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## Laws Governing Manslaughter by Food Safety Crimes in the United Kingdom, Australia, Bangladesh and India: a Critical Review

S M. Solaiman

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# **Laws Governing Manslaughter by Food Safety Crimes in the United Kingdom, Australia, Bangladesh and India: a Critical Review**

*S M Solaiman<sup>†</sup>*

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### ABSTRACT

Food safety has been a critical concern worldwide. The World Health Organization finds that harmful food causes more than 200 diseases, contributing to the death of 420,000 people globally every year. Nevertheless, prosecution for manslaughter by unsafe food remains largely unfamiliar. Recently, two English cases have set examples of such prosecutions, providing useful guidance for common law jurisdictions. Following a comparative method, this article analyzes the existing laws governing criminally negligent manslaughter in England, Australia, Bangladesh and India and examines their applicability to deaths caused by food. It finds that although there is a notable similarity between the laws of England and Australia, the statutory laws of Bangladesh and India have significant deficiencies, which can potentially be remedied through the incorporation of common law principles. This article provides specific recommendations based on its findings aimed at preventing food offenses through the adoption of a deterrence-based approach. As such, the recommendations can also benefit other common law countries.

Keywords: Unsafe food, manslaughter, England, Australia, Bangladesh, India

## I. Introduction

Food safety is indispensable for everyone living anywhere in the world, simply because food<sup>1</sup> is naturally a primary need of all life in order to survive. The World Health Organization (“WHO”) underscores that “certainly everyone has to die of something, but death does not need to be slow, painful, or premature”—especially as a result of consuming unsafe foods.<sup>2</sup> Adulterated or unsafe foods can kill consumers instantly or slowly, in most instances without being able to diagnose the true cause of one’s early demise—especially in developing countries. As consumers, we are mostly reliant on others to produce, manufacture, supply, or prepare food for us; however, we are generally unable to guard against illicit activities surrounding our meals from farm to fork in real life. Usually, profit-driven businesses (and sometimes greedy farmers) knowingly, unknowingly, or negligently transform our food from lifesaver to killer through contamination,<sup>3</sup> contributing to immediate death or causing incurable diseases leading to potential death or enduring impairment. To cater to the taste of contemporary eaters, even the most natural of foods such as grapes have been an object of engineering design, which accords to the fact that the “modern diet is killing us.”<sup>4</sup> Killing people by *food frauds*<sup>5</sup> is now recognized as a serious crime of homicide,<sup>6</sup> known as gross

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\* I am grateful to Dr Mathew Leighton-Daly, School of Law, University of Wollongong, Australia, for his helpful comments on an earlier draft of this article.

<sup>1</sup> The word “food,” as used in this article, is inclusive of all food, drinks, beverages, fruits, etc.

<sup>2</sup> World Health Organization, *Preventing Chronic Diseases: A Vital Investment*, WHO 1, 9 (2005), [https://www.who.int/chp/chronic\\_disease\\_report/contents/foreword.pdf?ua=1](https://www.who.int/chp/chronic_disease_report/contents/foreword.pdf?ua=1) [<https://perma.cc/9DMR-B2WN>].

<sup>3</sup> Though technically different, “adulteration” and “contamination” are used interchangeably in this article.

<sup>4</sup> Bee Wilson, *Good Enough to Eat? The Toxic Truth about Modern Food*, THE GUARDIAN (Mar. 16, 2019), <https://www.theguardian.com/books/2019/mar/16/snack-attacks-the-toxic-truth-about-the-way-we-eat> [<https://perma.cc/SD6E-ZV6W>].

<sup>5</sup> No single legal definition of food frauds exists. See Aline Wisniewski & Anja Buschulte, *Dealing with Food Fraud: Part 1*, 14 EUR. FOOD & FEED L. REV. 6, 6 (2019). However, “food frauds,” for the purposes of this article, include all sorts of willful or negligent biological, physical, chemical adulteration and contamination or mislabeling of foods, drinks and beverage for increasing financial benefit, not intending to cause injury or death of anyone.

<sup>6</sup> See, e.g., R v. Zaman [2017] EWCA (Crim) 1783 (UK); Kuddus v. R [2019] EWCA (Crim) 837 (UK).

negligence manslaughter or manslaughter by criminal negligence (“MCN”). We may also call it “food manslaughter” or manslaughter by unsafe food. Noting the seriousness of manslaughter caused by unsafe food, Lord Hickinbottom observed in the first ever British conviction of food manslaughter of a restaurateur in *R v. Zaman* that the trader’s behavior, “driven by money, was appalling.”<sup>7</sup>

The food industry is growing rapidly across the globe,<sup>8</sup> and, correspondingly, human food has been a greater cause of disease and death around the world compared to the harm inflicted by tobacco or alcohol.<sup>9</sup> Alarming, WHO finds that unsafe food containing harmful elements such as bacteria, viruses, parasites or chemical substances causes more than 200 diseases, spanning from diarrhea to cancers, resulting in death of 420,000 people worldwide every year.<sup>10</sup> It is obvious in the context of health and safety that deaths caused by adulterated foods are directly perpetrated, rather than consequences of tragic accidents.<sup>11</sup> In most cases, we remain unaware that we consume poisonous foods that kill us slowly, such as the often latently contaminated meat that we eat. One aspect of poisoning meats is antimicrobial resistance (“AMR”)<sup>12</sup> caused by excessive use of medically important antimicrobials (“MIA”) on meat producing animals (“MPA”) with the intention of artificially fattening MPA for merely economic gain.<sup>13</sup> The extent of AMR health effects is probably best illustrated in the 2019 Report of the

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<sup>7</sup> *R v. Zaman* [2017] EWCA (Crim) 1783 [81] (UK).

<sup>8</sup> John Spink ET AL., *International Survey of Food Fraud and Related Terminology: Preliminary Results and Discussion*, 84 J. FOOD SCIS. 2705, 2705 (2019).

<sup>9</sup> Wilson, *supra* note 4.

<sup>10</sup> World Health Organization, *Food Safety*, WHO 1, 1 (Apr. 30, 2020), <https://www.who.int/news-room/fact-sheets/detail/food-safety> [<https://perma.cc/K2B2-UYJD>].

<sup>11</sup> See Sophie Hofford, *Corporate Homicide/Manslaughter; Symbolic or Purely Instrumental*, 9 ABERDEEN STUDENT L. REV. 37, 50 (2019).

<sup>12</sup> Centers for Disease Control and Prevention, *Antibiotic Resistance Threats in the United States*, U.S. DEP’T OF HEALTH AND HUM. SERVS. 107 (2013), <https://www.cdc.gov/drugresistance/pdf/ar-threats-2013-508.pdf> [<https://perma.cc/9P9Q-7ACA>] (finding that the AMR has been defined as “the result of microorganisms changing in ways that reduce or eliminate the effectiveness of drugs, chemicals, or other agents used to cure or prevent infections.”).

<sup>13</sup> See generally Abu Noman Mohammad Atahar Ali & S. M. Solaiman, *Dishonest and Excessive Use of Antibiotics in Meat Producing Animals in Bangladesh: A Regulatory Review*, 15 EUR. FOOD & FEED L. REV. 449 (2020).

United Nations Interagency Coordination Group (“IACG”) on Antimicrobial Resistance, which reveals that AMR will cause an estimated ten million deaths worldwide each year by 2050.<sup>14</sup>

The situation in Bangladesh seems dreadful. Bangabandhu Sheikh Mujib Medical University (“BSMMU”), the country’s oldest medical university, reports that around eighty percent of deaths occurring in the intensive care unit of its hospital are caused by bacterial or fungal infections which could not be cured, due to the micro-organism’s insensitivity towards antibiotics.<sup>15</sup> The report adds that AMR contributes to seventy percent of total deaths across all intensive care units in Bangladesh.<sup>16</sup> Additionally, cancer has been an increasingly prominent cause of premature deaths in Bangladesh,<sup>17</sup> and such death rates are predicted to rise from seven and a half percent in 2005 to thirteen percent in 2030.<sup>18</sup> It is widely believed that the widespread cancer is a result of rampant food adulteration.<sup>19</sup> The situation is so severe that the President of Bangladesh asserted last year in a public speech that formalin—poison used to keep food looking fresh—is mixed with all foodstuffs in the country, killing thousands of people, so those who adulterate food commit “genocide.”<sup>20</sup> Likewise, the Food Minister of the country branded adulterators in 2019 as the “enemies of the

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<sup>14</sup> World Health Organization, *No Time to Wait: Securing the Future from Drug-Resistant Infections: Report to the Secretary-General of the United Nations*, WHO 1, 5 (Apr. 2019), [https://www.who.int/antimicrobial-resistance/interagency-coordination-group/IACG\\_final\\_report\\_EN.pdf](https://www.who.int/antimicrobial-resistance/interagency-coordination-group/IACG_final_report_EN.pdf) [<https://perma.cc/44J5-TACU>].

<sup>15</sup> See Ali & Solaiman, *supra* note 13.

<sup>16</sup> *Id.* at 455.

