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Reviewing the Prosecution of Medical Practitioners in Common Law Countries: A Needed Step or a Flawed Approach?

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Abstract

The prosecution of medical practitioners for the medical gross negligence has dramatically increased in the past decades. This was in a bid to curb the high prevalence and occurrence medical malpractice by the medical community. However, there are no proper data to support that the prosecution had any significant impact in reduction of such occurrences. Many believe that the criminal prosecution for medical practitioners in the course of their duties is not a right approach to take on. This paper aims to examine the medical gross negligence that occurred by the medical practitioners by reference to the various different common law countries and decided cases.

Keywords: *Gross Medical Negligence; Medical Malpractice; UK; Australia; New Zealand; Singapore; Malaysia*

1. Introduction

Doctors make the occasional mistake like everyone else. Sometimes the effects of these errors are catastrophic and somebody may even die. But when is an accident so dangerous that it has become a criminal offence? Currently, gross negligence is the legal limit in British criminal law for medical manslaughter. Gross negligence interpretation is controversial and this to some extent, causes discomfort in the medical field among the medical practitioners. However, not only is the definition of' gross negligence is problematic, it is also contentious the fundamental intuitions about moral luck and private control. When deciding whether something is a criminal offense, juries and judges encounter a challenging job in instances of medical manslaughter. These issues could be fixed by setting a clear defined objective standard as a threshold for private failure, but this will mean a greater threshold for criminal prosecution.[1]

Legally speaking, there is no distinction between medical manslaughter and gross negligence manslaughter. This is due to unintended grossly negligent act or omission

[1] Hubbeling, D. (2010). Criminal Prosecution for Medical Manslaughter. *Journal of the Royal Society of Medicine,* 103(6), 216–18, doi:10.1258/jrsm.2009.090324.

of defendant. In medicine this relates to medically skilled people who, when the act or omission happens, in the course of discharging their duties.[2]

Negligence generally is described as a non-compliance to practice standard of care that could be exercised by a reasonable person. Negligence in the vast majority of situations will be dealt through civil law (such as the law of torts, which deals between people or organizations), in which the primary concern is compensation for the injury suffered, or where negligence is deemed gross and therefore criminal ("the state acts against the accused") it may be subject to criminal law. There are distinct norms and burdens of proof required in civil and criminal law. The standard needed for the judgment in civil law is based "on the balance of probabilities", on the other hand the proof for criminal law must be beyond reasonable doubt. Moreover, in the criminal law the burden of proof is on the state, whereas this is not the case for civil suits. Additionally, according to R v Bateman, the extent of liability depends on the amount of damage done in civil action, and this definitely means not on the extent of negligence, however, on the extent damage done. However, in the criminal cases, the degree of negligence and the extent of damage are the important factors when it comes in deciding the cases as such nature in the court. [3]

Manslaughter is a type of homicide, and in comparison to murder it is less culpable. Legally has been used to narrate another human being's killing. Voluntary killing varies from murder as a result of the accused's diminished responsibility. There is no intention of killing or causing grievous bodily damage with involuntary homicide; the type of guilt may be careless or gross negligence. It is hard to distinguish between them.[4]

2. Analysis and Results

2.1. Medical Gross Negligence

Technically, medical manslaughter is not a technical word, however, it's part of gross negligence manslaughter. Medical manslaughter relates to medically skilled persons who perform acts in accordance with their obligation of care when an act or omission is alleged result in death.[5]

2.1.1. Historical background

There was no distinction between skilled and unqualified medical practitioners until the enactment of the Medical Act 1858. Prior to that was a common phenomenon among the patients to seek the services of unlicensed medical practitioners, charged many of whom with manslaughter. The law acknowledged in the early 19th century that doctors are also could be subject to prosecution in the event where it could be proven that medical practitioners have violated their duty of care toward their patients and behaved in a manner of gross want of care and skill. For instance, a surgeon, Frederick Robinson, was charged with a woman's death after birth in 1862. Robinson said that he had pulled out a part of the intestines instead of removing the placenta.[6] The judge said:

[2] Edwards, S. (2014). Medical Manslaughter: Arecent History. *The Royal College Of Surgeons Of England Bulletin*, 96, 118–119.

[3] Szawarski, P. (2014). Classic Cases Revisited—Medical Manslaughter, Corporate Liability and the Death of Sean Phillips. *Journal of the Intensive Care Society*, 15(2), 117–121.

