>Inflicting GBH</i>	93
	<i>Health and safety offences</i>	94
	<i>Corporate manslaughter</i>	94
	<i>Product liability offences</i>	95
	<i>Insufficient compensation</i>	97
	<i>Conclusion</i>	100
5	Is criminal law the answer to individual healthcare negligence?	102
	<i>Introduction</i>	102
	<i>No accountability for error/‘simple’ negligence</i>	104
	<i>Errors cannot be deterred</i>	104
	<i>Understanding errors in the broader systemic context</i>	107

	<i>Accountability for reckless and/or deliberate behaviour – abandoning the gross negligence test?</i>	109
	<i>Conduct offences</i>	111
	<i>Including individual decision-makers in the scope of criminal liability</i>	114
	<i>Improving our prosecutorial policy?</i>	116
	<i>Conclusion</i>	117
6	Institutions in the dock and alternatives to the criminal process	119
	<i>Introduction</i>	119
	<i>Systemic failings and criminal liability</i>	120
	<i>The corporate ‘person’ in the healthcare context</i>	122
	<i>Establishing the culpability of a health institution</i>	123
	<i>Using corporate offences in the healthcare context</i>	125
	<i>Liability under the CMCHA 2007</i>	126
	<i>Liability under the HSWA 1974</i>	128
	<i>Liability under the CJCA 2015</i>	130
	<i>The effect of criminal sanctions on health institutions</i>	130
	<i>Deterrence</i>	131
	<i>Incapacitation and rehabilitation</i>	132
	<i>Retribution and demands of victims</i>	134
	<i>Prevention and transparency</i>	135
	<i>Alternatives to the criminal process</i>	136
	<i>Regulatory mechanisms</i>	136
	<i>Support and reparation</i>	141
	<i>Conclusion</i>	143
7	Conclusion	144
	<i>Explaining differences</i>	145
	<i>Lessons from France</i>	146
	<i>Improving responses to healthcare failings</i>	148
	<i>Bibliography</i>	149
	<i>Index</i>	165

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1 Introduction

‘Responsable mais pas coupable’

Those were the words pronounced by Georgina Dufoix (then French Social Affairs Minister) on 4 November 1991, on a French national TV channel, when she was asked to explain her role in the 1980s contaminated blood scandal.¹ ‘I feel deeply responsible’, said Dufoix, ‘however, I do not feel guilty, because really, at the time, we made decisions in a certain context, which were decisions that seemed right to us’.² The contaminated blood scandal had resulted in thousands of victims being infected with HIV and hepatitis C following the failure of health authorities to prevent the provision of tainted blood products to patients. In France, three sets of criminal proceedings saw prescribing doctors, blood centre officials and three ministers, including Dufoix, being prosecuted for various criminal offences such as deception and involuntary homicide. Dufoix, along with Laurent Fabius, then Prime Minister, was acquitted of the charges of involuntary homicide in 1999.³ Out of over 30 health officials who were prosecuted for the failure to prevent the provision of contaminated blood products to patients, only two blood centre officials were jailed for deception.

Although a similar episode of the same scale occurred in the United Kingdom (UK), criminal charges were not brought. Nearly 40 years after the start of the contamination, in June 2017, a full public inquiry, the ‘Infected Blood Inquiry’, was ordered by the then UK Prime Minister Theresa May, to shed light on the failings which led to thousands of people being infected with HIV and the hepatitis C virus.⁴ Following the contamination, victims were awarded *ex gratia*

1 In this book the ‘contaminated blood scandal’ is also referred to as the ‘tainted blood scandal’ or the ‘infected blood scandal’.

2 J-A Heraud, F Kerr, T Burger-Helmchen, *Management créatif des systèmes complexes* (London: ISTE Editions 2019), 109.

3 E Favereau, ‘Le procès du sang contaminé. Les trois accusés et l’avenir. Georgina Dufoix non coupable. Son action a été jugée positive’, *Libération* (10 March 1999).

4 P Walker, A Topping, ‘Theresa May Orders Contaminated Blood Scandal Inquiry’, *The Guardian* (11 July 2017).

2 Introduction

payments from various trusts and funds,⁵ but the UK Government always denied liability.⁶

A crucial question in this book is to find out whether health authorities in both countries were merely *responsible* for the contamination, or whether they were *culpable* of causing the contamination and the death of thousands of patients. In this book, I do not address obviously blameworthy wrongdoing which *intentionally* aims to hurt others.⁷ Instead, I discuss healthcare ‘malpractice’⁸ in the context of failure to provide the level of safe care expected from healthcare services and individual professionals. The causes of healthcare failure are diverse and may include mistakes that reasonable and competent professionals make in the course of their practice. Sometimes failure may be the result of behaviour that reveals a more culpable frame of mind, where an individual might disregard the life, and health and safety, of others. Negligent behaviour in everyday life can have serious consequences depending on the type of activity involved. Negligence in the healthcare context more particularly may lead to tragic consequences including life-threatening injury or death. Paradoxically, an activity which aims to heal may instead harm or kill. Victims or their families consequently ask for reparation and justice, and sometimes seek to attribute blame to an individual or an institution. This may result in recourse to legal proceedings.⁹ Such legal proceedings may

5 Rt Hon Lord Archer, *Independent Public Inquiry Report on NHS-Supplied Contaminated Blood and Blood Products*, February 2009 (Archer Report), 73; Infected Blood Inquiry, Terms of Reference. www.infectedbloodinquiry.org.uk/sites/default/files/Terms-of-Reference-Infected-Blood-Inquiry.pdf; Additional payments to infected blood victims were made in 2017 in Scotland, Wales, Northern Ireland and England through infected blood support schemes: Scotland: <https://nhsns.org/services/practitioner/medical/scottish-infected-blood-support-scheme/>; Wales: <https://wibss.wales.nhs.uk/>; Northern Ireland: www.hscbusiness.hscni.net/services/2876.htm; England: <https://www.nhsbsa.nhs.uk/england-infected-blood-support-scheme>.