<sup>17</sup> Jannatol Ferdous ET AL., *A Study of Relationship between Dietary Habits and Cancer Patients Status in a Bangladeshi Population*, 9 INT’L J. HEALTH SCIS. & RES. 22, 22 (2019).

<sup>18</sup> *Id.*

<sup>19</sup> See S.M. Solaiman, & Abu Noman Mohammad Atahar Ali, *Rampant Food Adulteration in Bangladesh: Gross Violations of Fundamental Human Rights with Impunity*, 14(1-2) ASIA-PAC. J. HUM. RTS. & L. 29 (2013); S.M. Solaiman & Abu Noman Mohammad Atahar Ali, *Extensive Food Adulteration in Bangladesh: A Violation of Fundamental Human Rights and State’s Binding Obligations* 49 J. ASIAN AFR. STUD. 617 (2014). See also M.A. Hakim ET AL., *Role of Health Hazardous Ethephone in Nutritive Values of Selected Pineapple, Banana and Tomato*, 10(2) J FOOD AGRIC. ENVIRON. 247, (2012).

<sup>20</sup> Salam Mashroor & Hossain Imran, *Those Who Mix Formalin in Food Commit Genocide*, DAILY JANAKANTHA 1, 1 (Jan. 9, 2020) (Bangl.); Bangla Tribune Desk, *Use of Formalin Will Paralyse Nation: President*, BANGLA TRIBUNE (Bangl.) (Jan. 8, 2020).

nation” and termed food adulteration a “crime against humanity.”<sup>21</sup> The country’s Supreme Court was consistent with the trend, and in 2019 observed that “if necessary, the state may declare an emergency for preventing food adulteration” and also urged the Prime Minister to declare war on the menace of this abomination.<sup>22</sup> Without repeating facts and figures, we assert that the food safety scenario in India is comparable with that in Bangladesh.<sup>23</sup>

Apart from adulteration, food labeling is also very important. Food allergies have been an increasingly prevalent health problem across the world, and people die or become seriously sick due to defective and poor labeling or consumer lack of awareness of food ingredients.<sup>24</sup> About ten people die every year in the United Kingdom (“UK”) alone due to food related anaphylaxis,<sup>25</sup> and the mortality from harmful foods has been on the rise due to the negligence of traders over the past two decades in both Australia and the United Kingdom.<sup>26</sup> Hence, food adulteration or contamination, and mislabeling or hiding the actual ingredients from consumers, are all frightful human conduct, which should be adequately penalized to protect people through deterrence. Refraining from delving into the debate of effectiveness of the deterrence theory of punishment, we support the widely accepted view that punishment creates deterrence.<sup>27</sup>

21 Pearly Neo, ‘*Enemies of the Nation*’: *Bangladesh Considers Death Penalty, Life Imprisonment for Food Adulterators*, FOOD NAVIGATOR-ASIA.COM (June 11, 2019, 1:51 AM), <https://www.foodnavigator-asia.com/Article/2019/06/11/Enemies-of-the-nation-Bangladesh-considers-death-penalty-life-imprisonment-for-food-adulterators> [https://perma.cc/59AJ-BPJ6].

22 Shihab Sarkar, *Dealing with Food Adulteration Menace*, FIN. EXPRESS (Bangl.), May 20, 2019, at Views; Ashutosh Sarkar, *52 Food Items: Most of Them Now Pass BSTI Retest*, DAILY STAR (Bangl.), Jun. 11, 2019, at back page.

23 See Zuzana Smeets Kristkova ET AL., *The Economics of Food Safety in India – A Rapid Assessment*, (Nov. 2017), <https://cgspace.cgiar.org/bitstream/handle/10568/89203/Economics%20food%20safety%20India.pdf> [https://perma.cc/8FKE-8VNV]; R. V. Sudershan ET AL., *Foodborne Infections and Intoxications in Hyderabad India*, EPIDEMIOLOGY RES. INT’L 1, 1 (2014).

24 M. Hazel Gowland & Michael J. Walker, *Food Allergy, A Summary of Eight Cases in the UK Criminal and Civil Courts: Effective Last Resort for Vulnerable Consumers?*, 95 J. SCI. FOOD & AGRIC. 1979, 1979 (2015).

25 *Id.*

26 R. J. Mullins ET AL., *Increases in Anaphylaxis Fatalities in Australia from 1997 to 2013*, 46 CLIN. EXP. ALLERGY 1099, 1099 (2016).

27 See, e.g., Sally S. Simpson & Christopher S. Koper, *Deterring Corporate Crime*,

This article seeks to compare and contrast the laws concerning criminal liability of natural persons (excluding artificial persons) for homicides caused by unsafe food in the United Kingdom, Australia, Bangladesh and India, with a view to making suggestions for improvement of the relevant laws of the latter two in light of the corresponding laws of the former two jurisdictions. Notably, the laws of New South Wales (“NSW”), Australia, and that of England, the United Kingdom will be considered in this endeavor for appraising their equivalents in Bangladesh and India. It is worthwhile to mention that common law governs unintentional homicides by natural persons in both England and NSW,<sup>28</sup> whilst the *Penal Code 1860* inherited from the British colonial regime applies to MCN in both Bangladesh and India as their primary criminal legislation. India calls it *Indian Penal Code 1860* (“IPC1860”), while in Bangladesh it is known as the *Bangladesh Penal Code 1860* (“BPC1860”). This article, therefore, intends to analyze solely criminal law provisions, putting aside the regulatory offenses under food safety legislation. We would advocate harmonization of food-manslaughter laws amongst the selected four jurisdictions.<sup>29</sup>

Discussions are broken down into five sections. Section 2, which follows this introduction, presents the origins of the modern law of negligence and its applicability to MCN, whilst Section 3 discusses application of the law of MCN to deaths caused by food. Section 4 analyzes the elements of MCN, and Section 5 considers punishments available for MCN in the selected four jurisdictions. Section 6 concludes this article with its major recommendations.

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30 CRIMINOLOGY 347, 349 (1992). For the debate, see also Richard A. Posner, *Economic Analysis of Law*, 170 (1977); Sylvia Rich, *Corporate Criminals and Punishment Theory*, 29 CAN. J. L. & JURIS. 97 (2016); *McGonigle v R* [2020] NSWCCA 84 ¶¶ 78-79, 92 (Austl.); *Bates v R* [2020] NSWCCA 259 ¶¶ 29, 32 (Austl.); *Ellis v R* [2020] NSWCCA 303 ¶¶ 30, 59 (Austl.); *Hoskins v R* [2020] NSWCCA 18 ¶ 64 (Austl.); *Nauer v R* [2020] NSWCCA 174 ¶ 85 (Austl.).

<sup>28</sup> See *R v. Adomako* [1995] 1 AC (HL) 171 (UK), a leading case of House of Lords on gross negligence manslaughter.

<sup>29</sup> For the significance of convergence of food safety regulation, see Mengyi Wang & Ching-Fu Lin, *Towards a Bottom-up SPS Cooperation: An Analysis of Regulatory Convergence in Food Safety Regimes*, 8 TRADE L. & DEV. 117 (2016).



## II. Origins of the Modern Law of Negligence and its Applicability to Manslaughter by Criminal Negligence

The law of negligence in England and consequently NSW can be traced back to the late 19<sup>th</sup> century when Brett M.R. (Master of the Rolls) in *Heaven v. Pender* mentioned in dicta that:

[W]henever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.<sup>30</sup>

However, the modern law of negligence is widely believed to have been founded on the common law “neighborhood principle” enunciated by Lord Atkin in *Donoghue v. Stevenson* in 1932.<sup>31</sup> The oft-quoted principle reads:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? . . . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? . . . persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>32</sup>

The neighborhood principle was originally articulated in the context of a civil claim. However, the House of Lords in *R v. Adomako* affirmed its applicability to criminal negligence as well, and held that the ordinary principles of the law of negligence governing civil disputes apply to MCN in the determination of the existence of duty and the breach thereof.<sup>33</sup> More clearly, consistent with the U.K. authorities,<sup>34</sup> French CJ (Chief Justice) of the High

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<sup>30</sup> *Heaven v. Pender* [1883] All ER 35 at 39-40 (Eng.).

<sup>31</sup> *Donoghue v. Stevenson* [1932] AC 562 (HL) 562 (appeal taken from Scot.).

<sup>32</sup> *Id.* at 580.

<sup>33</sup> *R v. Adomako* [1995] 1 AC (HL) 171, 187B (UK).

<sup>34</sup> *Mitchell v. Glasgow City Council* [2009] 3 All ER 205 at 893 (Scot.); *R v. Miller* [1983] 2 AC (HL) 161, 179 (UK); *R v. Evans (Gemma)* [2009] EWCA (Crim) 650 (UK).