[4] Ibid.

[5] Griffiths, D., & Sanders, A. (2013). The Road to the Dock: Prosecution Decision Making in Medical Manslaughter Cases. *Bioethics, Medicine and the Criminal Law*. 2, 117–58.

[6] Ferner, R. E., & McDowell, S. E. (2005). Doctors Charged with Manslaughter in the Course of Medical Practice, 1795-2005: A Literature Review. *Journal of the Royal Society of Medicine*, 99(6), 309–14, doi:10.1258/jrsm.99.6.309.

The medical practitioners are also prone to make grave mistakes, however this does not mean that they will be criminally prosecuted if it comes to the realization that they have applied reasonable skill and caution, this could be applied at the instances where a medical practitioner, as stated earlier by him, "was guilty of gross negligence, or evinced a gross want of knowledge of his profession." [7]

The court convicted and imprisoned Robinson.

It is important to state that prior the introduction of the Medical Act 1858, medical practitioners without a license were also liable like licensed medical practitioners according to law. Joseph Webb, a chemist for instance, was charged in 1834 as a result of the death one of his for administering smallpox medication .[8] R v Webb, [9] It was stated by the judge in this case:

There is no difference in these cases between a licensed medical practitioner and a non-licensed medical practitioner. Either way, if a medical practitioner with such a qualified degree of skill and experience makes a grave mistake which in the course of treating his patient which leads to the demise of his patient, he will not be charged to for the manslaughter and be guilty of it: However if, where an appropriate medical assistance could be provided, and a non-medical practitioner with no qualification takes up the charge and start treating the patients and providing them medicines ,however, the patient dies due to his prescriptions of such medications, therefore he would be guilty of manslaughter.

The court eventually exonerated Webb.

Judicial attitudes after the Medical Act of 1858 seem to have changed. This could be seen in the case of William Crick A medical botanist, in 1859 he was charged for causing the child's death due to prescribing a dose of Lobelia inflata (an emetic herb) [10]. R v Crick[11] The judge stated:

If no one was able to prescribe the patients with medicine, it would be devastating to the productivity of the medical profession without a halter around his head. In that case I would have advised you to take leaps of faith and look up at his action as a medical man positively, if the prisoner had been a medical man.

In this case court ordered the acquittal of Crick.

Williamson is among oldest cases of common law on medical negligence before the Medical Act 1858 is enacted. [12] The accused was a midwife who took off a prolapsed uterus thinking it was part of the placenta. What is crucial at this stage is that the jury was directed that if they discovered him guilty for manslaughter ("by gross negligence, as he was later categorized as"), The danger behind the most important and anxious profession would prevent men from entering into it.[13]

2.1.2. The elements to prove the gross medical negligence.

In brief and concise terms, gross negligence can be claimed where someone can demonstrate that it was owed a duty of care, an infringement of that obligation has happened, resulting in death. It was initially recognized in **R v Bateman** in 1925[14] as the manslaughter test. The word' gross' was

[7] Ferner, R. E., & McDowell, S. E. (2005). Doctors Charged with Manslaughter in the Course of Medical Practice, 1795-2005: A Literature Review. *Journal of the Royal Society of Medicine*, 99(6), 309–14, doi:10.1258/jrsm.99.6.309.
[8] Ibid.
[9] 2 Lew CC 196
[10] Ibid.
[11] (1859) 1 F & F 519.
[12] 3 C & P 635.
[13] Hor, M. (1997). Medical Negligence: The Contours of Criminality and the Role of the Coroner. *Sing. J. Legal Stud*, 86.
[14] 19 Cr App R 8.

subjected to scrutiny. Lord Hewart said in R v Bateman:

In order to determine whether the negligence, in the specific case, resulted in a crime or not in explaining to juries the test which they should apply, many sobriquets have been used by judges like 'culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,' 'complete.' However, No matter how many sobriquets have been used, or either any sobriquet has been used at all, in order for us to establish a criminal liability, the accused negligence has gone further the point of compensation only, which his actions have posed such a threat to the safety and the life of his fellow men which tantamount to a crime and made him to be a worthy of punishment.[15]

Adomako[16] and *Misra*[17] are the leading cases of gross negligence manslaughter that, by coincidence, these two are the medical manslaughter cases. Several components of gross negligence manslaughter must be demonstrated in order to convict one for gross negligence manslaughter and those elements are as are as following:

