

CHAPTER 6 UNINTENTIONAL HARM

The structure of offences against the person

6.1 The Penal Code s 108 creates the offence of unintentional harm to the body of another person:

No person shall unintentionally cause damage to the body of another person, through recklessness or negligence, or failure to observe any law.

Penalty: (a) if the damage so caused is purely temporary, imprisonment for 3 months;

(b) if the damage so caused is permanent, imprisonment for 2 years;

(c) if the damage so caused results in death, imprisonment for 5 years.

There is an unfortunate dearth of judicial authority on the interpretation of this section, although some guidance has now been given by the case of *Morrison v Public Prosecutor* [2020] VUCA 29.

6.2 The structure of s 108 parallels that for intentional assaults causing damage or death under s 107, though the penalties under s 108 are less than under s 107. The source of the scheme is the same: the old Native Criminal Code of the New Hebrides.

6.3 Section 108 contemplates three modes through which the damage can be caused: through recklessness; through negligence; and through failure to observe a law. Comments by the Court of Appeal in *Morrison* suggest that, in this context, 'recklessness' means objective dangerousness and 'negligence' means the standard of ordinary negligence as in the civil law of torts rather than the special standard of criminal negligence which has been recognised at common law.: see **6.?-6.?** It is unclear why the third mode, 'failure to observe any law', was added. Failure to observe a law, such as a rule on occupational safety in the Employment Act or a rule of the road in the Road Traffic (Control) Act, is arguably always negligent conduct.

6.4 There is no liability under s 108 unless damage or death is caused. However, recklessly driving a motor vehicle is an offence under the Road Traffic (Control) Act s 13, even if there are no injurious consequences. In addition, there can be liability for criminal nuisance under the Penal Code s 114 if the conduct involves an unlawful act or an omission to fulfil a legal duty and it is known that this may endanger the life, safety or health of a person.

6.5 The terms ‘damage’ and ‘death’ are not defined in the Code so that, as was discussed in Chapter 5, resort must be had to the common law or the legislation of other jurisdictions:

- The term ‘harm’ rather than ‘damage’ is used in the legislation of most jurisdictions and is defined broadly. For example, the Solomon Islands Penal Code s 4 provides: “‘harm’ means any bodily hurt, disease or disorder whether permanent or temporary’. See **5.37**.
- Death is now generally conceived to involve either the irreversible cessation of blood circulation or irreversible cessation of all brain function, including that of the brain stem. See **5.18, 5.38**.

6.6 The consent of the person damaged or killed is not a defence ‘if the purpose of the act was to inflict serious physical or mental injury incompatible with the well-being of the victim’: Code s 7, discussed in **5.14**. Otherwise, consent to the conduct causing damage or death can presumably be a defence even if the conduct was negligent.

Recklessness and negligence

6.7 An offence under s 108 can be committed through ‘recklessness’ as well as ‘negligence’. In *Morrison v Public Prosecutor* [2020] VUCA 29 at [21], it was said: ‘s.108...covers a wide variety of acts, from *recklessness, which could include extremely dangerous driving*, to negligence which could extend to just momentary carelessness’ [emphasis added]. This suggests that recklessness in this context is used in the popular sense of dangerousness rather than the technical, subjective sense of the definition in the Penal Code s 6(3): see also **4.20**. It signifies a high degree of negligence, amounting to objective dangerousness, rather than an awareness of the risk and decision to run it. The Court of Appeal did not explain its interpretation. However, it makes sense in light of the previous history of the offence as part of the old Native Criminal Code of the New Hebrides: the offence was drafted long before the current Penal Code introduced its subjective principles in s 6. An objective interpretation of ‘recklessness’ is also in line with the decision in *Kal v Public Prosecutor* [2018] VUCA 56 at [48] on intentional homicide. *Kal* held that the specification of intention in the s 106 offence of intentional homicide did not exclude the operation of the Code s 6(2) which provides that recklessness is the equivalent of intention: see **5.8**. The result was that the fault element of the offence could be satisfied by not only intention but also the subjective form of recklessness specified in s 6(3). The same reasoning should apply to intentional assault under s 107. If this interpretation of ss 106-107 is correct, it makes some sense to treat the reference to recklessness in s 108 as meaning objectively dangerous. Otherwise, the specification of recklessness in s 108 would be

largely redundant: any case of unintentional but reckless harm would also constitute one of the other offences.

6.8 A s 108 offence can also be committed 'negligently'. 'Negligence' is defined in the Code s 6(4):

A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise.

This general definition is applicable to s 108.