Court of Australia (“HCA”) in *Burns v. R* clarified that “[a] duty of care may also arise where a defendant has played a causative part in the sequence of events which have given rise to the risk of injury, such that ‘a duty to take reasonable steps to avert or lessen the risk may arise.’”<sup>35</sup> Therefore, the HCA applied the neighborhood principle to MCN in *Burns v. R*.<sup>36</sup> Simpson JA in *R v. Moore* accordingly mentioned that “[t]he offence of manslaughter by gross criminal negligence is derived from the tort of negligence, with an additional important element,” which is grossness or wicked in negligence.<sup>37</sup> The NSW Court of Criminal Appeal (“NSWCCA”) in this case cited the above quoted French CJ’s assertion<sup>38</sup> and applied the neighborhood principle in NSW.

It is now clear that the neighborhood principle applies to MCN in both England and NSW. However, the common law has not developed in Bangladesh and India in line with its development in England and NSW, perhaps mainly because the offense of negligent killing was incorporated into the BPC1860 and IPC1860 in 1870. Arguably, another reason could be the public ignorance or tolerance of negligent conduct in general. For example, Justice Sharifuddin Chaklader of the High Court Division of the Supreme Court of Bangladesh (“HCD”) in *Bangladesh Beverage Industries Ltd v. Rowshan Akhter* observed about the application of law to negligent deaths in 2010 that:

This is a case on tortious liability of a person. This law in our country more or less *is on book, not in practice*. We have seen in daily newspapers that on each day several accidents took place causing death of passersby, passengers, driver but *either for ignorance of law or for some other purpose* i.e. ‘since death has occurred what will do in getting compensation,’ *no one come forward for invoking this law* and since this law has not been practiced, as a result, we are *unable to protect the lives* and properties of the citizens who lost their lives in different types of accidents.<sup>39</sup>

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<sup>35</sup> *Burns v The Queen* (2012) HCA at 23; 290 ALR 713, 723 (Austl.).

<sup>36</sup> *Burns v The Queen* (2012) 246 CLR 334 (Austl.).

<sup>37</sup> *R v Moore* [2015] NSWCCA 316 ¶ 142 (Austl.). *See also Nydam v R* [1977] VR 430 (Austl.), which was adopted by the NSW prosecution culminating in the High Court case, *The Queen v. Lavender* [2005] 222 CLR 67 (Austl.).

<sup>38</sup> *R v. Moore* [2015] NSWCCA 316 ¶ 225 (Austl.).

<sup>39</sup> *Bangladesh Beverage Industries Ltd v. Rowshan Akhter*, 62 DLR (HCD) 483, at

His Honor added that “[i]f this law be practiced, then it is our considered view that, at least, the death on accident may be minimized. There are laws in our country but for mishandling of law and sometimes misapplying of law for the benefit of the people in helm of the country, not for the citizen, *laws lost its applicability*.”<sup>40</sup>

However, claims of civil compensation for negligent deaths have begun to come up, as evidenced in recent cases, for example, *Catherine Masud v. Md. Kashed Miah*<sup>41</sup> and *CCB Foundation v. Government of Bangladesh*.<sup>42</sup> Notably, there is no bar on pursuing both civil and criminal cases against such deaths simultaneously.<sup>43</sup> Criminal suits against MCN caused by unsafe food are yet to be lodged with any courts in the country. We therefore argue that the Supreme Court of Bangladesh would or should apply the neighborhood principle in dealing with criminal cases involving negligent deaths including food manslaughter. The following discussion demonstrates application of laws of MCN to the deaths caused by unsafe food.

### III. Application of the Law of MCN to Deaths Caused by Food

The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) applies to business entities only, leaving natural persons to be tried under the common law of manslaughter. This article is concerned with the liability of individuals alone, putting the legislation outside of its purview. However, a significant development relating to individual liability occurred separately. For example, the English Court of Appeal (Criminal Division) in *Zaman*<sup>44</sup> convicted Mohammed Khalique Zaman (“Zaman”) of

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[22] (2010) (Bangl.) (emphasis added).

<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> *Catherine Masud v. Md. Kashed*, 67 DLR (HCD) 527 (Transferred Misc. Case No. 01 OF 2016) (Judgment on 3 Dec. 3, 2017). (ordering that, in a motor accident causing death, the defendant had to pay BDT46.2 million, approx. US\$ 536,005).

<sup>42</sup> 5 CLR (HCD) 278 (2017) (Bangl.). The first ever public/constitutional tort case, against the railway authority and fire service for the death of a four-year old boy who died after falling into an uncovered deep shaft in the capital, the Court ordered to pay BDT 20 lakh (approx. US\$23,203) as compensation to the victim’s parents.

<sup>43</sup> *See Masud*, 67 DLR (HCD) 527.

<sup>44</sup> *R v. Zaman* [2017] EWCA (Crim) 1783 (UK).

MCN of Paul Wilson (“Wilson”) who had been suffering from a severe peanut allergy since his childhood. Wilson visited Zaman’s restaurant on January 30, 2014 and ordered a chicken tikka masala takeaway. Wilson had clearly told the waiter who served him that his meal must be free from peanuts. Accordingly, the waiter specifically confirmed with Wilson at the time of serving the food that the meal contained no nuts at all. Contrary to this assurance, the sauce used in the meal contained a substantial number of peanuts. Wilson ate the meal at his home and was found dead there on the same day, following a terrible anaphylactic shock (allergic reaction) triggered by the meal resulting in his death.<sup>45</sup> Zaman was prosecuted and charged with one count of gross negligence manslaughter and six counts of contraventions of food safety regulations. Zaman, a highly experienced restaurateur in England, was sentenced to six years in prison, and he unsuccessfully appealed against both his conviction and sentence.

Investigations found that in June 2013, Zaman started using mixed nut powder comprised of wholly or mainly peanuts in replace of almond powder in various dishes in a bid to save money. Zaman admitted that at his restaurant, there were no relevant written procedures or policies in respect of allergens, specifically “no written recipes, no labelling of containers in the kitchen or storeroom, and no system for recording the fact that each member of staff understood the procedure and policy in relation to allergens.”<sup>46</sup> Officers from the Trading Standards Department who visited the restaurant on the following day, January 31, 2014, found peanut powder in different unmarked containers.<sup>47</sup> The officers also reported that a sample from an “unmarked tub containing sugar was found to have significant peanut contaminant, sufficient to cause a severe allergic reaction in an individual with an allergy to peanuts . . . .”<sup>48</sup> They also discovered “the chef using the same spoon to take ingredients from different containers, which could and would have resulted in mutual contamination.”<sup>49</sup>

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<sup>45</sup> *Id.* at 1; Tony Storey, *Gross Negligence Manslaughter, Restaurant Owners and the Duty of Care*, 82 J. CRIM. L. 201, 201 (2018).

<sup>46</sup> *R v. Zaman* [2017] EWCA (Crim) 1783 [28] (UK).

<sup>47</sup> *Id.* at [19].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

A critical question in the case was about how Zaman's instructions were given and enforced to his staffers when serving meals, especially to those customers who had explicitly informed the relevant staff members of their pre-existing food allergy.<sup>50</sup> The prosecution argued that Zaman "took no steps to ensure the safety of such customers, in that his staff were not trained, instructed or supervised; or, if any training or instructions were given, no steps were taken to ensure compliance by staff."<sup>51</sup> "As a result, the . . . restaurant consistently served those who had declared a peanut allergy with meals containing peanut."<sup>52</sup> The Crown case added that Zaman had run several other restaurants and he had a history of ignoring peanut allergy concerns,<sup>53</sup> and that "the policies, procedures, training and instruction, such as they were, were incapable of ensuring a peanut-free meal was served."<sup>54</sup> Zaman was informed a week before Wilson's incident that "his internal systems were defective and that steps had to be taken to protect such customers in the future; but he had taken no steps by 30 January 2014."<sup>55</sup>

Zaman claimed he did not breach his duty of care because he was not present at the restaurant the evening the event occurred—which was true—and further submitted that he imparted adequate training and provided guidance to his restaurant staffers "who had repeatedly failed to comply with their training and his clear and strict instructions . . . as to how to deal with those who declared a peanut allergy."<sup>56</sup> It was also true that Zaman never worked in that restaurant's kitchen, and certainly did not prepare Wilson's food.<sup>57</sup>

Zaman contended that the trial judge misdirected the jury as to the breach of duty and failed to direct the jury that the restaurant chef's negligence was the sole cause of the victim's death. The Court of Appeal rejected all his claims, dismissed the appeal in

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<sup>50</sup> *Id.* at [30].

<sup>51</sup> R v. Zaman [2017] EWCA (Crim) 1783 [30] (UK).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at [6].

<sup>54</sup> *Id.* at [30].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at [31]

<sup>57</sup> R v. Zaman [2017] EWCA (Crim) 1783 [31] (UK).

respect of both conviction and sentence, and therefore upheld the decision of the trial court.<sup>58</sup> *Zaman* is especially significant because (1) *Zaman* is the first English case in which a restaurateur has been convicted of MCN, and (2) because it establishes a precedent of such conviction in recognition of restaurateur's duty of care owed to their customers for the United Kingdom as well as other common law countries.<sup>59</sup> *Zaman* sets out five specific common law elements of MCN adopted from *Adomako*,<sup>60</sup> which will be explored in this piece.