I) Presence of a duty of care for the dead person;

II) an infringement of that duty of care which;

III) leads (or substantially adds) to the demise of the person;

IV) if the degree of the misconduct of the defendant differed with the appropriate standard of care... involving, as it should have done, the danger of passing away for the ailing person, was it in a such manner that leads the case to be tried criminal ("the 'gross negligence' element") .[18]

In medical manslaughter cases, it would be rarely an issue in establishing duty of care. It is also obvious in most instances of medical manslaughter whether a duty has been violated. While we Will see that roughly thirty percent of Medical Manslaughter non-prosecutions are due to lack of evidence of violation, in only half of them (i.e. fifteen percent of the total) this is because no violation can be found at all; in the other half there is no evidence who violated their obligation. The other components, however, are often difficult. Causation in Medical Manslaughter instances is a specific issue. The reason for this is clear, the defendant will attempt to disclaim accountability for his misconducts where causation is an issue.[19]

To demonstrate causation, it must be established that death must have been caused by the violation of the duty. It must not be the sole reason or even the main reason of death, however, it has to have caused death more than minimally, negligibly or trivially. The burden of establishing causation lies with the prosecution. [20] Lord Woolf MR in R v HM Coroner for Inner London, ex parte Douglas-Williams, briefly placed the test for causation in criminal instances[21]:

In order to establish the two forms of manslaughter, such as gross negligence or unlawful act, in order to prove the manslaughter, the key important factor is that the negligent or unlawful act have triggered the death of the patient. However, if it cannot be proved after the due process of

[15] Szawarski, Classic Cases Revisited—Medical Manslaughter, Corporate Liability and the Death of Sean Phillips.
[16] [1995] 1 AC 171
[17] [2005] 1 Cr App R 21
[18] Griffiths & Sanders, The Road to the Dock: Prosecution Decision Making in Medical Manslaughter Cases.
[19] John E Stannard, J. E. (1992). Criminal Causation and the Careless Doctor. *Mod. L. Rev,* 55, 577.
[20] Gross Negligence Manslaughter | The Crown Prosecution Service, [Accessed September 15, 2019], https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter.
[21] [1998] 1 All ER 344

examination of the evidence that the demise of the patient was caused as the result of negligent or unlawful act, as has been stated earlier, therefore the chain of causation cannot be established. Therefore, it is not proper to leave the matter to the jury to decide the verdict of unlawful killing.

It is needless to have been the only or even the primary reason for the breach of duty to be the cause of death, on condition that that it contributed substantially to the death of the victim. It is not the jury's role to assess conflicting causes or to decide which was prevailing, so long as they are convinced that the actions of the defendant could reasonably be said to have contributed significantly to the death of the victim[22]: **R v Cheshire**.[23]

The prosecution must demonstrate that negligent to act was a main reason behind the death, where there is an omission to act in the cases. Which there are compelling reasons and evidence that the deceased, irrespective of involvement by anyone would have stayed alive after a certain period of time, then failed to take action after a certain point of time ("i.e. when his condition became irreversible") incapable of creating causation. **In R v Misra**[24], with permission, the Court of Appeal quoted Langley J's summing up. Langley J said the following:

In the event if you are unsure that [X] would have stayed alive by any cost, even though if he was receiving the best treatment and perhaps-because he might not have been treated properly, then due to that, the prosecution is not able to establish his case on this matter and that is the end of it. Both defendants must not be found guilty. Likewise, if you come to the realization at a point of time such as on Saturday or Sunday that you are not certain whether [X] would have stayed alive after that point of time, then the prosecution is unable to prove anything from that point onwards. That whether [Dr. M] and [Dr. S] actions such as their performance or failure to do so [Xs] was the cause of demise, no matter what you think of the events that followed this, you are not going to issue them a guilty verdict. I implore you to give the defendants the benefits of the doubt in the event where you have reasonable doubt that [Xs] wellbeing became irreversible.

