Case Note and Comment

Suresh Gupta v. Government of NCT, Delhi, (2004) 6 S.C.C. 422.

Aparna Chandra*

Reviewing the decision of the Supreme Court of India in Suresh Gupta v. Government of NCT, Delhi (2004), this case note looks at issues regarding criminal liability for medical negligence that arose in the said case, the decision of the Court and a jurisprudential analysis thereof. The case note suggests that, while the judgement follows well-established precedents in coming to the conclusion that the standard of negligence for attributing criminal liability is that of gross negligence, there are certain conceptual fallacies in the reasoning of the court that need further discussion.

I. BACKGROUND TO THE CASE

The law relating to medical negligence is one area of interface between the medical and legal fraternities that evokes passionate responses from both sides of the divide and renders judicial pronouncements on this point highly controversial. The recent decision by the Supreme Court in *Suresh Gupta* v. *Govt. of NCT, Delhi*,[1] was no exception. Generating widespread interest, it was hailed by the media as a landmark judgment, finally laying down the correct position of law with respect to criminal liability for medical negligence.[2] On closer scrutiny, however, it can be seen that this

* Vth Year, B.A. LL.B (Hons.) Student, National Law School of India University, Bangalore.

1 (2004) 6 S.C.C. 422 [hereinafter *Suresh Gupta*].

2 *See* K. Mohan Panikker & Somishta Chowdhury, *Suresh Gupta v. Government of Delhi, available at* http://www.legal500.com/devs/in/pc/inpc_002.htm (last visited July 3, 2005); *Supreme Court Refers 'Medical Negligence' Case to Higher Bench*, THE HINDU,

case was a mere re-affirmation of the law on medical negligence in criminal law as expounded by existing precedents.

This note seeks to examine the issues that arose in *Suresh Gupta*, and how they were dealt with by the Supreme Court. For this purpose, the note first traces the history of the case, including the facts and the manner in which it was dealt with by the lower courts. Subsequently, the decision of the Supreme Court is analysed in detail, in light of the facts, precedents, and the jurisprudence surrounding the concept of criminal liability for negligence.

It would be instructive to briefly discuss the facts of the case before delving into the legal issues that arose therein. The appellant, Dr. Suresh Gupta, was a Plastic Surgeon by profession. It was alleged that he made a wrong incision while performing a minor procedure on the nasal cavity of the deceased. This led to blood entering the respiratory canal, causing the death of the patient.[3] Consequently, criminal proceedings under Section 304A of the Indian Penal Code, 1860 ("IPC"), for causing death by negligence, were launched against Dr. Gupta. In deciding to proceed with the trial, the Magistrate took into account various facts. He reasoned that the deceased was a young man of 38 years, who had no previous history of cardiac problems. Further, the post-mortem report categorically pinpointed complications arising out of the operation conducted by the accused as having caused the death of the victim. The operation was a minor procedure, and it was only due to the negligence of the doctors that a wrong incision was made, as a result of which blood seeped into the respiratory passage, causing the patient to collapse and die. Also, it was clear from the record that the patient had died at the clinic of the accused. Based on a combined consideration of these facts, the Magistrate concluded that there were sufficient grounds on record to make out a *prima facie* case against the accused.

The appellant then approached the High Court of Punjab & Haryana under Section 482 of the Code of Criminal Procedure, 1973, for quashing the criminal proceedings. The High Court refused to do so, on the grounds that the post mortem report was categorical in stating that the death was due to the incision by the accused. This made

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Sept. 10, 2004, *available at* http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2004091002641200.htm&date=2004/09/10/&prd=th& (last visited July 3, 2005) [hereinafter *Supreme Court Refers 'Medical Negligence' Case*]; *Doctor not liable if patient dies due to error: SC*, TIMES OF INDIA, Aug. 5, 2004, *available at* http://timesofindia.indiatimes.com/articleshow/803998.cms (last visited July 3, 2005); *Doctors' error of judgement not criminal: SC*, TIMES OF INDIA, Aug. 6, 2004, *available at* http://timesofindia.indiatimes.com/articleshow/804728.cms (last visited July 3, 2005); O.P. Verma, *Doctors heave a sigh of relief*, DECCAN HERALD, Aug. 15, 2004, *available at* http://www.deccanherald.com/deccanherald/aug152004/sl1.asp (last visited July 3, 2005).

