

Criminal Negligence¹ s289 (In Charge of Dangerous Things)

It is the duty of every person who has [in his charge or] under his control² anything ... of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid that danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

To establish that the defendant is guilty of [manslaughter or other offence] through criminal negligence, the prosecution must therefore prove, beyond reasonable doubt, that the defendant

- i) owed the prescribed duty of care;**
- ii) omitted to perform that duty; and**
- iii) thereby caused the [death or other event].**

These three matters require elaboration.

First, was the duty owed by the defendant?

You may be satisfied beyond reasonable doubt that the defendant had such a thing, namely (insert description) [in his charge or] under his control when (viz insert material time), and that it was of such a nature that³, in the absence of care or precaution in its use or management, the life, safety or health of a person may be endangered. If so, turn to consider the second issue: whether the defendant is shown beyond reasonable doubt to have omitted to perform his duty to use reasonable care to avoid danger to life, safety or health. And in

¹ *R v Hodgetts & Jackson* [1990] 1 Qd R 456; *MacKenzie* [2000] QCA 324 [53]; cf *Attorney-General's Reference (No 2 of 1999)* [2000] 3 WLR 195, 206-207. As to the directions required where there might be criminal responsibility under s 289 or else in circumstances where s 23(1)(a) or (b) might be germane, see *Stott & Van Embden* [2001] QCA 313 [20], [22]; *Kidd* [2001] QCA 356.

² *Stott & Van Embden* [2001] QCA 313 [20], [22].

³ As to what constitutes a dangerous thing for this purpose see *Stott & Van Embden* at [23].

considering whether he omitted to perform such a duty when, if you find it to be so, he (describe material act or omission), have regard to such things as the nature and extent of the risk to life, safety or health of which the defendant was aware or should reasonably have foreseen.⁴

You may have heard of people being compensated for personal injury, property damage or other loss by reason of another's negligence. In such civil cases, negligence is a basis for monetary compensation. In civil cases, to establish negligence the claimant must prove that it is more probable than not that loss was sustained through a breach of a duty of care owed to the claimant. In this criminal case, you cannot convict unless you are satisfied that the defendant breached the duty mentioned. In this, there is a similarity to civil negligence. But that is where the similarity ends.

To establish criminal negligence requires much more than is needed to establish a right to compensation in a civil claim.

First, the prosecution must prove its case beyond reasonable doubt.

Secondly, the lack of care which suffices to establish liability in a civil case is not enough here. A very high degree of negligence is required before a defendant may be found guilty of criminal negligence. To convict, you must be satisfied beyond reasonable doubt that his conduct in (describe act or omission), if you find that act or omission proved, so far departed from the standard of care incumbent upon him to use reasonable care to avoid a danger to life, health and safety, as to amount to conduct deserving of punishment.⁵

Since we are in a criminal court, we are concerned with whether there was a departure from those standards which is serious enough for the State to intervene and punish the person on the basis that he behaved with so little regard for the safety of others that he deserves to be punished as a criminal, not merely made to pay compensation.

⁴ In cases where serious harm is alleged; it is not necessary that the precise result be foreseen or foreseeable but the defendant could not be found criminally negligent unless at least some serious harm was reasonably foreseeable by him: *R v Hodgetts and Jackson* [1990] 1 Qd R 456 at 463, 464.

⁵ The term reckless ought no to be used when giving a direction in respect of criminal negligence. See *R v BBD* [2006] QCA 441.

The notion of criminal negligence involves a large or serious departure from reasonable standards of conduct, by which is meant the standard of conduct that a reasonable member of the community would use in the same circumstances. It must go substantially beyond a case where payment of compensation is adequate punishment. It must be in a category of behavior where the only adequate punishment is for his lack of care to be branded as criminal and for him to be punished by the State for it.

Before you can convict on the basis of criminal negligence, you must be satisfied that there has been a very serious departure from reasonable standards of care. Because it involves an assessment of what standard of care a reasonable member of the community would use in similar circumstances and the seriousness of the degree of departure from it by the accused, it is for you, as representatives of the community in this trial, to make up your minds whether you are satisfied beyond reasonable doubt that his conduct was criminally negligent or whether it falls short of the degree of deviation from proper standards necessary to prove criminal negligence.

If you are satisfied beyond reasonable doubt that the defendant was criminally negligent, next consider whether you are satisfied beyond reasonable doubt, that criminal negligence caused the (death or other event).

To conclude that the defendant's failure to perform the duties incumbent upon him resulted in the (death or other event), it is not essential that you find that his failure was the sole cause. You are entitled to conclude that the (death or other event) resulted from an omission to perform the duty if that omission contributed substantially or significantly to the (death or other event)⁶. Whether an act or omission that you regard as a breach of the prescribed duty resulted in the (death or other event) is a matter of causation. Causation is not a philosophical or scientific question. Whether such an act or omission resulted in the (death or other event) is determined by applying your commonsense to the facts as you find them, keenly appreciating, however, that the purpose of your inquiry is to attribute legal responsibility in a criminal matter.⁷

⁶ *Royall* (1991) 172 CLR 378, 387; cf *Sherrington & Kuchler* [2001] QCA 105, [4].

⁷ *Sherrington & Kuchler* [4].

