Index Cases in Hong Kong and the United Kingdom on Gross Negligence Manslaughter as may be applicable to healthcare providers

Jane Or (LLB), Crystal Chau, Sophia Lee, Joey Yuen, Calvin WL Ho (JSD)

Prepared for the Webinar on "Gross Negligence Manslaughter: Should it apply to healthcare practitioners?", organised by the Centre for Medical Ethics and Law of The University of Hong Kong on **9th April 2021 (Friday)** at 4pm (time in Hong Kong); 9am (time in London)

Participants of the Webinar are strongly encouraged to review this document before the Webinar.

Gross negligence manslaughter (GNM) is a common law offence, and may be committed by a healthcare professional if death occurs as a result of grossly negligent medical treatment or care. The offence of GNM is committed where "the death is a result of a grossly negligent (though otherwise lawful) act or omission on the part of the defendant"[1]. This offence is not to be confused with other manslaughter offences, such as unlawful act manslaughter[2] and voluntary manslaughter.

In Hong Kong, GNM is punishable under section 7 of the Offences against the Person Ordinance (Cap. 212), which provides that "[a]ny person who is convicted of manslaughter shall be liable to imprisonment for life and to pay such fine as the court may award".

This offence may arise in different contexts, although the following are common ones that have been identified by the Crown Prosecution Service (CPS) in the United Kingdom (UK):

- Death following medical treatment or care: "the offence can be committed by any healthcare professional, including but not exclusively doctors, nurses, pharmacists, and ambulance personnel"[3];

[1] The Crown Prosecution Service, Government of the United Kingdom. "Gross Negligence Manslaughter". *The Crown Prosecution Service Legal Guidance* (2019). https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter

[2] An example is *HKSAR v Harry Sudirman,* CACC No. 486 of 2003, judgment dated 2 September 2004, https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2003/CACC000486_2003.doc.

[3] The Crown Prosecution Service, Government of the United Kingdom. "Gross Negligence Manslaughter". *The Crown Prosecution Service Legal Guidance* (2019). https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter

- Death in the workplace: "the offence can be committed by anyone who is connected in some way to a workplace of any nature. The context is wide ranging but can include offices, factories, ships, airports, aeroplanes, construction sites, oil rigs, farms, schools and sporting grounds. The deceased victims may be employees, contractors, sub-contractors, and members of the public visiting or passing by the workplace when a fatal incident happens"[4];
- Death in custody: "a death in custody is a generic term referring to deaths of those in the custody of the State. In this context the offence can be committed by police or prison officers, dedicated detention and other custody assistants, and by healthcare professionals who are responsible for the care of those detained in a custodial setting"[5].

The basic requirements laid down by the leading English case of *R v Adomako* (see summary of judgement below) for GNM are as follows:

(a) The Defendant owed the Victim a duty of care in the circumstances;

(b) The Defendant breached that duty of care;

(c) The breach caused the death of the Victim; and

(d) The breach was sufficiently serious to constitute gross negligence.

These requirements are applicable in Hong Kong (see summaries of Hong Kong cases below). For more information on GNM, please refer to this instructive legal guidance issued by the CPS: https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter.

I. Summaries of Hong Kong Cases[6]

(1) *HKSAR v Chow Heung Wing Stephen & Ors* [2018] HKCFI 60 (Reasons for Sentence)

(2) *HKSAR v Mak Wan Ling* [2020] HKCFI 3069 (Reasons for Sentence), read with *HKSAR v Mak Wan Ling* [2019] HKCFA 37 (Judgment)

II. Summaries of English Cases

(1) *R v Adomako* [1995] 1 AC 171 (neutral citation: [1994] UKHL 6)

(2) *R v Prentice; R v Sullman* [1994] QB 302

(3) *R v Misra & Srivastava* [2004] EWCA Crim 2375

(4) *R v Sellu (David)* [2016] EWCA Crim 1716

[4] Same as above.

[5] Same as above.

[6] As to whether there is any other *recent* Hong Kong gross negligence manslaughter case against one or more medical doctors decided by the criminal court prior to *HKSAR v Chow Heung Wing Stephen & Ors* [2018] HKCFI 60 and *HKSAR v Mak Wan Ling* [2020] HKCFI 3069, we are not aware of any as at the date of this webinar, 9 April 2021.

(5) *R v Rose* [2017] EWCA Crim 1168

(6) *Hadiza Bawa-Garba v The General Medical Council and Others* [2018] EWCA Civ 1879

Background of

I. (1) *HKSAR v Chow Heung Wing Stephen & Ors* [2018] HKCFI 60; and

I. (2) *HKSAR v Mak Wan Ling* [2020] HKCFI 3069, read with *HKSAR v Mak Wan Ling* [2019] HKCFA 37

This infamous case centres upon a treatment called CIK Therapy launched and marketed by the "DR Group", which operated beauty centres in Hong Kong.

The CIK Therapy was based on an experimental process for treating cancer and involved the extraction of blood from a client. After the blood was processed, the processed blood product was infused back into the same person.

The deceased, CHAN Yuen Lam, was a customer for the CIK Therapy. The deceased's blood was extracted from her at a clinic operated by the DR Group and sent to a laboratory operated by the DR Group for processing. Unfortunately, the blood product became contaminated with the bacteria known as Mycobacterium Abscessus. The blood product did not undergo any bacterial test and the heavily contaminated blood product was infused back into the deceased in October 2012. After the infusion, the above bacteria was found in the deceased's blood and the deceased died from multi-organ failure due to "Mycobacterium Abscessus septicaemia".

Dr CHOW Heung-wing Stephen (D1) owned and controlled the DR Group. D1 practised as a medical doctor until 1994. He founded the DR Group of companies in 1995 and ceased practising as a medical doctor.

Mr CHAN Kwun Chung (D2) was employed by D1 as a technician working at the laboratory. D2 was responsible for the culturing process for the blood product. He did not cause the blood product to undergo any bacterial test.