The second recent English case is *R v. Kuddus*,<sup>61</sup> in which the MCN conviction of a restaurateur (the sole director of the company), Mohammed Abdul Kuddus ("Kuddus"), was set aside and the Court of Appeal acquitted him from the MCN charge (though not the charges under food safety regulations). This variation in judgments is attributed to the differences between the facts of these two cases (*Zaman* and *Kuddus*). In *Kuddus*, the defendant was the owner as well as a tandoori chef of the restaurant, which operated a takeaway business in England.<sup>62</sup> As stated in the facts of the case, Megan Lee, along with one of her friends on December 30, 2016, ordered a meal online via a third party website in which her friend inserted the words "nuts and prawns" into the comments section "because Megan had what was believed to be a mild allergy to those potential ingredients."<sup>63</sup> The restaurant received a printout of the order, but it was not brought to the notice of Kuddus, who was working at that time as one of the chefs and prepared part of the meal given to Megan.<sup>64</sup>

The food contained peanut proteins, which caused a severe allergic reaction in Megan, causing her death in the hospital two

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<sup>58</sup> *R v. Zaman* [2017] EWCA (Crim) 1783 [82] (UK).

<sup>59</sup> Storey, *supra* note 45 at 203. See also Adam Withnall, *Restaurant Owner Convicted After Peanut Allergy Death*, THE INDEPENDENT (DAILY EDITION) (UK), May 24, 2016, at 11; Michael E. Miller, *Penny-Pinching Restaurant Owner Convicted of Manslaughter for Serving Peanut-Tainted Tikka Masala to Man with Allergy*, THE WASHINGTON POST (U.S.), May 24, 2016, at Morning Mix.

<sup>60</sup> *R v. Adomako* [1995] 1 AC (HL) 171, 187B-C (UK).

<sup>61</sup> *R v. Kuddus* [2019] EWCA (Crim) 837 [1] (UK).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at [2].

<sup>64</sup> *Id.*

days later.<sup>65</sup> Kuddus was charged with MCN under common law, as well as breaches of food safety regulations. The accused (defendant and accused used interchangeably) contested the manslaughter charge but conceded, however, other breaches of food safety provisions. His argument was unsuccessful, and the trial court convicted him of MCN and sentenced him to two years' imprisonment for the offense of manslaughter, along with separate penalties for other safety breaches.<sup>66</sup> The manager of the business (Rashid) was also convicted as co-accused on all three counts, including MCN like Kuddus, and sentenced to three years' imprisonment. Kuddus alone appealed against the conviction of manslaughter on two grounds. First, Kuddus alleged that the trial judge was wrong in refusing to direct the jury that they needed to consider whether there was, in fact, a serious and obvious risk that the appellant's breach of duty would cause the death of specifically this victim (as opposed to others more generally, who might be suffering from peanut allergy), showing a distinction between the foreseeability of risk and the existence of risk.<sup>67</sup>

The appellant submitted that the existence of risk in relation to the victim was a matter of fact which the jury in this case should have been directed to consider separately.<sup>68</sup> Reasons argued in favor of this ground were: (i) that the prosecution had to prove the factual existence of serious and obvious risk of death concerning the victim, and (ii) that it was contrary to logic and justice that a person could be convicted on the basis that a reasonable person should have foreseen a serious risk of death, unless that level of risk actually existed.<sup>69</sup> The appellant added that the required level of risk actually did not exist.<sup>70</sup>

The appellant's counsel further argued that the victim's medical history did not suggest anything in support of such a severe reaction and added that the trial judge was "wholly illogical" in focusing on "foreseeability rather than actuality of risk to the exclusion of the

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at [3].

<sup>67</sup> *R v. Kuddus* [2019] EWCA (Crim) 837 [57] (UK).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at [58].

<sup>70</sup> *Id.*

issue that the appellant sought to raise.”<sup>71</sup> Furthermore, the appellant’s counsel submitted that, “because the jury was not directed as he had proposed, the factual existence of a serious risk of death was implicitly assumed and was not effectively left to the jury to decide” and reiterated that “the requisite serious and obvious risk of death did not actually exist in the present case.”<sup>72</sup>

The *second* ground of appeal was that the trial judge, in her directions to the jury, wrongly equated the declared allergy knowledge of the business as a separate person, or of its manager Rashid, who saw the note “nuts and prawns” inserted into the order on behalf of the victim, to that of the owner, Kuddus. It means that, since the victim declared “nuts, prawns” to the business, it amounted to the knowledge of Kuddus on the basis that as owner he was responsible for the whole system in the restaurant—even if the declaration was made without the actual knowledge of the appellant.<sup>73</sup> The appellant’s counsel submitted that, regardless of the propriety of imputing knowledge with respect to regulatory offenses, such imputation was erroneous pertaining to MCN.<sup>74</sup> The counsel further truthfully argued that Kuddus was absolutely unaware of the allergy declaration in question.<sup>75</sup>

In these circumstances, when viewed holistically, the Court of Appeal held that the conviction for MCN cannot stand.<sup>76</sup> The Court allowed the appeal and quashed the MCN conviction based on the ground that there was no evidence that Kuddus was informed of the victim’s allergy declaration and that the direction to the jury on attribution of knowledge renders his conviction unsafe.<sup>77</sup> However, the Court clarified that there was no requirement that a serious and obvious risk of death of the specific person who died had to be proved.<sup>78</sup> Hence, the Court of Appeal rejected the first ground of

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> R v. Kuddus [2019] EWCA (Crim) 837 [75] (UK).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> R v. Kuddus [2019] EWCA (Crim) 837 [81]-[84] (UK).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*



appeal and accepted the second one.<sup>79</sup>

As the grounds for allowing the appeal and quashing the conviction for MCN, the Court noted that the difficulty in the approach taken by the trial judge was “that it was not suggested that the appellant was armed with notice that Megan fell into the category of those in respect of whom a reasonable person in the position of the appellant could have foreseen an obvious and serious risk of death by serving the food that he did.”<sup>80</sup> The Court underscored that Kuddus knew nothing of the allergy which the victim had declared in the order. In those circumstances, the conviction for MCN cannot stand.<sup>81</sup> The Court further added that Kuddus “spoke little English and had only taken over the restaurant from Mr. Rashid the previous year in circumstances in which Mr. Rashid continued to manage it.”<sup>82</sup> The Court clarified that the prosecution case against Kuddus “was based solely upon his failure to introduce appropriate systems at a time when he knew nothing of prospective customers’ allergies.”<sup>83</sup> The Court further stated that “there was no evidence that he was at any stage notified of Megan’s allergy, the direction to the jury on attribution of knowledge renders his conviction unsafe for the reasons we have given.”<sup>84</sup> To avoid any confusion, the Court noted that the responsibility of the owner cannot be ignored simply by arguing that he/she was unaware of the requirement of a specific order; rather, the owner can still be held guilty of other offenses as Kuddus and the restaurant manager were convicted for the same facts.<sup>85</sup>

By rejecting the first ground of appeal, the Court has defended the common law principle that the duty of care need not be owed to any particular person; instead, it would suffice if proved that the victim who died was one of the class of people (e.g., nut allergy sufferers) to whom the defendant owed a duty of care.<sup>86</sup> The duty

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at [81]

<sup>81</sup> *Id.*

<sup>82</sup> R v. Kuddus [2019] EWCA (Crim) 837 [84] (UK).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at [82].

<sup>86</sup> *Id.* at [69].

is to take reasonable care not to injure that class of people, and the question to be answered is whether any proven breach would have created a serious and obvious risk of death for any one of that class. The objective foreseeability of the risk of a *specific* victim or the existence of *actual* risk need not be proved in order to establish breach of the duty. A critical point to note is that, to establish the requirement of the foreseeable risk for the purposes of MCN, the defendant needs to be “armed with notice that a particular customer falls into the category or class, which the system (or statute) was designed to deal with, a reasonable person in the position of the restaurateur . . . would, at the time of breach of duty, have foreseen an obvious and serious risk of death” of anyone of that class.<sup>87</sup> It is in those circumstances the required gross negligence can be proved.<sup>88</sup>

This is in sharp contrast to *Zaman* who admitted that he knew about the serious and obvious risk of death of people having nut allergies if they eat the food they supplied to the victim in *Zaman*. The existence of a duty of reasonable care still remains unaffected after the decision in *Kuddus*, as it is owed to the class of people and it is sufficient if the victim belongs to that class. Regarding determination of the required foreseeability of risk, Sir Brian Leveson, one of the most senior judges in England and Wales, confirmed that:

the assessment of the foreseeability question is both objective[,] i.e. determined according to a reasonable prudent person in the shoes of the defendant and prospective, i.e. it is predicated on the defendant’s actual knowledge at the time of the breach, and not on knowledge that he or she could, or should, have had.”<sup>89</sup>

Both *Zaman* and *Kuddus* are British examples of selling food which is unsafe for certain groups of people, whereas various food items that may be unsafe for all consumers at large (i.e., adulterated, contaminated, mislabeled, misbranded, etc.) are randomly sold by

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<sup>87</sup> *Id.* at [80].