[3] *Suresh Gupta*, (2004) 6 S.C.C. at 424.

out a case for the trial to proceed. If the accused wanted to put up a defence, he could do so at the trial stage. Hence, the Magistrate was directed to proceed with the case.[4]

II. DECISION OF THE SUPREME COURT

It was against this decision that the appellant approached the Supreme Court, by way of a Special Leave Petition under Art. 136 of the Constitution. Relying on the post-mortem report and the opinion of the three medical experts of the Special Medical Board constituted to look into this matter, the case of the prosecution was that there was negligence in 'not putting a cuffed endo-tracheal tube of proper size' in the nasal cavity, in a manner so as to prevent asphyxiation.[5] The Supreme Court held that even if this was the cause of death, this might attract tortious liability, but would not be sufficient to impose criminal liability on the doctor.

In arriving at its decision in this case, the court looked at three issues, (i) the standard of negligence required for imposing criminal liability, (ii) the impact of imposition of criminal liability for negligence, upon the medical profession and (iii) criminalisation and moral blameworthiness. Each of these issues is analysed separately in this note.

A. STANDARD OF NEGLIGENCE FOR IMPOSITION OF CRIMINAL LIABILITY

This section begins with an examination of the principle propounded by the Supreme Court in this case as regards the standard of negligence required for imposition of criminal liability. This is followed by an analysis of the decision in light of precedents.

The Court affixed the standard of negligence required for holding a doctor or surgeon criminally liable for his negligent act, as negligence to such an extent as to be termed "gross" negligence or recklessness. Mere lack of necessary care, attention and skill would not make the doctor criminally liable.[6] The rationale for this position was explained by reference to the decision of the U.K.'s House of Lords in *R.* v. *Adomako,*[7] where it was held that a doctor cannot be held criminally responsible for a patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State.

The Court therefore, concluded that a careless act of a doctor can be termed criminal only when he exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from an error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not

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4 *Suresh Gupta, id.* at 425.

5 *Suresh Gupta, id.* at 429.

6 *Suresh Gupta, id.*

7 [1994] 2 All E.R. 79.

suffice to hold the doctor criminally liable.[8] Therefore the act complained against the doctor must show negligence or rashness of such a high degree as to indicate a mental state which can be described as totally apathetic towards the patient.[9]

It is clear that the Court was following well established precedent, though it chose to refer only to *R.* v. *Adomako.*[10] Essentially, controversy regarding an appropriate 'standard' of negligence stems from the more fundamental issue of whether negligence should be culpable at all, and if so, in what circumstances. Let me therefore begin by examining the concept of negligence itself. Negligence is the failure to conform to that standard of care which it is the defendant's duty to conform to, or the failure to behave like a reasonable or prudent person, in circumstances where the law requires such reasonable behaviour.[11] It has been argued time and again by theorists[12] that since negligence connotes a careless state of mind, it should not be culpable at all, as there is no *mens rea* involved. Since the elements of voluntariness, intention, knowledge or foresight are absent from negligence, the same should not be brought under the ambit of criminal law. Doing this would amount to bringing negligence under strict or absolute liability which seems manifestly unfair. However, as H.L.A. Hart argues, the notion of *mens* should be extended beyond the 'cognitive' element of knowledge or foresight, so as to include the capacities and powers of normal persons to think about and control their conduct. Negligence should therefore be included in *mens rea* because it is essentially a failure to exercise such capacities.[13] Further, the doctrine of *magna culpa dolus est* (great negligence is equal to intention), can be applied to the issue of criminal liability for medical negligence. According to this doctrine, when the degree of negligence is gross, it raises the presumption that the act was intended. The degree of carelessness is measured by the imminence of the threatened mischief – the greater and more imminent the mischief, the more probable it is that the mischief was intended. Intent in such cases, though not actual, is implied. Keeping in mind the presumption against strict liability in criminal statutes, if the alleged negligence is lower than gross negligence, there can be no *mens rea* to the crime and hence, such negligence cannot be criminalised, though it might attract civil penalty.

It is now settled law, both in England and in India, that the degree of negligence required to affix criminal liability is that of gross negligence.[14] Therefore, as early as in

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[8] *Suresh Gupta*, (2004) 6 S.C.C. at 429.

[9] *Suresh Gupta, id.* at 430.

[10] [1994] 2 All E.R. 79.

[11] GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 88 (1999).

[12] Andrew P. Simester, *Can Negligence be Culpable? in* OXFORD ESSAYS IN JURISPRUDENCE (Jeremy Horder ed., 1999) at 86-87.

[13] H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility, in* OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed., 1961) at 33.

[14] Empress v. Indu Beg, I.L.R. 3 All. 776.

