CONCEPT OF ‘GROSS NEGLIGENCE” AS ELEMENT OF CRIMINAL CULPABILITY IN MEDICAL NEGLIGENCE CASES.

Criminal statutes which lack sufficient definiteness or specificity are commonly held “void for vagueness” as they ‘may run afoul of constitutionality because it fails to give adequate guidance to those who would be law-abiding to advise defendants of the nature of the offence with which they are charged, or to courts in trying those who are accused’1. Vague law offends several important values. First, because we assume that man is free to steer between lawful and unlawful conduct. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications”2.

Negligence is a circular term not easily yielding to clear meaning. “Negligence”, in law, is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which
a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

In medical negligence cases, the central question that arises is whether or not a doctor has attained the standard of care that is required by law. The standard expected is one of “reasonable care”. This needs to be judged by taking into account all the circumstances surrounding particular situation, and by balancing diversity inherent in medical practice against the interests of the patient. In determining the standard the court use the Bolam Test\(^3\). In Bolam it was held that a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. In other words, a man is not negligent if he is acting in accordance with such a practice merely because there is a body of opinion who would take a contrary view.

*R v. Bateman*\(^4\) is considered to be a very important development in the law of manslaughter by gross negligence. A Doctor appealed against conviction for manslaughter after a woman died because the trial judge failed to adequately differentiate between the level of negligence required for a civil
action for damages and the level required to establish criminal liability for manslaughter. In Bateman Court said that liability for gross negligence manslaughter would arise where, 1) the accused owed a duty to the deceased to take care, 2) the accused failed to properly discharge this duty, 3) this failure caused the death of the deceased and 4) the accused’s negligence was gross in that it displayed such a disregard for the life and safety of others as to amount to a crime deserving of punishment.

In Andrews v DPP the appellant was convicted of motor manslaughter on the ground of “gross negligence”. In R v Lawrence a motor cycle rider was convicted of causing death by reckless driving. The House of Lords held that the mens rea for the offence was ‘driving in such manner without giving any thought to the risk or having recognized that it exists, nevertheless taking that risk’. In R v Seymour the defendant tried to push his girlfriend’s car out of the way using his lorry and she was crushed between the two vehicles. The defendant was convicted of manslaughter by reckless driving. The House of Lords held that the necessary mens rea for reckless manslaughter was that there must be an obvious and serious risk of some harm and (a) either the defendant must have realized that risk and decided to take it, or (b) the defendant gave no thought to what was an obvious and serious risk of some harm. In R v Caldwell the defendant had done some
work for the owner of a hotel as the result of which he had a quarrel with the owner, got drunk and set fire to the hotel in revenge. In Andrews, Lawrence, Symour and Caldwell, “recklessness” and “gross negligence” were put in the same compartment and held to be similar. This grave anomaly in law was set right by the House of Lords in *R v. G and Another*. In *R v. G*, two children, aged 11 and 12 entered back yard of a building. They found bundles of newspaper which they opened up to read. They lit them up with a lighter and threw the lit newspapers into a large plastic bin. There was another bin near to the former bin. Fire spread from the first bin to the second bin and thereafter to an overhanging eave of a building. The building caught fire and roof collapsed. The defendants argued that they expected the newspaper fires to extinguish themselves on the contract floor of the yard. There was no dispute that the children did not appreciate that there was any risk whatsoever of the fire spreading in the way it eventually did. The Judge directed the jury that the prosecution to succeed in the case would have to prove that the defendant in damaging the building created a risk which would have been obvious to an ordinary, reasonable bystander watching that the building would be damaged by fire. But the jury had difficulty in reaching a verdict. They asked the judge why they should consider the risk as perceived by a reasonable person or layman. The judge replied that the law required them to do so.
The jury convicted the defendant. House of Lords allowed the Appeal and acquitted the defendant and held that ‘a man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act’, the House of Lords held that ‘it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable’ and ‘culpable state of mind is no doubt an intention to cause the injurious result, knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk’. It was also held that it is not blame worthy to do something involving a risk of injury to another if one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment. The House of Lords, in R v G, put “recklessness” and “gross negligence” in two separate compartments and said that both did not mean the same thing.

In *R v Adomako* an anesthetist failed to observe an operation properly, and did not notice that a tube had become disconnected from a ventilator. The patient suffered a cardiac arrest and died, and the defendant was convicted of
manslaughter, being guilty of gross negligence. Lord Mackay accepted that there was an element of circularity in the process by which the jury would arrive at its verdict based on ‘gross negligence’. The Court however said that there would be “gross negligence manslaughter” if the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred was a higher one and that the extent to which the defendant’s conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal. Adomako was found guilty and the conviction was confirmed by the House of Lords.