<sup>88</sup> *R v. Kuddus* [2019] EWCA (Crim) 837 [80] (UK).

<sup>89</sup> *Id.* at [80]. See also Tony Storey, *Gross Negligence Manslaughter, Restaurant Owners and the Foreseeability Question*, 83 J. CRIM. L. 516, 518 (2019).

restaurateurs in both Bangladesh<sup>90</sup> and India.<sup>91</sup> Following reasonable inquiries by the authors, although regulatory actions are sometimes taken against those wrongdoers by respective authorities, there has been no record of MCN conviction in either of the two countries so far as we know. This implies the relevance of *Zaman* and *Kuddus* to Bangladesh and India even from a restaurant perspective.

Some useful formulations for the elements of MCN in *Zaman* and *Kuddus* are found in a food safety context. This work now attempts to identify and analyze the elements of MCN under the current laws in England and NSW alongside their equivalents in Bangladesh and India in order to unravel the weaknesses inherent in the latter two jurisdictions.

#### IV. Elements of the Offense of Manslaughter by Criminal Negligence

The elements of MCN under the recent common law of England are similar, but not formulated in identical terms in all cases, as mentioned by the Court of Appeal in *Kuddus*.<sup>92</sup> Since this article is concerned with food safety, we rely mainly on *Kuddus* and *Zaman* and discuss the following five elements that the prosecution must prove beyond reasonable doubt. The elements listed in *Kuddus*, taken from *Zaman*, are:

- (a) *Existence of the duty of care*: that the defendant owed an existing duty of care to the victim as a member of the class of people who might be “injured” by the defendant’s conduct;
- (b) *Breach of the duty*: that the defendant negligently breached that duty of care;
- (c) *Reasonable foreseeability of risk*: that it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death;
- (d) *Causation*: that the breach of that duty caused the death of the victim; and

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<sup>90</sup> See AK Mohiuddin, *The Mysterious Domination of Food Contaminants and Adulterants in Bangladesh* 3 J. ENVIRON. SCI. PUB. HEALTH 34, 36 (2019).

<sup>91</sup> Deepika Jayaram, *How Safe is Restaurant Food?*, THE TIMES OF INDIA, Feb. 18, 2018, at City; Rajulapudi Srinivas, *426 Cases Booked for ‘Selling Unsafe, Misbranded Food Items*, THE HINDUS, Mar. 1, 2020, at States.

<sup>92</sup> R v. Kuddus [2019] EWCA (Crim) 837 [33]-[34] (UK).

(e) *Gross negligence*: that the circumstances of the breach were truly so exceptionally bad and reprehensible as to justify the conclusion that it amounted to gross negligence and requires criminal sanction.<sup>93</sup>

Each of these elements will be analyzed shortly below. However, before doing that, we must consider these elements as applied in NSW, followed by the corresponding requirements in Bangladesh and India.

No NSW manslaughter case may be identified that directly relates to food safety; however, there are cases of MCN caused by different conduct that can be used as a general principle to breaches of food safety prohibitions contributing to death, as applied in England. NSW common law principles are greatly similar to those of England and differ mainly on one point—the reasonably foreseeable risk of GBH or death,<sup>94</sup> unlike the English requirement of foreseeable risk of “death” only. It makes the scope of the duty wider in NSW.

Although the *Crimes Act 1900* (NSW) (“CA1900”) contains the definition of murder, it does not define manslaughter offenses at all, leaving it to the judiciary.<sup>95</sup> After defining murder, § 18 of the CA1900 states that “[e]very other punishable homicide shall be taken to be manslaughter.”<sup>96</sup> Hence, in NSW, common law determines and defines the elements of the offense of manslaughter.<sup>97</sup> As defined in *Nydam v. R* by the Supreme Court of Victoria, which was later affirmed by the HCA, making it the common law of Australia (to be discussed later), establishing MCN requires the prosecution to prove that:

The act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily

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<sup>93</sup> *R v. Kuddus* [2019] EWCA (Crim) 837 [34] (UK); *R v. Zaman* [2017] EWCA (Crim) 1783 [24] (UK).

<sup>94</sup> *Nydam v R* [1977] VR 430 ¶ 445 (Austl.).

<sup>95</sup> Crimes Act 1900 (NSW), § 18 (Austl.).

<sup>96</sup> *Id.*

<sup>97</sup> *R v Cittadini* [2009] NSWCCA 302 ¶¶ 29, 33 (Austl.); *The Queen v Lavender* [2005] 222 CLR 67 (Austl.).

harm would follow that the doing of the act merited criminal punishment.<sup>98</sup>

It is germane to mention that the English Court of Appeal, in the leading case of MCN, *R v. Bateman*,<sup>99</sup> formulated a similar set of four elements. These elements were subsequently reaffirmed by the House of Lords in *Adomako*.<sup>100</sup> The four elements as directed by the trial judge to the jury and later affirmed by the NSWCCA in *R v. Cittadini*<sup>101</sup> were adopted from *Adomako*, as follows:

- (a) *Existence of duty of care*: that the accused owed a duty of care to the deceased.
- (b) *Breach of duty of care by negligent conduct*: that the accused was negligent by breaching the duty of care by his/her conduct (acts or omissions), meaning he/she did something that a reasonable person in his/her position would not do or he/she failed to do something that a reasonable person in his/her position would have done.
- (c) *Grossly or wickedly negligent conduct*: that the breach of duty fell so far short of the standard of care that a reasonable person in his/her position would have exercised, and it involved such a risk of death or serious bodily harm so as to constitute “gross” or “wicked” negligence, therefore to be treated as criminal conduct.<sup>102</sup>
- (d) *Causation*: that the conduct of the accused caused the death of the deceased.

These four elements in NSW essentially mirror the aforesaid five in England, with a difference in the foreseeable risk to satisfy the grossness of criminal negligence, as mentioned earlier.

The Judicial Commission of NSW summarizes the common law requirements of MCN, which are similar to those of the above four with a better clarity that the accused conduct was “a substantial cause of, or accelerated, the death of the victim,” and the disputed conduct of the accused is criminally punishable because “(a) it fell so far short of the standard of care which a reasonable person would have exercised in the circumstances; and (b) it involved such a high

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<sup>98</sup> *Nydam v R* [1977] VR 430 ¶ 445.

<sup>99</sup> [1925] 19 Cr. App. R. [8] (UK).

<sup>100</sup> [1995] 1 AC (HL) 171 [9] (UK).

<sup>101</sup> *R v. Cittadini* [2009] NSWCCA 302 ¶ 29 (Austl.).

<sup>102</sup> *Id.*

risk that death or really serious bodily harm would follow” as a result of such conduct.<sup>103</sup>

All of these four elements are to be established beyond reasonable doubt in order to convict an accused of MCN in NSW.<sup>104</sup>

Both Bangladesh and India have identical statutory definition of the offense (§304A in their legislation, BPC1860 and IPC1860), though punishments differ.<sup>105</sup> Therefore, the discussion of elements from one of them covers the other as well. §304A of the BPC1860 and IPC1860 inserted in 1870 provides that “[w]hoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide [‘culpable homicide’ refer to general manslaughter defined in §299 of the legislation] shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both” [in Bangladesh].<sup>106</sup> The IPC1860 contains exactly the same provision with a variation in punishments, which are two years’ imprisonment, or with fine, or with both in India.<sup>107</sup> As it appears in the text of §304A, the constituting elements of MCN in Bangladesh and India lack precision, compared to those in England and NSW.<sup>108</sup> The elements that can be identified from §304A are:

- (a) *Actus reus*—any rash or negligent act (no mention of ‘omissions’ or the duty of care);
- (b) *Mens rea*—rashness or negligence (degree of negligence and how to determine it not mentioned);
- (c) Causation—the accused’s acts shall cause the death of the victim (not mentioned whether the sole cause, or a major or an operating cause).<sup>109</sup>

Each of these elements is ambiguous, and it would be difficult to apply them in practice in most cases without proper judicial interpretation. Making the situation worse, there is a paucity of interpretations of §304A by the higher judiciary in Bangladesh.

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<sup>103</sup> Judicial Commission, *Manslaughter*, (NSW), <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/manslaughter.html> [<https://perma.cc/G8PE-5VRW>].

<sup>104</sup> *Id.*

<sup>105</sup> Bangl. Penal Code, 1860, §304A.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

With the help of a sitting justice of the Supreme Court, only one reported case decided in 1969, preceding the country's independence from Pakistan in 1971, interpreted §304A. The case is *Rashidullah v. The State*<sup>110</sup> (not related to food safety). The Court in this case did not consider the negligent act as it was not relevant; rather, the Court interpreted the meaning of “rash acts” under §304A, which will be analyzed in a separate endeavor because this article is focused solely on MCN.<sup>111</sup> The reasons for such a scarcity of interpretation are mainly public tolerance of negligent fatalities and the disposal of cases with appeals at the district court levels because of the low penalties prescribed for the offense. District Courts belong to the subordinate judiciary and their judgments are not reported formally. However, a few Indian cases under §304A are available, which will be relied upon in discussing these elements.