Dr MAK Wan Ling (D3) was a qualified medical doctor employed to work at clinics under the DR Group. Explanation about the CIK Therapy was given by D3 to the deceased. The contaminated blood product was administered by D3 to the deceased. D3 did not check with the laboratory to see whether bacterial tests had been conducted on the blood product.

The jury found D1 and D2 guilty of manslaughter on the basis of gross negligence. They were sentenced to 12 years' and 10 years' imprisonment respectively: *HKSAR v Chow Heung Wing Stephen & Ors* [2018] HKCFI 60. The jury was unable to reach a verdict in respect of D3's charge of manslaughter. An order for retrial of D3 was granted.

Prior to the retrial and upon D3's appeal, the Hong Kong Court of Final Appeal (HKCFA) gave a landmark judgment on Gross Negligence Manslaughter (GNM): *HKSAR v Mak Wan Ling* [2019] HKCFA 37.

After the retrial, the jury found D3 guilty of GNM and D3 was sentenced to 3 ½ years' imprisonment: *HKSAR v Mak Wan Ling* [2020] HKCFI 3069.

The elements of the offence of Gross Negligence Manslaughter (GNM):

Gross negligence manslaughter is a common law offence. The prosecution must prove that (i) the defendant owed a duty of care to the deceased; (ii) the defendant breached that duty; (iii) the defendant's breach of the duty caused the deceased's death; and (iv) the defendant's breach amounted to gross negligence. The appeal to HKCFA centres upon the last element.

I. (1) *HKSAR v Chow Heung Wing Stephen & Ors* [2018] HKCFI 60 (Reasons for Sentence)

Reasons for Sentence available from:
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=113135
Summary: set out below

Facts

For the facts, please refer to the "Background" section above. After the jury found D1 and D2 guilty of manslaughter on the basis of gross negligence, the judge sentenced D1 and D2 and gave his reasons for sentence.

The judge held that the jury must have been satisfied that D1 and D2 each owed a duty of care to the deceased and that the breach of duty of each of them caused the deceased's death, with such breach being truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

As a result of the breach of duty, the bacterial contamination was not identified and the heavily contaminated blood product was directly infused into the blood stream of the deceased.

Excerpt from the "Reasons for Sentence" on D1's Sentence [para. 46 – 84]

"46. … D1 knew the CIK Therapy was an experimental treatment for cancer and was still unproven … that there was no basis to believe that CIK Therapy would be of benefit to a healthy person; that the deceased … was not given full information in relation to the risks involved in the administration of the CIK Therapy … D1 failed to ensure a properly validated protocol (and SOP) was implemented and used for the preparation of the CIK cells … he failed to ensure sterility tests were conducted on the blood product of Chan Yuen Lam prior to it leaving APSC with proper documentation, and … he failed to have a system requiring the doctor responsible for the infusion to have checked to ensure that sterility test had been performed on the blood product with proper documentation.

49. … I take into account the circumstances of how the DR Group came to launch the CIK Therapy and how the staff of DR Group were told to market the CIK Therapy, which to me, are aggravating features ...

51. … CIK Therapy was used on cancer patients and was still under clinical trial with mixed results. CIK Therapy for cancer patients had not been proven and D1 knew about that …

52. D1 decided to launch CIK Therapy for heathy persons when … the DR Group of companies were not ready to do so …

71. In the face of such clear evidence of how D1, who was in effective control of the DR Group of companies, instigated or allowed such encouragement to the staff to seek out customers, and to impart such misleading information … it is hard to accept the picture painted … that D1 was not a money-hunger individual …

73. … The contents of the notice did not properly inform the customer the benefits and risks involved in CIK Therapy … it is utterly irresponsible and disgraceful for D1 and his group of companies to shirk their responsibilities, and required their gullible and trusting customers, including Chan Yuen Lam, to sign such a disclaimer.

76. … the customers were simply told they would be taken to see a doctor, without being told that the doctors were in fact either employed by, or in co operation with, the DR Group …

77. After decided to launch and market the CIK Therapy when D2 was still experimenting with the CIK processing and the scientists were still doing research, D1 failed to ensure there was properly validated protocol for the processing, he failed to ensure proper sterility test had been conducted … thus causing or allowing the abundant presence of Mycobacterium Abscessus to be undetected and the contaminated blood product was infused directly into the blood stream of Chan Yuen Lam, causing her death. D1's negligence showed a total disregard for the life and safety of Chan Yuen Lam …

79. … what D1 had done and failed to do … were so truly exceptionally bad, and so reprehensible that a long term of imprisonment must be imposed on him to show the disgust and abhorrence felt by the society. I am of the view that a starting point of 12 years is appropriate.

80. … D1 was … a man of clear record. His conviction … may even be a hardship on D1 and his family. D1 will have to face civil claims ... However, I do not find any of the above to be mitigating factors …

83. … I do not detect the slightest hint of remorse from D1 …

84. … D1 is sentenced to 12 years' imprisonment."

Excerpt from the "Reasons for Sentence" on D2's Sentence [para. 85 – 95]

"85. As for D2, the jury must have found him to be the person responsible for the preparation of the CIK blood products ...

88. … the jury might have given D2 the benefit of the doubt … that he might have dispensed with the sterility test on the instruction of D1 …

90. As a result of his failure to ensure there was properly validated protocol; his failure to ensure sterility tests were conducted on the blood product of Chan Yuen Lam before it left APSC; his failure to have a safe system to ensure sterility test was done and documented; his conscious decision not to conduct any sterility test on the blood product of Chan Yuen Lam, including the bacterial test, the heavily contaminated blood product remained undetected and was injected directly into the blood stream of Chan Yuen Lam, causing her death ...

