“Danger” Sports and the spectre of criminal negligence

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Recent incidents of death at motor sport events in Melbourne and New Zealand raise the possibility of negligent sports administrators being dealt with in the criminal jurisdiction.

By Jason Harkess

Civil liability for a death or injury arising from a person’s negligent conduct is a familiar notion. If I suffer from shock and severe gastro-enteritis as a result of seeing the decomposed remains of a snail in a bottle of ginger-beer which I have consumed and which you have manufactured, it is my right (and everyone’s expectation) that I will sue you for damages. In this respect, Lord Atkin settled the law:[1]

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”

But while a negligence action may be a regular phenomenon in the civil jurisdiction, it certainly is not the bread and butter of the criminal courts.

That is probably because negligence “does not sit well with the concept of the fault element of a crime as a guilty mind”.[2] It is not the typical crime.

Aside from the criminal negligence statutory provisions of specific and limited application,[3] in Victoria negligence causing serious injury is a statutory crime under s24 of the *Crimes Act* 1958, and negligence causing death is recognised at common law as a category of manslaughter.[4]

But unlike civil negligence, these criminal laws cannot be invoked every time a decomposed snail causes severe gastro-enteritis or, heaven forbid, death. Criminal negligence is reserved for circumstances involving “such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.”[5] The negligence must be gross.[6]

Whether negligence is gross in a given situation is “supremely a jury question”.[7] That said, with such a high degree of negligence required for the crime, it is not surprising that criminal prosecutions of this type are uncommon.

Apart from the difficulty of proving gross negligence beyond reasonable doubt, there are the additional challenges regularly faced by the practising civil litigator. These difficulties might include formulating and attributing the duty of care, ascertaining the reasonable standard and establishing the causal nexus between the defendant’s conduct and the damage suffered.

Here the issues can be more esoteric than those encountered in a typical crime such as assault or murder.

The concept of negligence can be hard for a jury to fathom, especially at a criminal level. This may reduce the likelihood of conviction before a trial has even begun. Irrespective of the strength of the evidence, prosecuting agencies may be more reluctant to press forward with cases of negligence as a consequence.

“AVOIDABLE” DEATH AT THE AUSTRALIAN GRAND PRIX

Sometimes, however, an incident of serious neglect resulting in injury or death will clearly call for consideration of the criminal law. In this regard, the spectre of criminal negligence can be said to have made a momentary appearance earlier this year with the release of the Victorian state coroner’s report into the death of Graham Beveridge.[8] On 4 March 2001, Mr Beveridge, a volunteer spectator marshal from Queensland, was fatally injured as a result of an incident occurring during the fifth lap of the Australian Formula One Grand Prix held in Albert Park, Melbourne. Following the collision of two competing vehicles, one of the vehicles struck a concrete and wire mesh spectator fence and, at high speed, continued to slide along the fence where eventually the right rear wheel became dislodged at a gap in the fence designed for marshal and driver entry and exit. The dislodged wheel went through the gap and struck Mr Beveridge in the chest, ultimately causing his death. Eight spectators in the vicinity of the gap were also struck by flying debris and received minor injuries.

The coroner’s conclusions included the following:

- those who effectively ran the event were aware of the risk of debris passing through the gap and the potential for such debris to cause injury;
- the solution to reducing this hazard was obvious, not difficult and practical;
- such a solution should have been implemented by the organisers of the race many years before Mr Beveridge's death; and
- Mr Beveridge's death was avoidable.

These findings sound in negligence. But do they go further and lead to the inference of a gross wrong? That the organisers were aware of the risk and that the solution was "obvious" would seem to present a compelling argument for that question of criminal sanction to go to a jury.

The coroner did not recommend criminal prosecution and no charges appear to have since been laid by prosecuting authorities in relation to Mr Beveridge's death, perhaps because of the commendable efforts of the Grand Prix organisers to improve safety features since the incident. Nonetheless, the coroner's report foreshadows a real potential for charges of criminal negligence to be laid against "danger" sports organisers for future incidents.