Notably, the Supreme Court of India (“SCI”) relies on the English leading cases<sup>112</sup> in interpreting the statutory elements of MCN under §304A of the IPC. It is generally known that the courts in Bangladesh are often persuaded by legal interpretations of the higher judiciary of India, particularly where their own interpretation of a given provision of law either does not exist or does exist but is not particularly helpful.<sup>113</sup>

The SCI in *Sushil Ansal v. State Through CBI* (a case involving §304A) admits that the common law MCN is comparable with §304A by stating that “[t]here is no gainsaying that negligence in order to provide a cause of action to the affected party to sue for damages is different from negligence which the prosecution would be required to prove in order to establish a charge of involuntary manslaughter in England, analogous to what is punishable under §304A, IPC in India.”<sup>114</sup> The Court then clarifies the degree of

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<sup>110</sup> *Rashidullah v. The State*, 21 DLR 709 (1969) (Bangl.). Notably, the judgment was delivered by the High Court of East Pakistan, Dhaka, in 1969 under the PC1860 shortly before the independence of Bangladesh from Pakistan in 1971.

<sup>111</sup> *Id.*

<sup>112</sup> *R v. Adomako* [1995] 1 AC (HL) 171 (UK); *R v. Bateman* [1925] 19 Cr. App. R [8] (UK); *Andrews v DPP* [1937] 2 All ER 552 (UK); *R v Seymour* [1983] 2 All ER 1058 (UK).

<sup>113</sup> *See State v. Marfoth Ali Shah*, 68 DLR 13 (AD) (2016) (Bangl.); *Kamruzzaman v. Government of Bangladesh*, 67 DLR 157 (AD) (2015) (Bangl.).

<sup>114</sup> *Sushil Ansal v. State Through Central Bureau of Investigations*, (2014) 6 SCC 1,

negligence required for §304A, stating that “it is imperative for the prosecution to establish that the negligence with which the accused is charged is gross in nature no matter §304A, IPC does not use that expression.”<sup>115</sup> What is gross would depend upon the fact situation in each case and cannot, therefore, be defined with certitude.<sup>116</sup> Decided cases alone can illustrate what courts have considered to be gross negligence in a given situation.<sup>117</sup>

The above assertions of the SCI clearly embrace the common law principle of grossness for interpretation of the statutory definition of MCN; however, the Court does not define the phrase “gross negligence,” which has been left open to court’s discretion to decide on a case-by-case basis.<sup>118</sup> It is not clear as to why the SCI refrained from adopting its provision from English law about the foreseeability of risk to prove such negligence, whilst it overtly mentioned that §304A is analogous to the common law MCN. There are also other deficiencies in §304A, as will gradually unfold in the discussions of its elements.

Now each of the five elements of MCN identified above will be analyzed sequentially to scrutinize the shortcomings in §304A and to ascertain the requirements in Bangladesh and India in light of the other two.

#### *A. The Existence of Duty of Care*

As mentioned earlier, the existence of a duty of care the defendant owed the victim is a well-accepted principle of the law of negligence. In this regard, Lord Hoffmann in *SAAMCO v. York Montagu* mentions that “a duty of care . . . does not . . . exist in the abstract,” it must be owed by one to another person.<sup>119</sup> French CJ of the HCA pronounced in *Burns v. The Queen* that no liability, whether civil or criminal, arises at common law for negligence unless the defendant’s negligent conduct involves a breach of a duty of care owed to another.<sup>120</sup> The existence of duty is therefore the

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72-73 (India).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *SAAMCO v. York Montagu* [1996] 3 All ER 365 at 14 (UK).

<sup>120</sup> (2012) 246 CLR 334 ¶ 20 (Austl.).



first and foremost requirement. In this respect, Catherine Elliot explained that:

When Adomako was first decided the meaning of a duty of care in this context [of MCN] caused some confusion. It is now relatively clear that it has its ordinary civil meaning as developed in the law of negligence. Thus a person owes a duty of care to another where it is reasonably foreseeable that their acts or omissions will cause harm to another.<sup>121</sup>

The U.K. Court of Appeal in *R v. Evans (Gemma)* asserts that in any cases where the existence of duty is disputed, it would be initially the judge's task to consider, as a matter of law, whether it was "open to the jury to find that there was a duty of care."<sup>122</sup> The Court clarified in this case, *Evans*, that the meaning of duty of care is a question of law to be determined by the judge, whilst the jury will decide whether the facts of a given case satisfy that legal definition.<sup>123</sup>

Consistently in Australia, the HCA, as well as NSWCCA, held that before MCN can be established, the prosecution has to prove that the accused owes a recognized common law legal duty of care to the deceased, as a member of a class of people who may be affected by the conduct of the defendant.<sup>124</sup> As regards MCN by negligent omissions, Judge Yeldham in *R v. Taktak*<sup>125</sup> set out that criminal liability may arise for a breach of duty of care, which was, amongst other things, imposed by legislation or by contract, or which arose from a certain status relationship.<sup>126</sup> Therefore, it is clear that the duty of care may also be imposed by methods other than common law (and a breach thereof may constitute MCN), and in the absence of a manifestly imposed duty of care by common law or legislation, courts will determine the existence of such a duty on

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<sup>121</sup> Catherine Elliott, *Liability for Manslaughter by Omission: Don't Let the Baby Drown!*, 74 J. CRIM. L. 163, 166 (2010).

<sup>122</sup> [2009] EWCA (Crim) 650 [45] (UK).

<sup>123</sup> Elliot, *supra* note 121.

<sup>124</sup> *Burns v The Queen* (2012) HCA 35 at 97 & 107 (Austl.); *Lane v. R* [2013] NSWCCA 317 ¶¶ 59-62 (Austl.).

<sup>125</sup> [1988] 14 NSWLR 226 (Austl.).

<sup>126</sup> *R v. Taktak* [1988] 14 NSWLR 226, at 243-44 (per Yeldham J) (Austl.) (citing *Jones v. United States* 308 F. 2d 307 (1962) (U.S.)).

a case-by-case basis.<sup>127</sup> In the present perspective of food safety, however, the neighborhood principle imposes a duty of care on producers, manufacturers, processors and suppliers of foodstuffs (as actors) not to harm consumers (neighbors), as stated in *Donoghue* in which the producer of a ginger beer contaminated with a decomposed snail was held civilly liable.<sup>128</sup>

In the absence of a statutory duty of care, a common law duty exists in common law jurisdictions.<sup>129</sup> Courts in Australia and England apply this general principle (neighborhood principle) in determining the existence of a duty of care and related liabilities.<sup>130</sup> In *Zaman*, the duty of the restaurateur was “to provide food that was not harmful to customers who made clear that they have a food allergy.”<sup>131</sup> The prosecution did not have to prove the existence of a duty of care in *Zaman* because the defendant accepted the duty; however, had he not accepted, the Court probably would have imposed this duty.<sup>132</sup> It confirms that proprietors of businesses providing food or services to the public owe a duty of care to their consumers and service recipients. Regarding the existence of duty, Lord MacMillan in *Donoghue* pronounced:

A person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of those articles. That duty he owes to those whom he intends to consume his products.”<sup>133</sup>

Adding reasons for manufacturer’s duty of care, Lord MacMillan stated that:

He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that

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<sup>127</sup> *See id.*

<sup>128</sup> *See Donoghue v. Stevenson* [1932] AC 562 (HL) 580 (appeal taken from Scot.).

<sup>129</sup> *See id.*

<sup>130</sup> *See Jaensch v. Coffey* (1983) 155 CLR 549 (Austl.); *R v. Cittadini* [2009] NSWCCA 302 (Austl.); *R v. Zaman* [2017] EWCA (Crim) 1783 (UK); *R v. Kuddus* [2019] EWCA (Crim) 837 (UK).

<sup>131</sup> *R v. Zaman* [2017] EWCA (Crim) 1783 [25] & [41] (UK).

<sup>132</sup> Storey, *supra* note 45.

<sup>133</sup> *Donoghue v. Stevenson* [1932] All ER Rep 1 at 1-2 (UK).

relationship, which he assumes and desires for his own ends, imposes on him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health.<sup>134</sup>

Therefore, the duty is central to negligence and may exist in various ways, such as being implied by law, stemming from contract or certain relationships between the victim and offender, or being voluntarily assumed.<sup>135</sup> Both *Zaman* (England) and *Cittadini* (NSW) expressly required the existence of a duty of care the defendants owed to the victim.<sup>136</sup> However, there is no requirement to prove that they owed the duty to the victim individually; rather, it would suffice if the duty was owed to the class of people to whom the victim belongs.<sup>137</sup> The above-cited authorities demonstrate that the existence of duty is explicitly required in both England and NSW, whilst §304A (Bangladesh and India) is silent about this.