91. D2 must be punished severely to show the shock and disgust felt by the society.

92. As D2 was an employee, his position was not the same as that of D1. ... Further, the benefits to D2 would not be comparable to those to D1, who was the 100% owner of all the limited companies under the DR Group. D2's culpability is therefore not as high as that of D1's. That being the case, I am of the view that a starting point of 10 years is appropriate in the case of D2.

93. … D2 was a man of clear record ... I also appreciate the hardship faced by D2 and his family …

94. … D2 was a hard-working man who was helpful to others … He was also willing to perform volunteer work … he will have to live with the regret of causing the death of Chan Yuen Lam … and he will face civil claims … none of these amount to any mitigating circumstances … – particularly when D2 did not plead guilty …

95. D2 is sentenced to a term of 10 years' imprisonment ..."

I. (2) *HKSAR v Mak Wan Ling* [2019] HKCFA 37 (HKCFA Judgment)

Judgement available from:
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=124944
Summary: set out below

Facts

For the facts, please refer to the "Background" section above. This was an appeal by Dr Mak Wan Ling to the Hong Kong Court of Final Appeal (HKCFA) before her retrial. This appeal stemmed from a ruling by the trial judge in relation to the essential elements of the offence of GNM in determining a preliminary issue. Gross negligence is an element of the offence of GNM. The question involved was whether the prosecution should prove the element of gross negligence in the offence of GNM based on the objective reasonable man test only or whether, in addition to the objective reasonable man test, the prosecution is also required to prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased.

"Objective test" adopted in England and Wales

In the leading English case *R v Adomako* [1995] 1 AC 171, the House of Lords held that whether the defendant's breach of duty should be characterised as "gross negligence" is a question for the jury who, looking at the circumstances, "have to consider whether 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"[7]. Thus, *Adomako* applies an "objective test" for gross negligence by reference to a standard of care.

Dr Mak's arguments in favour of including a subjective test

Dr Mak put forward two arguments in favour of the proposition that, for the offence of GNM, "in addition to the objective reasonable man test, the prosecution is also required to prove that the defendant's subjective state of mind was culpable in that the defendant was subjectively aware of the obvious and serious risk of death to the deceased"[8].

Firstly, Dr Mak argued that the definition of GNM is objectionably "circular" in the sense that the *Adomako* line of authority failed to provide a jury with sufficient guidance as to what constitutes "gross" negligence, leaving the jury to determine whether the negligence in a particular case warrants determination as a crime.

Secondly, Dr Mak argued that it is unacceptable in principle and contrary to authority for the liability for an offence as serious as manslaughter to rest on an objective test, instead of proof of the defendant's awareness of the risk of causing death.

The Court of Final Appeal's Decision

Rejecting Dr Mak's arguments, HKCFA unanimously concluded that "[i]n the offence of manslaughter by gross negligence, the element of gross negligence referred to in the last

[7] *R v Adomako* [1995] 1 AC 171 at 187.
[8] *HKSAR v Mak Wan Ling* [2019] HKCFA 37, paragraph 28.

element of the offence as enunciated in *R v Adomako* [1995] 1 AC 171, is proved by application of the objective standard of reasonableness, there being no additional requirement that the prosecution must also prove that the defendant was subjectively aware of an obvious and serious risk of death to the deceased. Such awareness, if proved, is relevant to liability but not a necessary ingredient of the offence"[9]. The HKCFA thus dismissed Dr Mak's appeal.

I.(2) *HKSAR v Mak Wan Ling* [2020] HKCFI 3069 (Reasons for Sentence)

Reasons for Sentence available from:
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=132426
Summary: set out below

Facts

For the facts, please refer to the "Background" section above. After the retrial, Dr Mak Wan Ling was found guilty of manslaughter on the basis of gross negligence by the jury. The Judge sentenced her and gave his reasons for the sentence.

Reasons for Sentence

The judge was satisfied that the jury must have found the following particulars of Dr Mak's breach of duty of care proved [para. 18 and 20]:

- "failure to ensure bacteria tests had been conducted on the said blood product and that such tests had been documented prior to administering it to ChanYL";
- "administering the CIK Therapy to ChanYL without first having obtained from ChanYL a proper consent by reason of the defendant's failure to inform ChanYL" of the matters set out in paragraph 18 (2(c)(i)-(v)) of the Reasons for Sentence; and
- "failing to give sufficient regard for the fact that the intended use of CIK Therapy on ChanYL ought not to have been carried out in the circumstances".

There are no guideline tariffs for manslaughter cases. The facts of this case are very different from most medical negligence cases, which involve patients seeking medical assistance for an ailment or specific medical condition. The Deceased was a healthy woman of 46 when she agreed to undergo the CIK Therapy.

Excerpt from the "Reasons for Sentence" on Dr Mak's Sentence [para. 46 – 60]

"46. As the defendant failed to properly inform and advise ChanYL of the true nature, effect and risk of CIK Therapy, the so-called consent given by ChanYL did not amount to an "informed consent" ...

50. I appreciate the defendant was not the one who was responsible for launching or marketing such a risky treatment in haste or making a huge profit … nor was she the one who failed to have the processed blood products undergo bacterial tests ... she was a relatively inexperienced doctor who had not even practised medicine as a GP but was practising what she called cosmetic medicine on healthy persons in a beauty clinic setting … she was perhaps in awe of Dr Chow her boss and she may have been operating under a misguided loyalty to her employer. She also placed far too much trust on others and failed to exercise her own judgment independently …

[9] *HKSAR v Mak Wan Ling* [2019] HKCFA 37, paragraph 56.

51. … her failure to ensure that the processed blood products were free of contamination … resulted in the processed blood product heavily contaminated … being infused directly into the blood stream of ChanYL, causing the death of ChanYL.
52. … I am of the view that a starting point of 4 ½ years is appropriate ...
54. … she truly regretted what she had done and what had happened … The defence did not challenge much of the prosecution case … thus saving a lot of time during the trial ...
59. … it would be appropriate for me to give the defendant a reduction of 3 months for saving the court's time in the trial. I will give the defendant a further reduction of 9 months to take into account, mainly, for having this stressful matter over her head for 8 years and for having to face a tougher test of reasonable foreseeability of the risk of death during the retrial, and, to a lesser extent, the personal circumstances of the defendant, including the likelihood of her being disqualified from practising as a doctor and having to face civil claims.
60. … the defendant is sentenced to 3 ½ years' imprisonment."