NEW ZEALAND'S EXPERIENCE

At the time of Mr Beveridge's death, a case involving comparable facts was being prosecuted in New Zealand. In *Police v Osborne & Ors*, four senior motor sport officials were charged with criminal offences based in negligence[9] relating to the deaths of two spectators at the 1998 Queenstown Classic Road Race. The spectators were Queenstown residents James Mackie and Terence Tubman who, along with four other friends, on the afternoon of 7 November 1998 had decided to attend the temporary street circuit race that was held annually in their home town. The group of friends had seated themselves on a grass bank located along the main stretch of the race circuit, the edge of the track itself being only metres away from where they were sitting. Safety tape had been erected along the bank by the race organisers earlier that day, located directly in front of the group. This safety tape was the only form of barrier protection provided for spectators situated in the area. As the events unfolded, it became apparent that the tape afforded Messrs Mackie and Tubman no protection whatsoever. At about 4.10pm, a driver of a competing vehicle, a Holden Torana, lost control of his car along the main stretch of the circuit. The Torana,

travelling at between 130 and 145 kilometres per hour, left the track and went onto the bank. It broke through the tape and flew towards Messrs Mackie and Tubman's group. Two of the group were quick enough to escape unharmed. Another two also escaped receiving only minor injuries. Messrs Mackie and Tubman were fatally hit.

After two years of investigation, the New Zealand Police laid charges of manslaughter, injuring by an unlawful act, and criminal nuisance against John Osborne, and charges of criminal nuisance against Russell Jenkins, Keith Douglas and William Forsyth. Mr Osborne was the appointed track inspector for the Queenstown event whose primary responsibility was to inspect and assess all aspects of safety on the track circuit before permitting the event to begin. Mr Jenkins was clerk of the course, and Messrs Douglas and Forsyth were the appointed stewards. With respect to these latter three race officials, the obligation to ensure that the track was safe for racing was only one of a number of other organisational responsibilities they each had on the day of the event. However, the basis for charging all four individuals derived from the responsibilities and powers each had assumed under the rules of Motorsport New Zealand Incorporated, the governing body of motor sport events in New Zealand. Fundamentally, each defendant held an independent power to stop the race event if, for any reason, he considered it was unsafe to continue. The prosecution's contention was that, confronted with clear deficiencies in the safety aspects of the race circuit, and with particular reference to where Messrs Mackie and Tubman were located, each defendant had failed to exercise his power of veto when he ought to have done so. Accordingly, each was accused of omitting to discharge his legal duty of care.

At the conclusion of the depositions hearing, Motorsport New Zealand offered to plead guilty to a charge of criminal nuisance. The prosecution subsequently withdrew all charges against Mr Osborne and his colleagues. A guilty plea and conviction were entered against Motorsport New Zealand. In sentencing the corporation, Judge Moran remarked:[10]

"Rather than serve a safety objective, the tape gave a false sense of security fostering the belief that race organisers considered the bank to be a safe spectator area. In that respect the breach of duty of care was serious, culpability was high."

His Honour's words sent a chill through sports organisations around the country. The prosecution of Mr Osborne and his colleagues, and the conviction of Motorsport New

Zealand, set an ominous precedent. The prospect of criminal sanction for serious administrative mistakes suddenly made sports officials acutely aware of their responsibilities for ensuring safety.

OBSTACLES FOR THE PROSECUTION

If Mr Osborne and the other race day officials had been committed for trial, there was no guarantee that the end result would have been a guilty verdict. An unprecedented claim of this sort would have tested the bounds of criminal negligence in terms of the law, the facts, and the consciences of the 12 jurors selected to try the case. If charges had been laid against the organisers of the Australian Grand Prix, the prosecution would have been faced with similar obstacles.

Duty of care

Presented with an incident of serious injury or death in a danger sport, the first problem is identifying the relevant duty of care. Unlike crimes statutes in other jurisdictions, the *Crimes Act* 1958 (Vic) does not stipulate any duties on which a criminal charge of negligence can be based.[11] The duty must be drawn from either the common law or another statute. For prosecuting agencies, dealing with a criminal offence that has constituent elements spreading across more than one piece of legislation is highly unusual. They seldom have to ponder other sources of law on an issue so fundamental, and at such a preliminary stage of the criminal investigation.

Nevertheless, locating a legal duty of care is probably going to be the least problematic exercise in a prosecution of this sort. Civil courts already recognise that duties of care are assumed by sports administrators towards participants and spectators.[12] The broader duty to take reasonable precautions in dealing with dangerous things is also well-known to the criminal courts.[13] And the statutory duty of occupiers to see that persons on their premises are not endangered might also be applicable.[14] Insofar as danger sports are concerned, any of these strains of duty could found a *Crimes Act* charge.