However, in the context of Bangladesh, §304A arguably implies this requirement because there cannot be an offense committed by negligent conduct of anyone unless the alleged offenders breach their duty of care.<sup>138</sup> The SCI in *Sushil Ansal* in 2014 notes that IPC1860 does not define the word negligence; however, “that has not deterred the Courts from giving what has been widely acknowledged as a reasonably acceptable meaning to the term.”<sup>139</sup> More clearly, the SCI stipulates that the existence of a duty of care is “the first and most fundamental of ingredients in any civil or criminal action brought on the basis of negligence,” and the other two ingredients are breach of the duty and the consequences thereof.<sup>140</sup> The SCI further recognizes the duty of care imposed by

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<sup>134</sup> *Id.*

<sup>135</sup> See *R v Russell* [1933] VLR 59 (Austl.); *R v. Stone & Dobinson* [1977] 1 QB 354 (UK).

<sup>136</sup> *R v. Zaman* [2017] EWCA (Crim) 1783 (UK); *R v. Cittadini* [2009] NSWCCA 302 (Austl.).

<sup>137</sup> *Id.*

<sup>138</sup> Bangl. Penal Code, 1860, §304A.

<sup>139</sup> *Sushil Ansal v. State Through Central Bureau of Investigations*, (2014) 6 SCC 1, 50 (India).

<sup>140</sup> *Id.* at 66.

both common law and legislation,<sup>141</sup> and the SCI in *Sushil Ansal* categorically noted that the duty of care has to be owed to the victim.<sup>142</sup>

Relying on the above-mentioned judicial interpretations of MCN and the indispensable nature of the existence of a duty of care, we can draw an inference that the duty is inherently entrenched in §304A; therefore, it exists in respect to food manufactures, producers, processors, suppliers and retailers in Bangladesh and India under the neighborhood principle. Alongside this statutory duty of care, common law duty under the neighborhood principle also exists, as the SCI admits. Bangladesh can benefit from these judicial interpretations. Both the existence and breach of a duty of care are necessary conditions for holding a person liable.<sup>143</sup> Therefore, the prosecution must prove that the defendant has breached the duty. Consideration of this element follows.

#### *B. The Defendant Negligently Breached the Duty of Care*

While a breach is obvious, the degree of negligence is a determining factor in distinguishing between civil and criminal liability. Although Lord Atkin in *Andrews v. DPP* equated negligence with the omission of a duty to take care in the specific perspective of negligent driving,<sup>144</sup> criminal negligence actually applies to both actions and omissions. As identified above, the key difference between civil and criminal negligence is that only criminal negligence involves the additional requirement that it involved such a high risk of death or GBH as to merit criminal punishment.<sup>145</sup>

Regarding breach, the Court in *Kuddus* stipulates in a food safety context that “[i]t is also axiomatic that a working test for when a duty of care is owed is that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor.”<sup>146</sup> As Lord Atkin clarified, the concept of neighbor is very broad, and includes all persons who may

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<sup>141</sup> *Id.* at 52.

<sup>142</sup> *Id.* at 66.

<sup>143</sup> *Kelly v R* (1923) 32 CLR 509, 515 (Austl.).

<sup>144</sup> [1937] AC 576, 581 (UK).

<sup>145</sup> *Id.*

<sup>146</sup> *R v. Kuddus* [2019] EWCA (Crim) 837 [36] (UK).

be affected by the disputed breach of the duty where the defendant ought to reasonably be able to contemplate them being so affected.<sup>147</sup> Whether the breached duty constitutes criminal negligence is determined by applying an objective test.<sup>148</sup> In Australia, the Supreme Court of Victoria in *Nydam* meticulously defined a breach of the duty of care, requiring the prosecution to prove MCN.<sup>149</sup> As ruled in *Nydam*, it is sufficient to prove MCN if the defendant's conduct constituting the breach, and thereby causing death of the victim, was grossly negligent and was done consciously and voluntarily in the absence of any intention to cause death or GBH.<sup>150</sup> These requirements of establishing MCN were subsequently approved by the HCA in *The Queen v. Lavender*<sup>151</sup> and *Burns v. The Queen* (both appeals were from NSWCCA).<sup>152</sup> As approved by the HCA, the requirement of the test of breach is to consider a comparison between the accused person's conduct and the conduct of a reasonable person who possesses the same attributes of the accused (such as the age, experience and knowledge) in the circumstances in which the accused found himself, regarding the ordinary firmness of character and strength of mind which a hypothetical reasonable person has.<sup>153</sup> The knowledge of the accused is relevant in considering the circumstances in which the hypothetical reasonable person is placed.<sup>154</sup> A breach occurs when the accused's conduct falls far below that of the reasonable person.<sup>155</sup>

The description of the test clearly includes both subjective and

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<sup>147</sup> *Donoghue v Stevenson* [2019] All ER Rep 1 at 1 (UK).

<sup>148</sup> *The Queen v Lavender* [2005] HCA 37, 60 (Austl.); *Patel v The Queen* [2012] HCA 29, 88 (Austl.).

<sup>149</sup> [1977] VR 430 ¶ 445 (Austl.).

<sup>150</sup> *Id.*

<sup>151</sup> *The Queen v Lavender* (2005) 222 CLR 67, 17, 60, 72, & 136 (Austl.).

<sup>152</sup> (2012) 246 CLR 334, 19 (per French CJ) (Austl.).

<sup>153</sup> *The Queen v Lavender* [2005] HCA 37, 73 (Austl.).

<sup>154</sup> *Id.* at 88.

<sup>155</sup> *See Burns*, (2012) 246 CLR at 8 (Austl.) (quoting *R v Holzer*, [1968] VR 481, 482 (Vic. Sup. Ct.) (“The test for a dangerous act [is when] ‘the circumstances must be such that a reasonable man in the accused’s position, performing the very act which the accused performed, would have realised that he was exposing another or others to an appreciable risk of really serious injury.’”).

objective elements.<sup>156</sup> The HCA in *The Queen v. Lavender* offered clarification about the subjectivity in the objective test, which states that “[i]f there had been some particular fact or circumstance which the [accused] knew, or thought he knew and which contributed to that opinion, and the jury had been informed of that, and the counsel had asked for a direction about it, then it may have been appropriate to invite the jury to take that into account.”<sup>157</sup>

The above clarification fortifies the inclusion of subjective knowledge in the objective test. However, the HCA in *Patel v. The Queen* in a MCN context further clarifies the use of special knowledge of the accused persons as their personal attribute in the following terms:

There may be cases where the standard to be applied must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act. But that is not to use a person’s knowledge to determine their guilt. A person’s special knowledge may mean that the standard of conduct expected of them is higher. It is necessary to add that the appellant’s imputed knowledge of his limitations cannot, logically, be applied to exculpate him for the reason that the objective standard to be applied is a minimum standard, applicable to all persons who profess to have the skills and competence.<sup>158</sup>

Furthermore, the NSWSC in *R v. Sam (17)*, while determining the directions to the jury, adds that in considering the attributes of the reasonable person, the accused’s personal beliefs, views or attitudes should be disregarded.<sup>159</sup>

The above-mentioned judicial assertions neatly explain that the special knowledge of the accused may be considered to justify a “higher standard” of conduct expected of a particular accused but not to exonerate him/her from liability; further, at the same time, the accused’s imputed knowledge of limitations cannot be applied to downgrade the objective standard.<sup>160</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> (2005) 222 CLR 67, 59 (Austl.)

<sup>158</sup> *Patel v The Queen* [2012] HCA 29, 90 (internal citation omitted).

<sup>159</sup> *See R v. Sam* [2009] NSWSC 803 ¶ 21 (Austl.).

<sup>160</sup> *Id.*

The test in England is also objective as devised in *Adomako*<sup>161</sup> and applied in *Zaman* where the trial judge directed the jury, which was affirmed by the Court of Appeal.<sup>162</sup> Indeed, when Kuddus' lack of knowledge regarding Megan's meal order was considered on appeal, he was acquitted based on an objective test that a reasonable restaurateur would not have foreseen an obvious and serious risk of death of anyone of the class of people having a history of "mild" nut allergy.<sup>163</sup> However, the relevant circumstances or factual matrix will be taken into consideration in determining the scope of the duty that has been breached.<sup>164</sup>

Generally, a food producer or supplier must be reasonably careful not to serve a customer or consumer any foodstuff that is harmful to all or any members of the public, and any hidden risk, such as ingredients that might cause allergic reaction, must be properly disclosed where relevant.<sup>165</sup> In particular, if a customer makes his/her specific problem known to the supplier, such as peanut allergies or gluten intolerance, he/she cannot be served any food containing any of those risky ingredients. Thus, the scope of duty is "fact specific" and a breach relates to that scope.<sup>166</sup>

Conceivably, although the breach of this duty has to be proved objectively in NSW, the test is not purely objective, because its objectivity has been compromised by adding some subjective elements of the defendant, making the test effectively hybrid.<sup>167</sup>

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<sup>161</sup> [1995] 1 AC (HL) 171 (UK).

<sup>162</sup> [2017] EWCA (Crim) 1783 [59]-[60] (UK) ("The judge made it clear that the requisite standard was an objective one . . . [W]e consider that the jury would have fully understood that the test was objective, and reasonableness was to be based on the standards of a competent restaurateur.").