II. (1) English case: R v Adomako [1995] 1 AC 171 (neutral citation: [1994] UKHL 6)

Judgement available from:
http://www.bailii.org/uk/cases/UKHL/1994/6.html
Summary: set out below

Background

The defendant was the anaesthetist in charge of a patient during an eye operation carried out at a hospital.

An endotracheal tube was inserted to enable the patient to breathe by mechanical means. A disconnection occurred at the endotracheal tube connection during the operation at approximately 11.05 am. The supply of oxygen to the patient ceased leading to cardiac arrest at 11.14 am. The defendant failed to notice or remedy the disconnection during this period. When an alarm sounded on the Dinamap machine, which monitored the patient's blood pressure, the defendant became aware that something was amiss. However, he did not check the integrity of the endotracheal tube connection before the cardiac arrest. As a result, the patient died.

The jury found the defendant guilty of manslaughter on the basis of gross negligence and the defendant was sentenced to 6 months' imprisonment suspended for 12 months. The defendant's appeal was dismissed by the Court of Appeal and he appealed to the House of Lords, which dismissed his appeal. The defendant argued that the judge had wrongly directed the jury.

Judgement (Excerpt)

The House of Lords dismissed the defendant's appeal. Lord Mackay LC set out the elements of the offence of GNM in his judgment [*R v Adomako* [1995] 1 AC 171 at 187-188]:

"… Since the decision in *Andrews* was a decision of your Lordships' House, it remains the most authoritative statement of the present law which I have been able to find and although its relationship to *Reg. v. Seymour* [1983] 2 A.C. 493 is a matter to which I shall have to return, it is a decision which has not been departed from. On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether 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.

It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission …

My Lords, in my view the law as stated in *Reg. v. Seymour* [1983] 2 A.C. 493 should no longer apply since the underlying statutory provisions on which it rested have now been repealed by the Road Traffic Act 1991. It may be that cases of involuntary motor manslaughter will as a result become rare but I consider it unsatisfactory that there should be any exception to the generality of the statement which I have made, since such exception, in my view, gives rise to unnecessary complexity …

I consider it perfectly appropriate that the word "reckless" should be used in cases of involuntary manslaughter, but as Lord Atkin put it "in the ordinary connotation of that word." Examples in which this was done, to my mind, with complete accuracy are *Reg. v. Stone* [1977] Q.B. 354 and *Reg. v. West London Coroner, Ex parte Gray* [1988] Q.B. 467.

In my opinion it is quite unnecessary in the context of gross negligence to give the detailed directions with regard to the meaning of the word "reckless" associated with *Reg. v. Lawrence* [1982] A.C. 510. The decision of the Court of Appeal (Criminal Division) in the other cases with which they were concerned at the same time as they heard the appeal in this case indicates that the circumstances in which involuntary manslaughter has to be considered may make the somewhat elaborate and rather rigid directions inappropriate. I entirely agree with the view that the circumstances to which a charge of involuntary manslaughter may apply are so various that it is unwise to attempt to categorise or detail specimen directions. For my part I would not wish to go beyond the description of the basis in law which I have already given."

The House of Lords dismissed the appeal and concluded as follows [*R v Adomako* [1995] 1 AC 171 at 188-189]:

For these reasons I am of the opinion that this appeal should be dismissed and that the certified question should be answered by saying:

> "In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following *Rex v. Bateman*, 19 Cr.App.R. 8 and *Andrews v. Director of Public Prosecutions* [1937] A.C. 576 and that it is not necessary to refer to the definition of recklessness in *Reg. v. Lawrence* [1982] A.C. 510, although it is perfectly open to the trial judge to use the word 'reckless' in its ordinary meaning as

part of his exposition of the law if he deems it appropriate in the circumstances of the particular case."

…

I have reached the same conclusion on the basic law to be applied in this case as did the Court of Appeal. Personally I would not wish to state the law more elaborately than I have done. In particular I think it is difficult to take expressions used in particular cases out of the context of the cases in which they were used and enunciate them as if applying generally. This can I think lead to ambiguity and perhaps unnecessary complexity. The task of trial judges in setting out for the jury the issues of fact and the relevant law in cases of this class is a difficult and demanding one. I believe that the supreme test that should be satisfied in such directions is that they are comprehensible to an ordinary member of the public who is called to sit on a jury and who has no particular prior acquaintance with the law. To make it obligatory on trial judges to give directions in law which are so elaborate that the ordinary member of the jury will have great difficulty in following them, and even greater difficulty in retaining them in his memory for the purpose of application in the jury room, is no service to the cause of justice. The experienced counsel who assisted your Lordships in this appeal indicated that as a practical matter there was a danger in over elaboration of definition of the word "reckless." While therefore I have said in my view it is perfectly open to a trial judge to use the word "reckless" if it appears appropriate in the circumstances of a particular case as indicating the extent to which a defendant's conduct must deviate from that of a proper standard of care, I do not think it right to require that this should be done and certainly not right that it should incorporate the full detail required in *Lawrence*."

II. (2) English case: *Prentice & Sullman* [1994] QB 302

Judgment available from: Lexis; Westlaw **Summary:** Set out below

Background

Doctor Sullman and Doctor Prentice were convicted of manslaughter on the basis of gross negligence after cytotoxic drugs were erroneously injected into a patient's spine leading to his death.