The term ' de minimis' sometimes referred to as the de minimis rule implies that causation is not created if the prosecution can only prove that if the accused were not negligent, the departed would just have lived for a few more hours or days-**R v Sinclair and others.** [25] Therefore, a helpful original issue to inquire in this situation is: regardless of the negligence (act or omission) the deceased would or may have died in the de minimis rule. Had that been the response in evidence, regardless of the negligence, the deceased would have died or may have died when they did, or would have survived only hours or days longer in situations where the ensuing life was of no real quality, then causation is not identified. [26]

The “gross negligence” is an inherently vague notion that is challenging in every type of gross negligence manslaughter case: in Adomako, Lord MacKay said that whether a violation of duty ought to be characterized as gross negligence and consequently as a crime ... will rely on the significance of the violation of duty done by the defendant in all the conditions in which the defendant was placed. The manslaughter test for gross negligence is objective. There is no need to disregard and recklessness for conviction cases concerning a brief (but

[22] Ibid.
[23] [1991] 1 WLR 844 at 848B-C 851H-852B
[24] [2004] EWCA Crim 2375
[25] [1998] EWCA Crim 2590
[26] Ibid.

major) error without reckless or disregarding evidence.[27]

If we have to concisely and briefly state the components of manslaughter by gross negligence, the reference to the latest case of **R v Rudling**[28] would be a fine illustration by which the President of the Queen's Bench Division summarized the aspects of manslaughter by gross negligence as follows in chapter 18:

The aspects law of manslaughter by gross negligence can be summarized concisely, by taking its gist from the case of R v Prentice, Adomako and Holloway in this court and Adomako in the House of Lords as well as R v Misra. In these two cases, the aspects of law by gross negligence as a breach of present duty of care, which leads to a reasonable doubt and its predictably leads to the increment and apparent chances of death, taking into account the risk of death, cause death in the situations where, the performance of the defendant was so bad in all these situations that resulted in omission or criminal act.

2.2. Medical Gross Negligence cases in different jurisdictions

2.2.1. Australia

Cases of medical manslaughter in Australia are uncommon. Only four doctors have been convicted of the offense since the first case 165 years ago, and two of them date back more than 100 years. Some legal commentators, such as a law lecturer, Associate Professor Ian Dobinson, have asserted that this infrequency of the cases as such implies that Public prosecutors are dealing with the gray area of law, resulting in some instances not being pursued by the judiciary. The primary legal clues to how Australian courts deal with instances of medical manslaughter, so far four successful convictions have been found. consistencies are noticeable throughout the centuries.[29]

Dr William Valentine (1843)

The earliest Australian doctor arrested for manslaughter, Tasmanian Dr. Valentine, admitted to prescribing a bottle of laudanum to a patient as opposed to the black draught that he intended. He was found guilty, but instead he was fined of £ 25, and escaped the punishment.[30]

Dr Frederick Hornbrook (1864)

After giving 210 drops of sulfuric acid to an adult patient — 13 times the peak dose— Dr. Hornbrook, from Goulburn, NSW, was found guilty of manslaughter. The tribunal convicted him to two years in prison, sparking in private practice a lobbying attempt by local physicians who opposed the outcome. Dr. Hornbrook got a royal pardon after just one month in prison.[31]

Dr Margaret Pearce (2000)

Brisbane GP Dr. Margaret Pearce was convicted of a same kind of mistake almost 150 years later. According to a study in the Lancet, Dr. Pearce injected a 15-month-old girl with morphine to prevent the girl from moving and let Dr. Pearce examine her burnt hand. The dose of morphine was 15 mg, approximately 10 times higher than the quantity needed. The girl passed away overnight. Dr. Pearce was convicted to five years in prison by the tribunal, which was suspended after six months. Dr. Pearce's registration was re-established in.[32]

Dr Arthur Garry Gow (2006)

In another similar case, instead of morphine sulfate, Dr. Gow prescribed five

[27] Griffiths & Sanders. The Road to the Dock: Prosecution Decision Making in Medical Manslaughter Cases.
[28] [2016] EWCA Crim 741
[29] Why Are Medical Manslaughter Cases so Rare in Australia? - Carroll & O'Dea Lawyers, [Accessed September 15, 2019], https://www.codea.com.au/publication/medical-manslaughter-cases-rare-australia/.
[30] Ibid.
[31] Ibid.
[32] Ibid.

ampules of morphine tartrate to a patient. The patient died for treating chronic back pain after self-administering 120 mg of morphine tartrate. Dr. Gow was convicted of manslaughter, like Dr. William Valentine, who also had blended medicines. He was sentenced to an 18-month suspension. The judge justified the suspension sentence by stating that system failures had contributed to the death and that the sentence was "to recognise that people, even professional people, make mistakes."[33]