1925, in *R.* v. *Bateman*,[15] it was held that the facts must be such that the negligence of the accused went beyond a mere matter of compensation between subjects and showed "such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment"[16] for negligence to go beyond civil penalty and attract criminal liability. This decision has been followed by Indian Courts. In *S.N. Hussain* v. *State of Andhra Pradesh*,[17] the Court ruled that in criminal cases, the amount and degree of negligence are the determining factors and that there must be *mens rea* in criminal negligence as well. In order to establish this, the facts must show such disregard for the life and safety of others, as to amount to a crime. The trend has been fairly consistent[18] and therefore, the *Suresh Gupta* court was merely following the well-settled law with respect to criminal liability for negligence.

A related issue that comes up for consideration is whether errors of judgement by doctors can amount to negligence at all. This question, though not addressed by the Court in *Suresh Gupta*, would have helped to further clarify the issues in this case. The point came up for discussion in *Whitehouse* v. *Jordon*,[19] where it was held that the 'nature' of the error determines whether an error of judgment amounts to negligence. If the error would not have been committed by a reasonably competent professional man professing to possess the standard and type of skill which the defendant holds himself out as having, and acting with ordinary care, then it would amount to negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it would not amount to negligence. In *Suresh Gupta*, for example, if the Court had found that a reasonably competent doctor would not have erred in making the incision, the Appellant would rightly have been guilty of criminal negligence. Had the Court looked into this issue, the question of gross negligence would not have arisen at all.

Another problem with this judgment is that the Court has used the terms "negligence" and "recklessness" interchangeably.[20] The difference between the two is well

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[15] [1925] All E.R. Rep. 45.

[16] *Id.* at 49.

[17] A.I.R. 1972 S.C. 685.

[18] *See* P.N. Desouza v. Emperor, A.I.R. 1920 All. 32; Jugganklhan v. State of Madhya Pradesh, A.I.R. 1965 S.C. 831; Bhalachandra Waman Pathe v. State of Maharashtra, A.I.R. 1968 S.C. 1319; P.N. Rao v. G. Jayaprakasu, A.I.R. 1990 A.P. 207; Ram Niwas v. State of UP, 1998 Cri. L.J. 635 (All.); Rakesh Narayan Gupta v. State of Uttar Pradesh, (1999) 1 S.C.C. 188.

[19] [1981] 1 All E.R. 281.

[20] The Court stated that an act of a doctor can be criminal "only when the medical man exhibits a gross lack of competence or inaction and *wanton indifference* to his patient's safety and which is found to have arisen from gross ignorance or *gross negligence...*" (emphasis supplied) *see Suresh Gupta,* (2004) 6 S.C.C. at 429. However, wanton indifference defines rashness and cannot arise from gross negligence. Further, the Court held that:

established. Recklessness connotes rashness. Criminal rashness implies hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without the intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of carrying out such an act recklessly or being indifferent as to its consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused to have adopted.[21] Section 304-A criminalises both rashness and negligence. However, the two are separate concepts and this confusion in the judgment in *Suresh Gupta* is unfortunate. While the purport of the judgement is clear, the language used can create confusion in interpretation. In the case at hand, the act concerned would amount to recklessness if the accused had known what the consequences of his act would be and he had gone ahead with making the incision. The same act would amount to negligence if in making the incision he did not take that amount of care that a reasonable man in the same circumstances would have.

B. Impact of Imposition of Criminal Liability in cases of Medical Negligence

In *Suresh Gupta*, the Court also invoked a policy-based justification for the restriction of criminal liability for medical negligence to cases of gross negligence. It stated that such restriction was necessary to ensure that medical professionals are not unreasonably exposed to criminal liability and the threat of a prison sentence. Criminal charges should not be brought against doctors for every mishap or death that occurs under their care. To do so in the absence of adequate medical opinion pointing to their guilt would be a great disservice to the community at large. If courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more concerned about their own liability rather than giving the best treatment to their patients. This would lead to shaking the relationship of mutual trust and confidence between the doctor and patient. Therefore, the Court concluded that not every medical mishap or misfortune under the care of a doctor amounts to a gross act of negligence on the basis of which he can be charged with culpable negligence.[22]

> Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the *degree of carelessness and negligence* alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof (sic) *recklessness and deliberate wrong doing* i.e. *a higher degree of morally blameworthy conduct.*

(emphasis applied), *see id.* at 430. Here again the court speaks of degrees of negligence in terms of recklessness.

[21] Bhalachandra Waman Pathe v. State of Maharashtra, A.I.R. 1968 S.C. 1319.

[22] *Suresh Gupta*, (2004) 6 S.C.C. at 429.

This rationale of preventing the development of defensive medical practices, by carefully treading the line between what amounts to gross negligence and what does not, has found support in several landmark common law decisions, including in *Roe* v. *Ministry of Health*,[23] and *Bolam* v. *Friern Hospital Committee*.[24] In these cases, the Courts have cautioned against the potential dangers of increasing conviction of doctors by pointing out that doctors would then be led to think more of their safety than of the good of their patients. Further, in the opinion of the courts in these cases, it would be wrong to condemn as medical negligence that which was only a misadventure.