Doctor Sullman was a houseman and Doctor Prentice was a pre-registration houseman. The patient, Malcom Savage, went to the hospital to have his regular treatment with cytotoxic drugs. Once a month the patient was injected intravenously with vincristine and every other month intrathecally with methotrexate, that is, into his spine. The patient was due for both of these injections.

Prentice was asked by the registrar to get Sullman to supervise him (Prentice) in doing the treatment. Sullman agreed to supervise him. Prentice thought that Sullman was supervising the whole procedure, including the administration of the cytotoxic drugs. However, Sullman thought he was only to supervise the use of the needle to make a lumbar puncture but had no responsibility over the administration of the cytotoxic drugs.

Neither Prentice nor Sullman checked the labels on the box containing the cytotoxic drugs or the labels on the syringes before the two injections were performed by Prentice. As a result, the vincristine was injected wrongly into the spine of the patient with fatal results.

After the injections, an operation was carried out to save the patient's life. The operation was unsuccessful and caused damage to the base of the brain and the spinal cord, which was the immediate cause of death. However, a substantial cause of the patient's death was the wrongful injection of vincristine into the spine.

The prosecution's case against Prentice was that he ought to have known of the dangers involved in the injection of vincristine into the spine, and that he ought to have checked the labels before injecting the drugs either by looking at the labels on the box and/or in addition at those on the syringes when they were handed to him.

The prosecution's case against Sullman was as follows. Firstly, Sullman had a duty to supervise the whole operation and ensure that the right drugs were inserted in the right place, by checking the labels and ensuring that Prentice injected the drugs correctly. Secondly, even if Sullman did not have a duty to supervise the whole operation, he had a duty to intervene when he saw Prentice was preparing to inject the patient without having checked the labels himself.

At trial, the judge directed the jury that the prosecution had to prove four main elements:

1. The defendant had a duty to take care to prevent harm to the patient;
2. Without any sufficient excuse that defendant failed in that duty;
3. That failure caused the patient's death; and

4. In failing his duty, the defendant acted recklessly.
   [Note: it was clarified in subsequent cases that recklessness is not an essential element of the offence of GNM in English law.]

The trial judge related consideration of "any sufficient excuse" to the issue as to whether there was a breach of duty.

The jury found Prentice and Sullman guilty of manslaughter on the basis of gross negligence. They were each sentenced to nine months' imprisonment suspended for 12 months. They appealed to the Court of Appeal (CA).

Summary of Judgment

As discussed above, the trial judge related consideration of "any sufficient excuse" to the issue as to whether there was a breach of duty. The CA noted that:

> "Breach of duty was number 2 in the judge's list of ingredients. Once that point in the judge's list was passed, his directions left little room for a consideration of excuses or mitigating circumstances in deciding whether the necessary *mens rea* for manslaughter was proved." [page 328]

The CA held that the question for the jury should have been whether "they were sure that the failure to ascertain the correct mode of administering the drug and to ensure that only that mode was adopted was grossly negligent to the point of criminality having regard to all the excuses and mitigating circumstances in the case" [page 328].

For Prentice, one of the mitigating circumstances was that having asked for supervision and believing that Sullman was supervising the whole treatment, he was actually handed each of the two syringes in turn by Sullman and administered the drugs under his very eyes. For Sullman, mitigating circumstances include that he believed he was simply required to supervise the insertion of the lumbar puncture needle, and he did not have special experience or knowledge of cytotoxic drugs.

The CA held that, if the directions to the jury had left it open to them to take the mitigating circumstances into account on the specific issue of gross negligence, they may have concluded that the prosecution had failed to establish that essential ingredient.

The CA allowed the appeals from Prentice and Sullman accordingly and quashed their convictions.

On a related note, the appeals from Prentice and Sullman to CA was heard alongside the appeal from Adomako. The CA dismissed Adomako's appeal. Upon Adomako's appeal, the House of Lords gave a landmark judgment, *R v Adomako* [1995] 1 AC 171 above.

II. (3) English case: *R v Misra & Srivastava* [2004] EWCA Crim 2375

Judgement available from:
https://www.bailii.org/ew/cases/EWCA/Crim/2004/2375.html

Summary: Set out below

Background

The patient had a surgery in a hospital to repair his patella tendon and became infected with staphylococcus aureus. His condition remained untreated. The gradual build-up of poison within his body resulted in toxic shock syndrome from which he died. The defendants were senior house officers. They were involved in the post-operative care of the deceased and were charged with manslaughter on the basis of gross negligence.

The particulars of the offence alleged were that the defendants as doctors had owed a duty of care to their patient, and in breach of the duty had failed to make any or adequate diagnosis of the nature of the patient's illness as a severe infection which required aggressive support therapy and antibiotics, and to take steps to ensure appropriate treatment, and that the breach amounted to gross negligence which was a substantial cause of the patient's death.

The prosecution case did not rest on the defendants' failure to diagnose the precise condition, which was rare. Instead, what the prosecution relied upon was the defendants' failure to appreciate that the patient was seriously ill from the persistent signs of infection, despite suggestions from other members of staff that the patient required treatment.

The defendants accepted that they had made mistakes in hindsight but contended that they genuinely had not realised how ill the patient was and had acted in good faith. They further argued that the extent of the mistakes did not justify the conclusion that the negligence was gross.

Both defendants were found guilty by the jury. Each was sentenced to 18 months imprisonment, suspended for two years. The judge certified that "the question of compliance of the crime of "gross negligence manslaughter" with the ECHR [European Convention on Human Rights] is one of some importance" and that the case was fit for appeal accordingly.