*R v. Misra and Srivastava*\(^\text{11}\) related to ‘gross negligence” on the part of two Doctors of Southampton General Hospital. The victim was Sean Phillips, who underwent surgery to repair his patella tendon. He became infected with staphylococcus aureus. The defendants were found guilty of not treating Sean Phillips in spite of the fact that classic signs of infection was obvious and were evident from relevant charts. The Court conceded that manslaughter by gross negligence is an offence which lack certainty. Leave was granted to appeal to the Court of Appeal on the question of compatibility of crime of “gross negligence manslaughter’ with the European Convention on Human Rights’. The Court of Appeal following *Adomako* held that though manslaughter by gross negligence lacks certainty,
the requirement of law is not absolute certainty but sufficient certainty. The Court said that offence requires: 1. death resulting from a negligent breach of the duty of care owned by the defendant to the deceased. 2. In negligent breach of that duty, the victim was exposed by the defendant to the risk of death; and 3. The circumstances were so reprehensible as to amount to gross negligence so as to constitute a criminal offence. The Court of Appeal also held that in a case of manslaughter by gross negligence “the circumstances must be such that a reasonably prudent person would have foreseen a serious and obvious risk not merely of injury, even serious injury, but death”. The Court added an additional specific ingredient of the offence of manslaughter by gross negligence that the jury had to decide whether the defendant’s conduct amounted to a crime. The Court of Appeal explained that the question for the jury is not whether the defendant’s negligence was gross and whether additionally it was a crime, but whether the defendant’s negligence was gross, and consequentially criminal.

In *Rowley v. DPP¹²* Queens Bench followed *Adomako*. The facts in Rowley did not relate to medical negligence. Malcolm Rowley was 30 years of age. He is physically disabled and moved into residential care when he was about 8 years of age. All three residents of the residential care home had profound physical disabilities and they were cared for by two carers,
Brenda Mather and Sarah Peters. Sarah Peters took Malcolm to bath room, laid him in the bath and after the bath openED the Jacuzzi and allowed him to revel in water. She then left to do other works. There were bubbles in the water and Malcolm who was physically disabled could not come out of water and drowned. She obviously violated the instructions that “normal bubble baths will froth excessively with whirlpools and must not be used”. Sarah Peters was acquitted. Queen’s Bench refused to quash the order of acquittal. In Rowley the Queen’s Bench pointed out to a fifth ingredient in the judgment of Lord Mackay in Adomako: “criminality” or “badness”. Court explained that ‘using the word “badness”, the jury must be sure that the defendant’s conduct was so bad as in all the circumstances to amount “to a criminal act or omission’.

The approach of the Judges in England on the question of circularity of the term “gross negligence” had never been uniform. In Hinton v Dibber Lord Denman doubted as to whether “between gross negligence and negligence merely, any intelligent distinction exists”. In Wilson v. Brett Lord Cranworth said that “gross negligence is negligence with a vituperative epithet”. In Pentecost v London District Auditor Lord Godard said that “the use of the expression ‘gross negligence’ is always misleading”. In Armitage v. Nurse Lord Millet said that ‘English lawyers have always had a healthy disrespect’ for the distinction between “negligence” and “gross
negligence”. In *N.Y.C.R.R. Co v Lockwood*¹⁷, the U.S. Supreme Court disapproved “gross negligence” as a division of negligence.

The Law Commission of UK in Consultation Paper on Criminal Law, Involuntary Manslaughter (1994) pointed out the jurisprudential difference between cases of involuntary manslaughter caused by recklessness and manslaughter by gross negligence. It was pointed out that “the law in that area failed to meet the standard of certainty required by European Convention of Human Rights”. Though this aspect is yet to receive full recognition by appropriate law made in that regard, it is now well recognised in English jurisdiction that “manslaughter by gross negligence” is crime of lesser extent than “unlawful involuntary manslaughter”.

In *Dr. Suresh Gupta’s Case*¹⁸ Supreme Court of India interpreting Section 304A of Indian Penal Code, held that the negligence has to be “gross negligence” or “recklessness” for fixing criminal liability on a doctor. The court said the moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not
occur, but this hope nevertheless fails to inhibit the taking of the risk. The Court also held that ‘criminal action against a Doctor for criminal culpability arising out of negligence is warranted only if the negligence is gross and there is recklessness’ putting the life of the patient in danger. It was also held that for conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing. The Court also held that ‘between civil and criminal liability of a doctor causing death of his patient the Court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. It was also held that for “conviction of a doctor for alleged criminal offence, the standard should be proof recklessness and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct’.