While, this ruling in *Suresh Gupta* makes practical sense, there are two problems with this reasoning. Firstly, in *Suresh Gupta*, the Court is merely referring to convictions under the IPC. There is nothing to suggest that if there were no criminal liability, only civil liability, this would prevent doctors from practicing "defensive medicine". Therefore, such reasoning cannot be the basis for determining the degree of negligence required in criminal cases. Secondly, the standard of negligence under Section 304A, IPC, is the same for all types of negligence[25] and this section is not limited merely to cases of medical negligence. It is illogical therefore, to base the standard of negligence under this section on an analysis only of cases of medical negligence.

C. CRIMINALISATION AND MORAL BLAMEWORTHINESS

The Supreme Court, in *Suresh Gupta*, was of the opinion that for the conviction of a doctor on charges of criminal negligence, there should be deliberate wrongdoing, implying a higher degree of morally blameworthy conduct. Quoting from *Errors, Medicine and the Law*,[26] the Court stated that since criminal punishment carries substantial moral overtones, conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrong doing are normally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs; otherwise, it distorts tolerant and constructive relations between people.[27]

This analysis regarding criminalization is pertinent in examining the impact of increased litigation in the area of medical negligence. This phenomenon has distorted doctor-patient relationships, forcing both parties to view each other with distrust. The interplay between criminal law and morality was clearly elucidated by Sir James

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[23] [1954] 2 All E.R. 131.

[24] [1957] 2 All E.R. 118.

[25] *E.g.*, negligence while driving, etc.

[26] MCCALL SMITH & MERRY, ERRORS, MEDICINE AND THE LAW 247-248 (2001).

[27] *Suresh Gupta*, (2004) 6 S.C.C. at 430.

FitzJames Stephen, when he said that "... .the infliction of punishment by law gives definite expression and solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral and popular sanction of morality which is also sanctioned by criminal law".[28] Therefore, it becomes very important to determine whether the act to be subjected to punishment deserves such moral condemnation. Otherwise, not only will it distort relations between people, it will also dilute the impact of criminal law itself, as its moral legitimacy is taken away. Therefore, the court rightly insisted on an element of deliberate wrong-doing to convict a person under Section 304A. Such a requirement can be fulfilled by application of the doctrine of *magna culpa dolus est,* as discussed above.

One other issue that arises from this case is that the Appellant sought to argue that Sections 80[29] and 88[30] of the IPC would apply in the instant case.[31] The Court did not rule upon this point. Such arguments are of doubtful validity. Section 80 applies only where proper care and caution have been taken and is therefore inapplicable to cases of negligence. Section 88 can only apply where there is risk involved even where the procedure has been properly performed and that outcome is a harm relating to that risk. This follows from the fact that the consent that the section speaks of can only be to a risk inherent in the procedure itself.

III. CONCLUSION

In conclusion, the case of *Suresh Gupta*, while being lauded as a landmark and path-breaking decision, was merely one in a series of cases where the same principle has been reiterated. In essence, this case holds that the standard of negligence needed for attracting criminal liability is that of gross negligence. Therefore the negligence should be of such a magnitude as to no longer remain a matter of mere compensation but become something that society as a whole has an interest in. It should be of such a nature as to allow an inference of intention and deliberation. Hence, this reasoning

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[28] PSA PILLAI, CRIMINAL LAW 4 (1999).

[29] INDIA PEN. CODE, 1860, § 80: "Accident in doing a lawful act - Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

[30] INDIA PEN. CODE, 1860, § 88:

> Act not intended to cause death, done by consent in good faith for person's benefit. Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

[31] *Suresh Gupta,* (2004) 6 S.C.C. at 428.

provides for there to be *mens rea* in negligence as well. This also follows from the Roman doctrine of *magna culpa doles est.* While there is a certain amount of conceptual confusion in the case, regarding the concepts of recklessness and negligence that have been used somewhat interchangeably, the purport of the judgment is clear, and it has played an important role in publicising the position of law with respect to criminal liability for medical negligence. This, it is hoped, will serve to prevent the tendency of doctors to indulge in defensive medical practices in order to shield themselves against future litigation. The issue of what constitutes medical negligence under criminal law is now before a higher bench,[32] and it is hoped that the Supreme Court will again endorse the *ratio* of *Suresh Gupta.*

EDITORS' NOTE: The ratio in *Suresh Gupta* has in fact been upheld by a larger bench of the Supreme Court in a recent decision.

[32] *Supreme Court Refers 'Medical Negligence' Case, supra* note 2.