2.2.2 New Zealand

It was feasible to use the New Zealand criminal law for most of the twentieth century to punish health practitioners who caused death or physical injury by "ordinary" negligence: and there was no need to "prove" "gross" negligence. These prosecutions mostly happened in New Zealand in the past decades. That was the old position, the new legal position requires to prove more than "ordinary" negligence in most situations.[34]

The statutory provisions in New Zealand

The New Zealand criminal law imposing various responsibilities on health practitioners, as well as on many others. Two of the main requirements have been highlighted in sections 155 and 156 of the 1961 Crimes Act. which are as follows:[35]

155. Duty of persons performing dangerous acts— Duty of persons doing dangerous acts — Everyone who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.[36]

156. Duty of person in charge of dangerous things — Everyone who has in his charge or under his control anything whatever, or who operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally res - possible for the consequences of omitting without lawful excuse to discharge that duty.[37]

The New Zealand Court of Appeal has long declined to read a requirement of "gross negligence" into these provisions. Earlier cases focused on the statutory duty in what is now section 156; more recently the court has affirmed the same approach with the respect to the statutory duty "to have and to use reasonable knowledge, skill, and care" which is imposed by section 155. The Judicial Committee of the Privy Council has declined an opportunity to overrule these cases.

It has been refused by the for a very long time by New Zealand Court of Appeal to read the requirement of gross negligence in the above legal provisions. The focus on section 156 in the past was more on statuary duty, the same approach has applied recently by the tribunal on section 155 imposing to use reasonable knowledge, skill, and care. [38]

[33] Ibid.

[34] "The Crimes Amendment Act 1997 received the assent on 21 November 1997 and came into force the following day. It amends the Crimes Act 1961 by inserting s.150A, which applies to prosecutions based on the breach of the duties imposed by ss. 151–153 and ss. 155–157 of the Crimes Act 1961. Section 150A has no application to prosecutions for the endangerment offence in s.145 of the Crimes Act 1961: this is the reason for the qualification "in most contexts" in the text above. (There is also a remote possibility that a further health professional will be prosecuted for conduct which occurred before the Crimes Amendment Act 1997 came into force.)"

[35] Skegg, P D G. (1998). Criminal Prosecutions of Negligent Health Professionals: The New Zealand Experience. *Medical Law Review,* 6(2), 220–46.

[36] Crimes Act 1961

[37] Crimes Act 1961

[38] Ibid.

[39] Where the opportunity has occurred that these cases to be reviewed, the privy council has refused to overrule them [40] All of the lawsuits of supposedly negligent medical practitioners depended on section 155, even though in some instances the prosecution may have referred to section 156. It is important to state that the qualification in provision of 155 "except in case of necessity" is significant .[41]

Overall, there were eight instances of fatalities for which medical practitioners did not submit a guilty plea against the manslaughter charges. Among these eight cases, five of them prosecutions have failed partially or entirely due to the difficulty of proving these cases beyond the reasonable doubt, that defendant's grave mistakes caused the death these patients. We could infer based on the above decisions, that proving beyond reasonable doubt and establishing all the elements of manslaughter how difficult can be.[42]

We will highlight a few cases where the health care practitioners were charged for the gross negligence and brought before the court in the following cases.

Long v. R.[43]

A consultant anesthetist Dr. Geoffrey Long has been brought before the court for the charge manslaughter, for administering anesthesia for bowel surgery in 1993 to a senior citizen in the public hospital as a result of which the patient passed away. It was claimed that Dr. Long did not properly observe the "rapid intra –venous" infusion of fluid into the patient in response to a crisis that happened during the procedure. Allegedly air was injected into her, which resulted in her death due to air embolism as a result of this omission. After a three-day hearing on depositions, Dr. Long was brought to trial at the High Court. At the high court, he was acquitted as judge, Hamilton Hammond granted an application that no indictment be presented. [44]

R. v. Ramstead[45]

A British Surgeon by the name of Mr. Ramstead was working at the Canterbury Area Health Board as a Cardiothoracic surgeon in September 1991. The Royal Australasian College of Surgeons investigated his performance for the duration of the subsequent eleven months. That investigation examined five instances in which patients have died during surgery and two others in which patients have passed away aftermath of the surgery. The study pointed to severe shortcomings in the job of Mr Ramstead and found that incompetently managed the seven instances. As a result, these unfortunate events, these cases have been referred to the Police for investigation. All the patients who died were suspected of cancer or being operated for cancer. Eventually, three charges of manslaughter