Summary of Judgement:

The Court of Appeal (CA) dismissed the appeals. The ingredients of the offence of GNM have been clearly defined. The element of circularity identified does not lead to uncertainty which offends against Article 7, nor if the court may say so, any principle of common law. GNM is not incompatible with the ECHR. The following is an excerpt from the judgement of Mr Lord Justice Judge [para. 52-54]:

> “There will, of course, be numerous occasions when these distinctions are entirely theoretical. From time to time, however, they will be of great significance, not only to the decision whether to prosecute, but also to the risk of conviction of manslaughter. In our judgment, where the issue of risk is engaged, *Adomako* demonstrates, and it is now clearly established, that it relates to the risk of death, and is not sufficiently satisfied by the risk of bodily injury or injury to health. In short, the offence requires gross negligence in circumstances where what is at risk is the life of an individual to whom the defendant owes a duty of care. As such it serves to protect his or her right to life.
>
> *Adomako* further explained that with involuntary manslaughter, …, recklessness … had no application. The use of the word "reckless" by the trial judge, as part of his exposition of the concept of gross negligence in an appropriate case, was permissible. In the single speech agreed by the other members of the House, as we have already indicated, Lord Mackay approved *Stone* … as examples of an acceptable use of the word "reckless" in its ordinary connotation. In *Stone*, Geoffrey Lane LJ described examples of "recklessness", and … that reckless "was an appropriate epithet for the very high degree of negligence required before the defendant could be convicted of manslaughter by gross negligence." Although the word "reckless" might be deployed in summing up to the jury, its use simply reflected one way of describing the ingredients of the offence. At the end of his speech Lord Mackay's language was quite unequivocal… [and the] point of law certified for the decision of the House of Lords was answered: "In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence tests set out by the Court of Appeal in the present case … and that it is not necessary to refer to the definition of recklessness…, although it is perfectly open to the trial judge to use the word 'reckless' in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case."
>
> The result of the appeal was that the continuing existence of the offence of manslaughter by gross negligence was confirmed. The attempt to replace manslaughter by gross negligence with manslaughter by recklessness was rejected.”

As Mr Lord Justice Judge observed, the law of GNM is clear and a hypothetical citizen who seeks to know the legal position could be advised that he would be liable to conviction for manslaughter if, assuming that he owed the deceased a duty of care which he had negligently breached and that death resulted, the jury was satisfied that his negligence was gross on the evidence available.

The jury is not to decide whether the particular accused ought to be convicted of GNM on some legal basis. Rather, the jury is to decide this on a factual basis. The question for the jury is not whether the accused's negligence was gross, and whether additionally it was a crime, but whether his conduct was grossly negligent and, as a result, criminal. The CA found the convictions safe and upheld them. The following excerpt from Mr Lord Justice Judge sets out the reasons [para. 58-66]:

“We can now return to the argument based on circularity and uncertainty, and the application of Articles 6 and 7 of the ECHR. The most important passages in the speech of Lord Mackay on the issue of circularity [in that the jury must consider whether that breach of duty should be characterised as gross negligence and therefore as a crime, depending on the seriousness of the breach of duty committed by the defendant, as well as whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving a risk of death to the patient, was such that it should be judged criminal].

… Looking at the authorities…, the purpose of referring to the differences between civil and criminal liability, …, or in directions to the jury, is to highlight that the burden on the prosecution goes beyond proof of negligence for which compensation would be payable. Negligence of that degree could not lead to a conviction for manslaughter. The negligence must be so bad, "gross", that if all the other ingredients of the offence are proved, then it amounts to a crime and is punishable as such …

Accordingly, the value of references to the criminal law in this context is that they avoid the danger that the jury may equate what we may describe as "simple" negligence, which in relation to manslaughter would not be a crime at all, with negligence which involves a criminal offence. In short, by bringing home to the jury the extent of the burden on the prosecution, they ensure that the defendant whose negligence does not fall within the ambit of the criminal law is not convicted of a crime. They do not alter the essential ingredients of this offence. A conviction cannot be returned if the negligent conduct is or may be less than gross. If however the defendant is found by the jury to have been grossly negligent, then, if the jury is to act in accordance with its duty, he must be convicted. … On proper analysis, therefore, the jury is not deciding whether the particular defendant ought to be convicted on some unprincipled basis. The question for the jury is not whether the defendant's negligence was gross, and whether, *additionally*, it was a crime, but whether his behaviour was grossly negligent and *consequently* criminal. This is not a question of law, but one of fact, for decision in the individual case.

…In our judgment the law is clear. The ingredients of the offence have been clearly defined, and the principles decided in the House of Lords in *Adomako*. They involve no uncertainty. The hypothetical citizen, seeking to know his position, would be advised that, assuming he owed a duty of care to the deceased which he had negligently broken, and that death resulted, he would be liable to conviction for manslaughter if, on the available evidence, the jury was satisfied that his negligence was gross. A doctor would be told that grossly negligent treatment of a patient which exposed him or her to the risk of death, and caused it, would constitute manslaughter.

…the House of Lords in *Adomako* clarified the relevant principles and the ingredients of this offence. Although, to a limited extent, Lord Mackay accepted that there was an element of circularity in the process by which the jury would arrive at its verdict, the

element of circularity which he identified did not then and does not now result in uncertainty which offends against Article 7, nor if we may say so, any principle of common law. Gross negligence manslaughter is not incompatible with the European Convention on Human Rights. Accordingly the appeal arising from the question certified by the trial judge must be dismissed.

This conclusion in effect disposes of the Article 6 argument. It is well-understood in the European Court, and accepted, that a jury is not required to give reasons for its decision… In the present case, by reference to the indictment in its amended form, and the summing up of the trial judge delivered in open court, the appellants knew the case alleged against each of them, and the issues that the jury had to consider, and we, by reference to the same documents, can examine the basis on which they were convicted. The jury concluded that the conduct of each appellant in the course of performing his professional obligations to his patient was "truly exceptionally bad", and showed a high degree of indifference to an obvious and serious risk to the patient's life. Accordingly, along with the other ingredients of the offence, gross negligence too, was proved. In our judgment it is unrealistic to suggest that the basis for the jury's decision cannot readily be understood. Accordingly this contention fails."