6.9 In criminal law a person is liable for causing harm negligently even if the harm would not have materialised but for the negligent conduct of the victim or another person. Criminal law does not recognise any equivalent to the doctrine of contributory negligence in the civil law of torts. Under that doctrine, responsibility for an accident can be apportioned between two or more persons who have contributed to its occurrence, including the victim. However, contributory fault is irrelevant in criminal law. See *Morrison v Public Prosecutor* [2020] VUCA 29, where a driver was convicted of unintentional harm causing death through a collision, even though it may have been a contributing factor to the accident that the other party was speeding. See also *Chang v Attorney-General* [2018] WSCA 3 at [42]: 'No amount of fault on his (the other driver's) part could remove the focus from the driving of the appellant.'

6.10 It is unclear whether negligence in s 108 means ordinary negligence of the kind that would be sufficient for civil liability in the law of torts or the higher level of 'criminal' or 'gross' negligence': see **4.30-4.32**. The special standard of criminal negligence has been endorsed by the House of Lords as a matter of common law principle: see *Andrews v D.P.P.* [1937] AC 576 at 583, [1937] 2 All ER 552 (HL). It has also been imported into criminal statutes by various courts including the High Court of Australia: see *Callaghan v R* (1952) 87 CLR 115; [1952] HCA 55. On the other hand, New Zealand courts historically declined to read it into their Crimes Act: see *The King v Storey* [1931] NZLR 417 at 432 (CA); *R v Yogasakaran* [1989] NZCA 362, [1990] 1 NZLR 399 (CA). It required a legislative amendment in 1997 before the standard of criminal negligence became part of the law of New Zealand.

6.11 The description of the range of s 108 in *Morrison v Public Prosecutor* [2020] VUCA 29 at [21] suggests that the section does not require criminal negligence: 's.108...covers a wide variety of acts, from recklessness, which could include extremely dangerous driving, to *negligence which could extend to just momentary carelessness*' [emphasis added]. It was also said: 'In this case the allegation is essentially of momentary carelessness.' 'Momentary carelessness' falls well short of criminal negligence.

6.12 The issues were not canvassed in any depth in *Morrison*. Nevertheless, there is textual justification for giving s 108 a broad scope unrestricted by the doctrine of criminal negligence. 'Negligence' in s 108 is juxtaposed with 'recklessness'. It was

argued above, in **6.7**, that recklessness in this context signifies a high degree of negligence, amounting to objective dangerousness, rather than an awareness of the risk and a decision to run it. This is because the offence of intentional assault under s 107 already covers subjective recklessness, so that adopting the same meaning for recklessness in s 108 would make the reference to it largely redundant. However, if reckless in s 108 means objectively dangerous, it effectively covers the ground of criminal negligence. It would then be redundant to spell out 'negligence' as an alternative if it were to mean only criminal negligence. To give meaning to s 108 as a whole, the term 'negligence' should be interpreted as referring to negligence to any degree.

6.13 In many jurisdictions, criminal liability for negligence is tied by a statutory provision or entrenched common law to breach of a recognised legal duty of care. This has caused difficulty where the list of legal duties appears incomplete. There is conflicting case authority from other jurisdictions on whether additional duties from the common law can be imported: see **3.7**. Several contentious cases have involved an alleged duty of care with respect to dangerous things under a person's charge or control, such as motor vehicles. For example, a Samoan court declined to import such a duty from the common law into the then Criminal Ordinance and therefore held that there was no offence of 'motor manslaughter' in Samoa: *Police v Uolo* [2003] WSSC 11.

6.14 The language of the Vanuatu Penal Code s 108 does not indicate that its scope is limited by a list of recognised duties of care. Moreover, no restriction was mentioned by the Court of Appeal in *Morrison v Public Prosecutor* [2020] VUCA 29. In that case, a death was caused in the operation of a motor vehicle. A conviction of unintentional harm causing death was upheld simply by reference to the words of s 108, without any gloss respecting breach of a duty of care. Yet the Penal Codes 6(4) provides: 'A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission.' The kind of omission which is most commonly in issue is an omission to take due care with a dangerous thing such as a motor vehicle. It was suggested at **3.7** that the simplest explanation of the *Morrison* decision may be that a common law duty respecting dangerous things was implied into the Penal Code.

6.15 However 'negligence' is interpreted in s 108, account must also be taken of the third alternative specified in the section: 'failure to observe any law'. This provision would often be applicable to the negligent driving of motor vehicles, when provisions of the Road Traffic (Control) Act might be violated.