The Supreme Court, in *Jacob Mathew v. State of Punjab*¹⁹ said that what is a ‘simple negligence’ and what is ‘gross negligence’ may be a matter of dispute even among experts. In *Jacob Mathew* the Supreme Court also said that law, like medicine is not an exact science. One cannot predict with certainty an outcome of many cases. It depends on the facts and circumstances of each case and also the personal notions of the judge concerned who is hearing the case. The Supreme Court, also held that the basic principle relating to medical negligence is Bolam Rule.
In *Martin F. D’Souza vs. Mohd. Ishfaq* \(^\text{20}\) the Supreme Court of India held that ‘Judges have usually to-rely on testimonies of other Doctors which may not necessarily in all cases be objective. Since in all profession and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. A testimony may also be difficult to understand, particularly in medical matters for a layman like a Judge. A balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, in must also be remembered that like all professionals Doctors too many make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Martin D’Souza did not arise from a criminal prosecution. It arose from an order of the National Consumer Disputes Redressal Commission, rejecting the claim of a patient for compensation against the Doctor. In short, the Supreme Court of India held that a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in closing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below the standard that of reasonably competent practitioner in his field. The Court held that there may be cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment, which has never been
tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm the doctor should not be held liable in such cases. When a patient dies or suffers some mishap, there is a tendency to blame the doctor. The attitude in such cases is things have gone wrong and therefore somebody must be punished. Even the best professionals, not to speak of ordinary professionals, sometimes fail. Supreme Court however acknowledged that though the difference between ‘simple negligence’ and ‘gross negligence’ have been broadly explained in Jacob Mathew’s case difficulties may arise in the application of the principles in particular cases.

What amounts to ‘very high degree’ of negligence is not very clear from judicial pronouncements of the Supreme Court. The Supreme Court in *Sushil Ansal v. State* through CBI (Criminal Appeal No.597/2010 dated 5.3.2014) case, referred to *R V Adomako* and held that the court would have to consider whether the defendant’s conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient was such that it should be judged as criminal. *Sushil Ansal* arose from a conviction under Section 304A of IPC. Fire broke in Upahaar Cinema, Delhi resulting in the death of 59 persons and causing injuries to many. The Supreme Court, in *Sushil Ansal*, said that prosecution would be required to prove in order to
establish “gross negligence” as criminal offence, a charge of ‘involuntary manslaughter’ in England, analogous to what is punishable under Section 304A of I.P.C. in India. The Court also said that what is ‘gross’ would depend upon the fact situation in each case and could not, therefore, be defined with certitude. It also said that decided cases alone can illustrate what has been considered to be gross negligence in a given situation.

In Malay Kumar Ganguly v. Sukumar Mukharjee\textsuperscript{21} the court though referred to \textit{R v Prentice} and \textit{R v Adomako}, the court did not lay down any clear guideline for the trial court to follow in cases of ‘gross negligence medical manslaughter’.

The issue relating to circularity of “gross negligence” in medical negligence cases needs fresh consideration in the hands of our Supreme Court. Even in countries where the concept of “negligence” as a concept of criminal liability originated Courts are grappling with the problem of circularity which is inherent in the concept. Jury in England often find it difficult to identify the dividing line between “negligence” and “gross negligence”. More and more jurists now agree with Prof. J.W.C. Turner, a world renowned jurist and criminal lawyer that foresight of criminal harm provides a necessary condition for criminal liability and “negligence” as culpability did not fit in that category. Turner’s primary argument for this claim was
that a system of criminal liability that dispenses with foresight of harm is tantamount to a system of strict liability\textsuperscript{22}. Prof. Jerome Hall, another jurist, voiced the same view\textsuperscript{23}. Even our own Courts including the Supreme Courts have expressed concern over the circularity of the term “gross negligence” and difficulty in describing the term in a subjective way.

There is no reason, and more so in a liberal democracy governed by Rule of Law, to find criminal culpability in ‘negligence’. Negligence presupposes a blank mind. There cannot be degrees of nothing. It is only proper for our Courts to exclude “negligence” from the concept of criminal culpability, at least in cases of professional negligence like ‘medical negligence’ and confine the criminal offences to cases of “rashness” or “recklessness” warranting penal action.

-------------------------------------------------------------------------------------------------------------------------------------

1. Musser v Utah (333 US 95 (1940)
2. Graynard v. City of Rockford, 408 US 104
3. Bolam v Friern Hospital Management Committee [1957] 1 WLR 583
4. (1925) 19 Cr App R 8
5. (1937) 2 All E.R. 552
6. (1981) 1 All E R 974
7. (1983) 2 All E R 1058
8. [1981] 1 All ER 961
9. (2003) UKHL 50
10.(1994) 99 Cr.App.R.362
11. (2005) 1 Cr. App.R 21
12. [2003] EWHC 693
13. ((1842) 2 QB 646)
14. (1843) 11 M&W 113
15. [1951] 2 KB 759
16. 1998 Chancery 241
17. 17 Wall.357
18. (2004) 6 SCC 422
19. (2005)6 SCC 1
20. AIR 2009 SC 2049
21. AIR 2010 SC 1162