6 UK Government, *Government Response to Lord Archer’s Independent Inquiry Report on NHS-supplied Contaminated Blood and Blood Products*, 20 May 2009, 1–2.

7 In this book, I am concerned with healthcare malpractice in the sense of error and disregard for the life of others, but not intentional wrongdoing as was the case in the Shipman scandal in England, where Doctor Shipman was sentenced to life imprisonment for the murder of numerous patients; see <http://webarchive.nationalarchives.gov.uk/20090808154959/www.the-shipman-inquiry.org.uk/backgroundinfo.asp>, accessed 28 January 2020; ‘Shipman Jailed for 15 Murders’, *BBC News* (31 January 2000). Other examples of ‘intentional’ medical wrongdoing include the case of Dr Paterson, who was charged with 17 counts of wounding with intent, for performing unnecessary breast surgery on patients, or the case of Dr Bramhall, who was convicted of assault for branding his initials on patients’ livers. See G James Rev’d (Chair), *Report of the Independent Inquiry into the Issues raised by Paterson*, February 2020; A Topping, ‘Breast Surgeon Ian Paterson Jailed for 15 Years for Carrying Out Needless Operations’, *The Guardian* (31 May 2017); ‘“Liver Branding” Surgeon Simon Bramhall Fined £10,000’, *BBC News* (12 January 2018).

8 The terms ‘medical malpractice’ and ‘healthcare malpractice’ will be used interchangeably throughout this book as general terms for errors, negligence, and reckless or indifferent conduct endangering the life and health of patients which occur in the healthcare setting.

9 A Merry, W Brookbanks, *Merry and McCall Smith’s Errors, Medicine and the Law* (2nd edn, Cambridge: Cambridge University Press 2017), 1.

take several forms. They may involve disciplinary proceedings against responsible professionals, claims for compensation for the harm caused, or criminal proceedings. This book focuses on the use of criminal proceedings in the healthcare malpractice context. It explores some of the key factors in the criminal justice system that contribute to explaining the differences between the approaches taken by France and by England and Wales on this matter, and considers whether lessons could be learnt from the French experience on the use of the criminal law in healthcare malpractice cases.

The over-criminalisation of healthcare malpractice?

In the past decade in England and Wales,¹⁰ the medical profession has expressed growing concern that health professionals may unjustly face criminal prosecutions for gross negligence manslaughter (GNM) as a result of errors or negligence which caused the death of patients.¹¹ Instances of health professionals being prosecuted for and/or convicted of GNM are perceived to have risen in recent years, and have included health professionals who were characterised by their peers as both diligent and competent professionals.¹² Several other examples have included health professionals committing negligence in pressured and understaffed healthcare institutions. In November 2015, Dr Bawa-Garba and Nurse Amaro were both convicted of GNM for causing the death of Jack Adcock, a 6-year-old boy with Down syndrome, and were subsequently struck off the medical and nursing registers by the General Medical Council (GMC) and

- 10 This book compares the law in France and in England and Wales in relation to negligence committed within the healthcare setting. The law in other countries of the United Kingdom is not thoroughly discussed but may be mentioned where relevant.
- 11 Examples of ‘medical manslaughter’ convictions include the convictions of Dr Adomako, Drs Misra and Srivastava, Dr Garg, and more recently Dr Sellu and Dr Bawa-Garba. Dr Sellu was convicted and jailed for GNM, but his conviction was then quashed by appeal judges in 2016 as his conduct did not reach the criminal standard: C Dyer, ‘Senior Surgeon’s Conviction for Manslaughter Is Quashed’, (2016) *British Medical Journal* 355; ‘David Sellu Trial: Doctor’s Conviction Over Patient’s Death Quashed’, *BBC News* (15 November 2016); see also *R v Adomako* [1994] 3 WLR 288; *R v Misra*; *R v Srivastava* [2004] EWCA Crim 2375; *R v Garg* (Sudhanshu) [2012] EWCA Crim 2520; *R v Bawa-Garba* [2016] EWCA Crim 1841; P Gooderham, B Toft, ‘Involuntary Automacy: A Potential Legal Defence to an Allegation of Clinical Negligence?’ (2009) 18(1) *Quality and Safety in Health Care* 69; M Brazier, A Alghrani, ‘Fatal Medical Malpractice and Criminal Liability’, (2009) 25(2) *Journal of Professional Negligence* 51.
- 12 C Dyer, ‘Sellu Is Cleared of Medical Misconduct’, (2018) *British Medical Journal* 360; S Boseley, ‘Doctors Sign Letter Expressing Worry Over Criminalisation of Surgeon’, *The Guardian* (6 August 2015). The use of the offence of GNM in the healthcare context has not been restricted to doctors: In July 2016, an optometrist, Mrs Honey Rose, was convicted of GNM, but the decision to convict her was quashed as the Court of Appeal decided that she could not have reasonably foreseen an obvious and serious risk of death. *R v Honey Maria Rose* [2017] EWCA Crim 1168; see also ‘Vincent Barker Death: Optometrist Honey Rose Conviction Quashed’, *BBC News* (31 July 2017). As will be explained in Chapter 2, the law on GNM was somewhat clarified in this case.

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