

Many will remember the horrific event of 18 June 2000, following the interception by Customs and Excise officers in Dover of a lorry entering the United Kingdom. Upon opening the lorry's container, the officers discovered 60 Chinese illegal immigrants. 58 of them were dead.

The cause of death was suffocation. Just prior to boarding the ferry at Zeebrugge, the driver had closed the one vent through which air was supplied into the container, apparently in order to reduce the likelihood of detection. That this would occur had been explained to the would-be immigrants. Unfortunately, the vent was not reopened during the crossing and, by the time the container was opened by officials in Dover, it was too late. The air had run out.

The Dutch driver, Perry Wacker, was convicted of conspiracy to facilitate the entry of illegal immigrants, and of 58 counts of manslaughter. He appealed against the manslaughter convictions, which were predicated on gross negligence, on the ground that no duty of care was owed by him to the victims. The was said by D's counsel to be for two reasons: first, because D's conduct occurred as part of a shared illegal enterprise, and so the principle of *ex turpi causa non oritur actio* applied; secondly, because the relevant causative conduct was an omission (failure to reopen the vent) rather than an act, so that the relevant time at which any duty might arise could not be specified.

The second argument can be dealt with quite quickly. Normally there would be no concern about the omission, since one could still trace causation from D's original positive act of closing the vent. But that act was not grossly negligent. Instead, the Court of Appeal reasoned that there was a duty to re-open the vent and, moreover,

"it was a continuing duty, which continued until air was allowed into the container. At the moment when the duty first arose, the defendant was outside the jurisdiction in Holland. However the duty continued once the ferry had sailed and it is quite clear on the evidence that if the vent had been opened at that stage, the deaths would not have resulted. Thus we can see no difficulty in this regard." [para. 40.]

Although the Court does not specify the source of that duty, it can be grounded either in the Miller doctrine [[1983] 2 AC 161; S&S2, p. 78] or in the dependent nature of the relationship between the victims and their driver.

The more important argument concerns the duty of care. In *Adomako* [1995] 1 AC 171, 187 the Lord Chancellor, Lord Mackay of Clashfern, stated:

between joint participants in the execution of a criminal enterprise. At trial, the prosecution and judge accepted, on the basis of Adomako, that *ex turpi causa* also forms part of the criminal law of negligence. The trial judge ruled, however, that the failure to reopen the air vent was "incidental" to the criminal enterprise jointly undertaken (i.e. the agreement to enter illegally). It was not directly criminal, or the very essence of the victims' criminality, but was one of the details of implementation for which D, rather than the victims, was responsible.

Quite rightly, the Court of Appeal rejected this approach. Instead, the Court ruled that the *ex turpi causa* principle is not part of the criminal law. The criminal and civil laws serve different functions. In civil law, the dispute is between D and V. Where *ex turpi causa* applies, public policy may disentitle V from recovering against D; but it does not prevent the state from penalising D. That is quite a different matter, since transferring assets to V is no longer a consideration. V's failure to recover is for reasons that concern V. It is not because D has done no wrong. And so the criminal law may be applied to hold D responsible for the harm he does V, notwithstanding V's own participation. (Adomako itself does not require otherwise, since the case did not concern the *ex turpi causa* exception.) Indeed, this proposition is implicit already in criminal-law decisions such as *Brown* [1994] 1 AC 212 [S&S2 pp. 610, 618-622], where V's consent was ruled to be no defence to charges of assault occasioning actual bodily harm, notwithstanding that it may foreclose tort liability.

In summary, Wacker raises a number of useful points about the duty of care in manslaughter by gross negligence. Where death is caused by a positive act, the general rule remains that one owes a duty of care to those others who lie within the reasonably foreseeable range of persons who may be harmed by one's conduct; where it is caused by an omission, something extra has to be shown—a specific duty of care, arising from an assumption of responsibility for V's welfare or from some other source such as the scenario in *Miller*. Either way, however, the supplementary tortious principles of *ex turpi causa* and (presumably) *volenti non fit injuria*, which would defeat any civil claim by V for reasons personal to V, are not part of the criminal law.

Notice that the ruling is a negative one: that *ex turpi causa* does not negate a duty of care. Its negation does not establish, positively, that any duty of care exists. Clearly, on the facts of *Wacker*, the relationship of dependence between immigrants and driver, and the fact that Wacker himself had closed the vent, justified a finding that the driver owed a duty of care in the first place. Such findings may be unlikely to arise where two or more individuals, on a basis of equality rather than dependence, enter into a joint and dangerous criminal enterprise—say, a planned bank raid. The court may well find that the respective bank robbers owe no duty of care to each other. So, if robber E is injured in the course of the raid it does not follow that his partner in crime F will be criminally responsible for the death of E even if she could have saved him by driving to a hospital rather than fleeing.