[39] R. v. Yogasakaran [1990] 1 N.Z.L.R. 399. See also R. v. Myatt [1991] 1 N.Z.L.R. 674. R. v. Yogasakaran [1990] 1 N.Z.L.R. 399. See also R. v. Myatt [1991] 1 N.Z.L.R. 674. The interpretation of ss.155–156 which was affirmed in R. v. Yogasakaran were significantly important to the medical practitioners. It was stated by one medical consultant that the definition standard of negligence for instance like (reasonable) infers anything except the usual standard of negligence. On the contrary if we decide differently, it gives the impression that that negligence that is not gross can tantamount to "reasonable care and skill" (D. J. Court, The Role of the Criminal Law in Regulating Fatal Medical Error in New Zealand (unpublished dissertation, University of Auckland, 1995), 29–30.

[40] Please refer to D.B. Collins, Medical Law in New Zealand (1992), 196 (On 30 January 1991It was stated by Dr. Collins Dr. at Yogasakaran at the Privy Council meeting, when refusing Dr. Yogasakaran's application for special leave to appeal, that privy council should not interfere with the New Zealand Court's ' decision or policy ' as the decision of the New Zealand court of appeal tantamount to law.

[41] Ibid.

[42] Ibid.

[43] [1995] 2 N.Z.L.R. 691

[44] Ibid.

[45] C.A. 428/96, 12 May 1997

were introduced. At the end of the five-week trial at Wellington's High Court, the jury found Mr Ramstead guilty of one of his patients of manslaughter, but not guilty of the other two. However, the jury stated to the judge that "due care, skill and knowledge were breached". The failure of prosecutors to prove the two cases beyond the reasonable doubt, that Mr. Ramstead's negligence was a sufficient cause of deaths which consequently resulted in acquittal of him for two cases. Mr. Ramstead was convicted for six months imprisonment, this decision was upheld by the court of appeal.[46]

2.2.3. Malaysia and Singapore

Generally speaking, Singapore and Malaysia have two sources of negligent offences. One of those two sources is the Penal Code, which encompasses a wide range of negligence offences, such as negligence causing hurt, to the negligence creation of risk to life or personal safety, also negligent for causing death, however, negligently damage the property deemed not to be severe in order engage the Penal Code The second aspects of negligence offences are set outside of the Penal Code, which can be seen in the Road Traffic Act. It is noteworthy to mention that, there is no specific statute that deals with medical gross negligence activity. Section 304A the Penal Code deals with negligence causing death, the focus of the discussion will be on the general negligence offenses stated in the Penal Code as aforementioned section 304A. [47]

The meaning of negligence and specifically what degree of negligence is required, have posted great difficulties to courts of Malaysia and Singapore for decades. The statutory provisions of the Penal Code are not clear on this. This could be due to the fact that Penal Code has been drafted long before the scholarly discourse on criminal negligence has begun. However, this lacuna has been addressed with many cases which most have been decided under the road traffic offenses. However, still there is no clear answer in regards of meaning of criminal negligence. In the case of Mah Kah Yew the Singaporean court dealt with this issue, however, the high court rejected the gross negligence approach but did not state what is the replacement.[48]

Mah *Kah Yew v PP* [49]

In this case, an appeal submitted by the appellant against his conviction for an offence under section 304A of the Penal Code for causing death by doing acts of negligent not amounting to culpable homicide. The evidence which was submitted by the prosecution was unsatisfactory contradicting which leads the grounds for the appeal to be granted. During the trial, appellant has raised a point of law in regards of the standard of negligence in cases under section 304A of the Penal Code. The district judge stated that, subsequent verdict of the High Court in the cases of WOO SING V R that standard of negligence in civil and criminal are the same and the English law interpretation of the manslaughter has no relevance to the interpretation of section 304A. It was argued in support of the appellant, by referring to the ruling of the Court of Appeal of the Federated Malay States in Cheow Keok v Public Prosecutor, that the same high degree of negligence must be established for manslaughter as England before a person could be appropriately sentenced for an offence under section 304A of the Penal Code.

Held: Pursuant to the provisions of section 88(3) of the Malaysian Act and section 13 of the Republic of Singapore Independence Act, 1966, the High Court of Singapore is tied by a decision made by the

[46] Ibid.