Whose duty?

Having identified the relevant duty, to whom is that duty to be attributed for the purposes of laying a criminal charge? Large-scale sporting events can involve many people. Power,

control and assumptions of responsibility for ensuring safety may be delegated, divided and shared amongst a number of individuals. When corporate entities are also involved, that organisational complexity is more manifest. In *Osborne*, the control and power to administer the Queenstown event was spread over three corporate entities, the four individual defendants originally prosecuted, and arguably a good many others. The Australian Grand Prix event involves a comparable organisational structure, although on a much grander scale and, unlike Queenstown, is subject to a statutory regime.[15]

What must be borne in mind, however, is that a complex organisation of people does not necessarily equate to a dilution of responsibility. In the context of a highly dangerous sporting event, a shared responsibility to take reasonable precautions, involving a process of delegation, is to be expected. If one individual neglects to identify and remedy a safety hazard, another would be expected to counter that negligence by noticing the problem. The factual matrix of a large-scale sporting event is therefore likely to oblige the prosecution to take a pluralistic approach in attributing the duty of care. Obviously, that is what was done in *Osborne*. Attention focuses on all those individuals who had assumed positions of control, power and responsibility. Legal duties are attributed to each of them.

Imputing the duty to a corporate entity can be a little more difficult. The prosecution must establish that the acts or omissions of concern were of a natural person representing the corporation's "directing mind and will".[16]Logically, this means that the question of corporate duty will only follow from the positive attribution of the same duty to a natural person. The issue then becomes one of ascertaining the nature of the intangible relationship between the natural person and the corporation. Tracing the "mind and will" through governing statutes, articles of association, board resolutions and official directives will be a laborious but necessary exercise. An answer to the question of whose acts, knowledge, and state of mind were, for the purpose the criminal offence, meant to count as those of the corporation might then be forthcoming.[17] If a natural person who owes a legal duty is identified, that same duty can be attributed to the corporation.

Standard of care

The extent to which each person has discharged the duty will then be the subject of analysis. That will involve consideration of the standard of care expected in executing (or otherwise

delegating) the power and responsibility assumed. As with the tort, the standard of care in criminal negligence is determined objectively, that is by reference to the reasonable person.[18] In the case of a specially skilled person, the standard of conduct must conform to that which would be expected of skilled and informed members of that person's profession, judged as at the time the acts were undertaken.[19] So, in *Osborne* the question posed by the prosecution was "what precautions would the reasonable track inspector, steward and clerk of the course have taken"?

Ideally, the prosecution might call an experienced sports administrator in the field to give evidence as to what reasonable steps would be taken to ensure the safety of spectators, officials and competitors. However, this is not always practical. It is clearly in the sports administrator's own interests that the standard of care be set at a relatively low level, for fear of a precedent being set that exposes the witness and colleagues to indeterminate criminal liability. The evidence could be improperly skewed to the defendant's benefit.

In *Osborne*, expert evidence of a different kind was sought to assist in determining the objective standard. A mechanical engineer provided the prosecution with his opinion as to what form of barrier device would have been necessary to prevent an out of control vehicle leaving the race track. This expert evidence was aimed at providing a commonsense approach to ascertaining the appropriate standard of care. In this way, the need for the more "direct" evidence of an experienced track inspector, steward or clerk of the course was avoided. To determine what each defendant ought to have done, the prosecution's evidence here would have obliged a jury to draw inferences from the expert engineer's opinion and from their own appreciation of the dangers of motor sport. Of course, the jury would probably also have been obliged to consider the opinions of the expert track inspector, steward and clerk of the course, being witnesses called by the defence. That could lead to conflicting evidence on the theoretical objective standard. A jury's patience might be tried before the question of whether the defendant breached the standard is even addressed.

Causation

Admittedly, there could be a number of causes attributable to an incident of death or serious injury at a sports event. In the case of motor sport, driver error could be the primary cause. Alternatively, it might be reasoned that the victim assumed a risk of injury by attending the

event. It is also possible that race-day officials (other than the defendant) shirked their responsibilities. On top of this, there is the proposition that the incident was a “freak” accident incapable of having any cause legally attributed to it.