II. (4) English case: *R v Sellu (David)* [2016] EWCA Crim 1716[10]

Judgement available from:
https://www.bailii.org/ew/cases/EWCA/Crim/2016/1716.html

Source of Summary (Stewart Duffy): please visit https://www.rlb-law.com/ and search "David Sellu" to access the summary

II. (5) English case: *R v Rose* [2017] EWCA Crim 1168[11]

Judgement available from:
https://www.iclr.co.uk/document/2016099122/transcriptXml_2016099122_20180706114550 22/html

Source of Summary (UK Law Society Gazette): please visit https://www.lawgazette.co.uk/ and search "*R v Rose*" to access the summary

[10] The Defendant was convicted of GNM by a jury in the Central Criminal Court and was sentenced to 2.5 years' imprisonment. On appeal, the Defendant's conviction was quashed by the Court of Appeal.

[11] The Defendant was convicted of GNM by a jury in the Crown Court at Ipswich and was sentenced to a term of 2 years' imprisonment, suspended for 2 years, with a supervision order and unpaid work requirement of 200 hours. On appeal, the Defendant's conviction was quashed by the Court of Appeal.

II. (6) *Hadiza Bawa-Garba v The General Medical Council and Others* [2018] EWCA Civ 1879

Judgement available from:
https://www.judiciary.uk/wp-content/uploads/2018/08/bawa-garba-v-gmc-final-judgment-1.pdf

Source of Summary copied below (UK Judicial Office)[12]:
https://www.judiciary.uk/wp-content/uploads/2018/08/bawa-garba-media-statement-final-1.pdf

Background

"This appeal considers the circumstances in which a doctor, convicted of manslaughter by gross negligence, should be erased from the Medical Register of licensed medical practitioners.

Dr Bawa-Garba is a junior doctor specialising in paediatrics. In February 2011 she had recently returned to practice as a Registrar at the Leicester Royal Infirmary Hospital ("the Hospital") after 14 months of maternity leave. She was employed in the Children's Assessment Unit of the hospital ("the Unit"). That was an admissions unit of 15 beds which would receive patients from Accident and Emergency or from direct referrals by a GP. Its purpose was to assess, diagnose and (if appropriate) then treat children, or to admit them onto a ward or to the Paediatric Intensive Care Unit as necessary. The case concerns Dr Bawa-Garba's care and treatment of Jack Adcock.

In February 2011 Jack was six years of age. He had been diagnosed from birth with Downs Syndrome. He was also born with a "hole in the heart", which required surgery. As a result, he required long-term medication, and he was more susceptible to coughs, colds and resulting breathlessness. In the past Jack had required antibiotics for throat and chest infections, including one hospital admission for pneumonia. On Friday 18 February 2011, after having been very unwell, he was admitted to the Unit. Dr Bawa-Garba was the most senior junior doctor on duty. Jack was initially treated for acute gastro-enteritis and dehydration. After an x-ray he was subsequently treated for pneumonia with antibiotics. In fact, when Jack was admitted to hospital, he was suffering from pneumonia which caused his body to go into septic shock. The sepsis resulted in organ failure and caused his heart to fail. Despite efforts to resuscitate him Jack died.

[12] Judicial Office of the United Kingdom. "Media Summary *Bawa-Garba* (Appellant) *v General Medical Council* (Respondent) [2018] EWCA Civ 1879". 13 August 2018. https://www.judiciary.uk/wp-content/uploads/2018/08/bawa-garba-media-statement-final-1.pdf. Attribution statement: Contains public sector information licensed under the Open Government Licence v3.0: http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/

The members of the Court express their deep sympathy with Jack's parents, who attended the hearing in person, as well as respect for the dignified and resolute way in which they have coped with a terrible loss in traumatic circumstances.

Dr Bawa-Garba and also a nurse on duty at that time were subsequently convicted at Nottingham Crown Court on 4 November 2015 of gross negligence manslaughter. On the basis of the legal test for that offence, the jury found their conduct to be "truly exceptionally bad". They were each sentenced to a term of two years' imprisonment, suspended for two years.

On 20 February 2017 a Medical Practitioners Tribunal ("the Tribunal") was convened to determine whether, on the basis of Dr Bawa-Garba's conviction, her fitness to practise was impaired. The Tribunal comprised three members, assisted by a legal assessor. There were two lay members, one of whom chaired the Tribunal and was legally qualified, and a medical practitioner member. The Tribunal concluded that Dr Bawa-Garba's fitness to practise was impaired. After a subsequent hearing in June 2017 the Tribunal issued its decision imposing the sanction of immediate suspension for a period of 12 months. The suspension was subject to review before the period of suspension expired in case there remained an issue as to Dr Bawa-Garba's fitness to practise. The Tribunal rejected as a disproportionate sanction the erasure of Dr Bawa-Garba's name from the Medical Register.

The General Medical Council appealed the Tribunal's sanction to the Divisional Court of the Queen's Bench Division of the High Court. The Divisional Court held that the Tribunal's decision was not consistent with, and did not respect, the verdict of the jury that Dr Bawa-Garba's conduct was "truly exceptionally bad". The Divisional Court considered that the Tribunal had been wrong to take into account that there were systemic failings of the Hospital and that Dr Bawa-Garba shared with others the responsibility for failings in the care and treatment of Jack. The Divisional Court concluded that, in view of the decision of the jury as to Dr Bawa-Garba's personal culpability, the Tribunal was wrong to think that public confidence in the profession could be maintained by any sanction short of erasure from the Medical Register. The Divisional Court, therefore, quashed the order of suspension of the Tribunal and substituted an order of erasure."[13]

Summary of Judgement

"The Court of Appeal unanimously allows the appeal. It holds that the Divisional Court was wrong to interfere with the decision of the Tribunal. The Court of Appeal sets aside the order of the Divisional Court that Dr Bawa-Garba should be erased from the Medical Register and restores the order of the Tribunal that she be suspended from practice for 12 months subject to review."[14]

[13] Same as above.
[14] Same as above.