[47] Hor, M. (1997). Medical Negligence: The Contours of Criminality and the Role of the Coroner. *Sing. J. Legal Stud, 86*.

[48] Ibid.

[49] [1969-1971] SLR 441

Court of Appeal of Sarawak, North Borneo and Brunei in the Public Prosecutor v Mills Brunei Criminal Appeal No 3 of 1955 referred to in the Appendix (page 4 infra) which has the same effect as if it were the Federal court and should, consequently, be allowed that the manner and extent of negligence in an act of causing death needed to support an arrest under section 304A of the Penal Code is similar to that in all other acts carried out so recklessly or negligently that it endangers human life or the safety of others where the act was the primary and not remote cause of death.

As regards of medical negligence, under the section 304A there is only one old Malayan authority [50],comes under it. [51]

In the following there are few cases that relate with medical practitioners which have been charged under different sections of the penal code in the course of discharging their duties.

The first case, **Attorney General v Dr. Nadason Kanalingam**, [52] is about an obstetrician and gynecologist who assisted a patient with abortion, as a result of, they were charged under section 312 of the Penal Code, for voluntary miscarriage of a woman with child, this performance of miscarriage was not done in good faith, the woman found to be fourteen weeks pregnant at the time when the abortion took place. It was argued by the defendant that the woman was suffering from enlarged varicose veins which might lead to pulmonary embolism, therefore the abortion was very much needed, and this procedure had been done in a good faith.

The court sentenced the defendant to pay a fine of RM 3500, in default four-months imprisonment. As the abortion was not done in a good faith, further examination was needed. The judge in deceiving his sentence stated that the defendant "finding that the woman had enlarged or bad varicose veins are no other than the result of his mere clinical examination." Therefore, more steps should have taken in examining her. Therefore, the abortion was not done in a good faith for the purpose of saving the woman's life.

In Ting Teck Chin vs PP[53]

Dr Ting Teck Chin work as an obstetrician and gynaecologist at the Kuala Lumpur Hospital, was charged under section 304(b) of the Penal Code for culpable homicide not amounting to murder. The victim was Datuk Seri Dr Ahmad Zahid Hamidi's son-in-law (the former Deputy Prime Minister). Upon the conviction the accused could have been imprisoned up to 10 years or a fine or both.[54]

Syed Alman while undergoing fell unconscious and brought to the University Malaya Medical Centre for medical treatment where he declared to be dead. The accused allegedly committed the offence at the Imperial Dental Specialist Centre in Jalan Telawi, Bangsar Baru around 6pm to 9:05 pm. [55]

However, at the trial, Dr Ting was acquitted without entering his defense, due to failure of the prosecution to prove a prima facie case against him. Zaman Mohd Noor in delivering ring his judgement stated that the onus is on the prosecution to prove that victim was allergic on certain types of medicines, and not on the accused. so."I now acquit and discharge the accused without his defence being called," he said. [56]

4. Conclusion

Over the years, we have seen some of medical practitioners have been prosecuted

[50] Ibid.
[51] Low Boon Hiong (1948-49) MU Supp 135 (HC, Kuala Lumpur).
[52] [1985] 2 MLJ 122
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.

for Medical Gross Negligence, making grave mistakes in the course of their duties. However, there are no proper data to show that this approach has been fruitful and resulted in a dramatic reduction of cases of this nature. Many believe that criminal sanctions against medical practitioners could be counterproductive, leading to a path that less lives could be saved due to the fear of the prosecution. It is our humble opinion and many others that, it would be better to treat these cases through disciplinary board and civil actions, unless there are conscious violations of established standards which in that case the criminal sanctions would be justified.

5. Recommendation

There are no proper data to support that the prosecution of medical practitioners had any significant impact in the reduction of medical gross negligence cases, therefore, many believe rather than prosecuting the medical practitioners who made unintended grave mistakes, should be brought to disciplinary board and their cases be treated as civil.

1. The notion of criminalization of medical practitioners in the course of their duties can have the opposite of the desired effect, in a sense that fewer human lives could be saved due to the fear of being subjected to criminal charges in the event where an unintentional error occurs.
2. It is out of proportion to assume that, taking a harsher approach against medical practitioners is a positive move, in enhancing safety of patients. The criminal punishments should be only limited to the cases where there are conscious violations of standards, otherwise the cases where there are unintentional mistakes occur, they should be handled by the disciplinary board and civil actions.

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