These were the types of issues considered by the prosecution in *Osborne* and by the coroner in the Beveridge inquest. However, as with all other types of crime, in a case of criminal negligence it is sufficient for the prosecution to prove that the defendant’s negligence was “a direct and substantial cause” of the death or injury.[20] It need not be the sole cause. It is, nevertheless, open to the defence to make issue of other causes, in the hope that the element of causation is clouded sufficiently to bring home an acquittal.

Jury’s conscience

Perhaps the biggest obstacle for the prosecution will be the jury’s readiness to convict. Negligence is not the typical crime and accused sports administrators are not typical criminals. Indeed, in *Osborne* public sentiment was strongly opposed to the prosecution as soon as the charges were laid. The defendants were respectable individuals. They were volunteer sports officials who had devoted their lives to their recreational passion. Irrespective of the legal merits of the prosecution’s case and notwithstanding any strong direction to the jury from the trial judge, jurors may still refuse to convict simply because they do not want to. The jury’s conscience will probably be the most volatile aspect of a prosecution of this sort.

CONCLUSION

Negligence is evidently one of the more problematic crimes to prosecute. Its application to danger sports is relatively novel in New Zealand and is yet to be tested in Victoria. But as Lord Diplock observed, there is “no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one’s power to counteract a danger that one has oneself created”.[21]Situations fraught with danger may expose a significant number of unsuspecting people to the risk of serious injury or death. In the event of such incident resulting from a breach of a duty of care, the civil jurisdiction and its focus on compensation may not adequately deal with the public’s need for accountability, denunciation and deterrence.

The conviction of Motorsport New Zealand resulted in sports organisations around New Zealand suddenly focusing on and improving the safety features of their sport. The public has benefited as a consequence. Despite the difficulties in prosecuting the crime, if that is the result then the issue of negligence might be better dealt with in a criminal context.

NOTES

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[1] *Donoghue v Stevenson* [1932] AC 562 at 580.

[2] Bronitt and McSherry, *Principles of Criminal Law* (2001) LBC Information Services, 185.

[3] For example, s318 of the *Crimes Act* 1958 (culpable driving causing death) and the offence provisions contained in the *Occupational Health and Safety Act* 1985 (negligence in the workplace).

[4] *Nydam v The Queen* (1977) VR 430.

[5] Note 4 above, at 445.

[6] *R v Wright* [1999] VSCA 145; *Andrews v Director of Public Prosecutions* [1937] AC 576.

[7] *R v Osip* [2000] VSCA 237; *R v Adomako* [1995] 1 AC 171.

[8] See the report of the state coroner, “Incident at the 2001 Australian Grand Prix”, issued 8 February 2002 (Case No 621/01).

[9] The offences were under the *Crimes Act* 1961 (NZ), namely criminal nuisance (s145), injuring by an unlawful act (s190) and manslaughter (s171). The depositions hearing of *Police v Osborne & Ors* took place at the District Court, Invercargill in May/June 2001.

[10] Sentencing notes of Judge PA Moran, *Police v Motor Sport New Zealand* (8 June 2001, District Court, Invercargill, CRN 1025007251).

[11] In *Osborne*, the prosecution relied on the duty under s156 of the *Crimes Act* 1961 (NZ) (duty of persons in charge of dangerous things). Similar duties are enacted in the Criminal Codes of Queensland, Western Australia and Northern Territory.

[12] *Trevali Pty Ltd (t/as Campbelltown Roller Rink) v Haddad* [1989] Aust Torts Reports 80-286 (duty to players);*Hall v Brooklands Auto Racing Club* [1933] 1 KB 205 (duty to spectators).

[13] *Callaghan v R* (1952) 87 CLR 115; *R v Taktak* (1988) 14 NSWLR 226.

[14] See s14A of the *Wrongs Act* 1958.

[15] See the *Australian Grands Prix Act* 1994 and the *Australian Grands Prix (Formula One) Regulations* 1996

[16] *Tesco Supermarkets Ltd v Nathan* [1972] AC 153.

[17] This is the question posed in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) (tacitly approved in *Director of Public Prosecutions Reference No 1 of 1996* [1998] 3 VR 352).

[18] *R v Osip*, note 7 above; note 4 above.

[19] *R v Adomako* (where defendant had specialised knowledge as a medical practitioner).

[20] *R v Russell* [1933] VLR 59 at 81-83.

[21] *R v Miller* [1983] 2 AC 1 at 176.