"The decision of the Tribunal that suspension rather than erasure was an appropriate sanction for the failings of Dr Bawa-Garba, which led to her conviction for gross negligence manslaughter, was not a decision of fact or law but an evaluative decision based on many factors. It is the type of decision which has been described as a kind of jury question about which reasonable people may reasonably disagree. An appeal court should generally be cautious before interfering with such an evaluative decision. That caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal. An appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, in the sense that it was a decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide [60-67]. Neither of those grounds applies in the present case.

The Tribunal did not reduce the level of Dr Bawa-Garba's culpability below that which had been found by the jury and established by her conviction, namely that her failings in her care and treatment of Jack were "truly exceptionally bad", by taking into account evidence of systemic failings of the Hospital and the failings of others [70-71 and 74]. First, as Mr Justice Nicol said in his sentencing remarks at the criminal trial, there was a limit to how far systemic failings of the Hospital and the failings of others could be explored in the trial [74-75], the focus of which was on the personal actions of Dr Bawa-Garba and their contribution to Jack's death. Second, the criminal court and the Tribunal were different bodies, with different functions, addressing different questions and at different times. The jury was concerned with Dr Bawa-Garba's guilt or absence of guilt having regard to her personal past conduct. The task of the Tribunal, looking to the future, was to decide what sanction would most appropriately meet the overriding objective of protecting the public [76]. Third, there are different degrees of culpability which are capable of satisfying the requirement of gross or severe negligence for a conviction of gross negligence manslaughter. That is reflected in the range of penal sentences that are available, depending on the particular facts of the case. The sentence imposed by Mr Justice Nicol at the criminal trial was at the lightest end of the sentencing range for the offence. In passing that sentence he took into account the systemic failings of the Hospital and the failings of others, who shared a responsibility with Dr Bawa-Garba for the care and treatment of Jack. They included that the Unit was a busy ward which could not limit its intake; the communication of Jack's blood results was delayed because the Hospital's 'I Lab' computer system was not working that day; there was not a consultant on the Unit the whole time; and the nurse assigned to the care of Jack while on duty was herself guilty of gross negligence manslaughter as a result of her failings. Other multiple systemic failures were identified in the Hospital investigation following the events of 18 February 2011. The Tribunal was just as entitled, as Mr Justice Nicol had been in determining Dr Bawa-Garba's sentence, to take into account, in determining the appropriate sanction, systemic failings on the part of the Hospital, as well as matters of personal mitigation [77]. Fourth, it follows that the Tribunal was not disrespecting the jury's verdict. Rather, it was conducting an evaluative exercise to determine what sanction was most appropriate to protect the public in all the circumstances [78]. The Tribunal made no error of principle.

Undoubtedly, there are some cases where the facts are such that the most severe sanction, erasure from the Medical Register, is the only proper and reasonable sanction. This is not one of them. Once it is understood that it was permissible for the Tribunal to take into account the full context of Jack's death, including the range of persons bearing responsibility for that tragedy and the systemic failings of the Hospital, as well as the other matters relied upon by Dr Bawa-Garba, and that the Tribunal plainly had in mind its overriding obligation to protect the public for the future, it is impossible to say that the suspension sanction imposed by the Tribunal was not one properly open to it and that the only sanction properly and reasonably available was erasure. Contrary to the approach taken by the Divisional Court, there is no presumption of erasure in the case of serious harm [88-90]. The appropriate sanction will always depend upon the precise circumstances of the particular case.

The present case is unusual. No concerns have ever been raised about the clinical competence of Dr Bawa-Garba, other than in relation to Jack's death, even though she continued to be employed at the Hospital until her conviction. The evidence before the Tribunal was that she was in the top third of her Specialist Trainee cohort. The Tribunal was satisfied that her deficient actions in relation to Jack were neither deliberate nor reckless, that she had remedied the deficiencies in her clinical skills and did not present a continuing risk to patients, and that the risk of her clinical practice suddenly and without explanation falling below the standards expected on any given day was no higher than for any other reasonably competent doctor [92].

The Tribunal was an expert body entitled to reach all those conclusions, including the important factor weighing in favour of Dr Bawa-Garba that she is a competent and useful doctor, who presents no material continuing danger to the public, and can provide considerable useful future service to society [93].

In those circumstances, the Court of Appeal allows the appeal, sets aside the decision of the Divisional Court, restores the decision of the Tribunal and remits the matter to the Medical Practitioners Tribunal Service for review of Dr Bawa-Garba's suspension [98]."[15]

[15] Same as above.

III. Optional References

(1) The Crown Prosecution Service, Government of the United Kingdom. “Gross Negligence Manslaughter”. *The Crown Prosecution Service Legal Guidance* (2019). https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter

(2) Prosecution Divisions, Department of Justice, The Government of the Hong Kong Special Administrative Region. “Summary of Judicial Decision: HKSAR v Mak Wan Ling (D3) (“the Appellant”) FACC No.3 of 2019; [2019] HKCFA 37”. (2020). https://www.doj.gov.hk/en/notable_judgments/pdf/FACC_3_2019e.pdf

(3) Derrick KS Au. “Somewhere between no-blame culture and treating medical errors as crimes”. *Hong Kong Medical Journal* (2018) 24:330–2. https://www.hkmj.org/abstracts/v24n4/330.htm

(4) Gilberto KK Leung. “Medical manslaughter in Hong Kong—how, why, and why not”. *Hong Kong Medical Journal* (2018) 24:384–90. https://www.hkmj.org/abstracts/v24n4/384.htm

(5) Margaret Brazier. "Wilfred Fish Lecture". *British Dental Journal* (2002) 193:193–197. https://www.nature.com/articles/4801521.pdf

(6) Philip SL Beh. “Medical manslaughter”. *Hong Kong Medical Journal* (2018) 24:333–4. https://www.hkmj.org/abstracts/v24n4/333.htm

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