The Issues
In criminal law, the question of establishing causation invites a combination of factual and legal determinations. When directing the jury and formulating solutions to cases where causation is in question, the courts have sometimes said that causation is simply a matter of ‘common sense’, but in one area of homicide law in particular, causation is often far from a matter of common sense.

Gross negligence manslaughter (GNM) which occurs in a medical context will often involve multiple possible causes of death. The question of whether the victim died because of the medical blunder, because of their illness or original injury, or because of the combined effects of a subsisting condition and the medical error can be very difficult to determine with the degree of certainty required for criminal law. Moreover, some of the criminal principles which have developed as a solution to complex causative dilemmas are ill-suited to the medical context. This often leads to the chain of causation being very easily broken and so the question is, does this serve as a positive mitigating safeguard against the criminal law, or, should certain civil law developments, such as the modified ‘but for’ test, be considered in order to serve justice in this context?

Causation in Criminal Law

1. CAUSATION IN FACT

‘But for’ the defendant’s action, would the result have occurred?

2. CAUSATION IN LAW

Was the defendant’s action sufficiently and culpably causative? It need not be the sole cause but must be more than de minimus.

The ‘thin skull’ rule – take your victim as you find them.

Did an intervening act break the chain of causation?

Applying causation rules to GNM

The evidential burden of proving causation beyond reasonable doubt in the medical context is a significant challenge. Often the victim is in poor health and so unless there is a very clear causative link between the grossly negligent event and the victim’s death, as there was in R v Adomako, doubt as to whether death might have occurred anyway can be easy to draw. The thin-skull rule seems inappropriate in this context and intervening adverse health events, which may or may not be connected to the harm inflicted by the grossly negligent action, can cloud the causative determination.

Griffiths and Sanders reviewed CPS files, revealing that in 44% of cases (33 out of 75) the decision not to prosecute was taken on grounds of causation. This included several cases where the behaviour of the suspect was clearly either grossly negligent or even subjectively reckless.

QUESTION:
Does the particular difficulty of proving causation in GNM provide a useful safeguard to mitigate the harshness of the criminal law in this context?

OR
Are culpable healthcare professionals escaping liability simply because the criminal principles of causation are ill-suited to the medical context?

If the latter is true, and justice is not being served by the current approach, should we look to the civil law for a solution?

1. A modified ‘but for’ test as developed in Bailey v Ministry of Defence. If there are cumulative causes but it is clear that the defendant’s gross negligence acted as a ‘material contribution’ to the harm suffered, causation should be satisfied.

2. Loss of chance of survival (e.g. Gregg v Scott), where a defendant should be held to have caused death if a patient was more likely than not to survive ‘but for’ the grossly negligent action.

References
R v Adomako [1994] QB 302

Bailey v Ministry of Defence [2008] EWCA Civ 883

Greg v Scott [2005] UKHL 2

alexandra.mullock@manchester.ac.uk