<sup>163</sup> *Kuddus*, [2019] EWCA (Crim) 837 [62] (UK) ("Megan's parents always understood that her allergies were mild and had never been aware that they might lead to her death.").

<sup>164</sup> *Id.* at [39].

<sup>165</sup> *Id.* ("[A] restaurateur must obviously take reasonable steps not to serve food to a customer that is injurious to all and any members of the public . . . [But] the scope of the duty owed to members of the class (or subset) of allergy sufferers may well extend to identifying by warning in a menu or otherwise the presence of such allergens in food with the request that notice be given to the restaurant if, in a particular case, such an allergen is likely to cause harm.").

<sup>166</sup> *Id.* at [40].

<sup>167</sup> See *Lavender* (2005) 222 CLR 67 ¶ 14 (Austl.) ("It is [the jury's] task to determine . . . whether his actions amounted to negligence based upon . . . [what] a

However, it is important to note that the compromise in accepting the subjective attributes does not unduly advantage the defendant.

Like the requirement in England, NSW and India — Bangladesh obviously needs a breach of the duty. However, the test for proving a breach is somewhat different. §304A of the BPC1860 requires the defendant to cause death of any person by doing any *rash* or *negligent* act not amounting to culpable homicide.<sup>168</sup> There are no statutory illustrations or sufficient judicial interpretations of “rash or negligent acts” available in Bangladesh, as mentioned earlier.<sup>169</sup> In the absence of such annotations, a close reading of §304A as quoted previously leads us to identify a few distinctions between this statutory articulation of MCN and their common law equivalents in England and NSW.

First, §304A adds ‘rash acts’ in addition to “negligent acts,”<sup>170</sup> whereas “negligent conduct” stands alone in England and NSW.<sup>171</sup>

Second, §304A does not indicate anything about the degree of negligence required to commit this offense.<sup>172</sup> It may mean to some people that ordinary negligence may have been criminalized unfairly, whereas the common law succinctly requires grossly negligent conduct.<sup>173</sup> However, the SCI added this qualification of grossness for India.

Third, §304A literally makes only “acts” as the conduct element of this offense and remains silent about “omissions” which is an obvious part of negligent conduct.<sup>174</sup> By contrast, England and NSW explicitly criminalize both acts and omissions.<sup>175</sup> However, the SCI included “omissions” as well (which will be shown shortly

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reasonable person in the position of the accused would have done.”).

<sup>168</sup> Bangl. Penal Code, 1860, §304A.

<sup>169</sup> *Rashidullah*, 21 DLR 709 (1969) (Bangl.).

<sup>170</sup> See Bangl. Penal Code, 1860, §304A.

<sup>171</sup> See *Cittadini*, [2009] NSWCCA 302 at [29]; see also *Adomako* [1995] AC (HL) 171 at 9 (UK).

<sup>172</sup> See Indian Penal Code, 1860, §304A(a) (requiring “any rash or negligent act”) (emphasis added).

<sup>173</sup> See *Bhalachandra Waman Pathe v. State of Maharashtra*, AIR 1968 SC 1319 (1968) (India) (“Criminal negligence is the gross and culpable negligent or failure exercise that reasonable and proper care.”).

<sup>174</sup> Citation needed

<sup>175</sup> Compare Indian Penal Code §304A(a); *Cittadini*, [2009] NSWCCA 302 ¶ 29; *Adomako* [1995] 1 AC (HL) 171, 9 (UK).



below).

Fourth, there is no indication of the foreseeability of risks associated with the negligent acts, which is essential to determine criminal negligence, whereas England and NSW are both clear about the relevant risks.<sup>176</sup> This loophole in §304A has the potential to criminalize the act where the defendant foresaw only “simple injury,” which seems to be overreach of manslaughter liability.<sup>177</sup> This view is supported by the fact that a proven foresight of simple injury eventually resulting in death of the victim does not attract manslaughter liability in England or NSW.<sup>178</sup>

Fifth, given the absence of foreseeable risks, §304A also omits mentioning the applicable test to determine the breach (or the guilt) of the defendant. This can create further complexity in establishing the breach. Generally, an objective foresight of a possibility of causing at least GBH is required to commit MCN.<sup>179</sup> §304A is sharply different from England and NSW, as there is the foreseeability risk of GBH or death in NSW and only death in England.<sup>180</sup> Hence, based on the above-stated differing points, §304A of the BPC1860 seems to be deficient in several respects, and it has the potential of over-criminalization of negligent conduct. The recipe for such a suspicion is found in the sole case interpreting §304A from Bangladesh, which is *Rashidullah*.<sup>181</sup> The HCD interprets the term a “rash act,” but not a “negligent act,” therefore we are not analyzing this case.<sup>182</sup> However, the following interpretation of the meaning of a “rash act” would be helpful to substantiate our concern of over-criminalization of negligent conduct. The Court interpreted:

A rash act means hazarding a dangerous and wanton act with the *knowledge* that it is dangerous or wanton and that it may

<sup>176</sup> Citation needed

<sup>177</sup> See *Rashidullah*, 21 DLR 709 (1969) (describing culpable conduct as “a dangerous and wanton act . . . that [] may cause injury”) (emphasis added).

<sup>178</sup> *Kuddus* [2019] EWCA (Crim) 837 [47] (UK) (quoting R v Gurpal Singh [1999] Crim LR 582 (UK)) (“The circumstances must be such that a reasonably prudent person would have foreseen a serious and obvious risk not merely of injury or even serious injury but of death.”).

<sup>179</sup> See *Cittadini* [2009] NSWCCA 302 ¶¶ 29, 33 (Austl.).

<sup>180</sup> *Id.*; see also *Kuddus* [2019] EWCA (Crim) 837 [54] (UK).

<sup>181</sup> 21 DLR 709 (1969) (Bangl.).

<sup>182</sup> *Id.* (emphasis added).

cause injury but without any intention to cause injury or knowledge that it will probably be caused. The *criminality* in such a case lies in running the risk of doing the act *with recklessness or indifference* as to the consequence.<sup>183</sup>

The above interpretation requires subjective knowledge that “it may cause injury but without any intention to cause injury or knowledge that it will probably be caused.”<sup>184</sup> This is an unusual test for a manslaughter offense. If the accused knew that the disputed conduct has the potential to cause injury, and eventually caused death, on what basis will the accused have the knowledge that it will “probably” not cause it? The word “probably” means “more likely than not,” whereas “possibility” refers to “less likely” to happen.<sup>185</sup> The Court appears to have criminalized the subjective knowledge of the probability of causing “simple injury” for a serious offense of manslaughter under §304A. So, we have reasons to argue that this formulation may also extend to “negligence” under the same section.

The researchers found some interpretations of §304A by Indian courts. The High Court of Delhi in *Sanjeev Nanda v. The State* explains, in relation to “rash act” in §304A, that “the knowledge of third degree involves death of a person but the offender hopes that the same would not occur and such type of offense would be the lowest degree of gross recklessness and may be called a rash act.”<sup>186</sup> This is more acceptable and is significantly different from the above-cited interpretation of the word in *Rashidullah*. The High Court of Delhi in *Bhalachandra Waman Pathe v. The State of Maharashtra* in 1968 sought to distinguish between “rash” and “negligent” acts:

In the case of a rash act . . . the criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences [death as noted above]. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having

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<sup>183</sup> *Id.* at 709 (emphasis added).

<sup>184</sup> *See R v Crabbe* (1985) 156 CLR 464 (Austl.).

<sup>185</sup> *See id.*; *See also* David Brown ET AL., *Criminal Laws* 793-796 (7<sup>th</sup> ed, 2020).

<sup>186</sup> *Sanjeev Nanda v. The State of Dehli*, Crim. Appeal No. 807 of 2008, decided on Jul. 20, 2009 (High Ct. of Delhi), at 200.

regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.<sup>187</sup>

The Court further wrote:

Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and if he had he would have had the consciousness. The imputability arises from the negligence of the civil duty of circumspection.<sup>188</sup>

This interpretation includes both “acts” and “omissions” in negligent conduct, as it should be, though §304A is silent about omissions.

Regarding the element of breach, the High Court of Delhi in *Sanjeev Nanda* requires that in establishing a criminal breach of negligence under §304A, the prosecution has to prove that it was “a breach of duty, an act done without due care and caution and decision in taking precaution.”<sup>189</sup> Likewise, summing up such a breach, the SCI in *Sushil Ansal* spells out that:

[N]egligence signifies the breach of a duty to do something which a reasonably prudent man would under the circumstances have done or doing something which when judged from reasonably prudent standards should not have been done. The essence of negligence whether arising from an act of commission or omission lies in neglect of care towards a person to whom the defendant or the accused as the case may be owes a duty of care to prevent damage or injury to the property or the person of the victim.<sup>190</sup>

Providing a similar interpretation previously, the SCI in *Prabhakaran v. State of Kerala* stated that “[a] negligent act is an

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<sup>187</sup> Bhalachandra, AIR 1968 SC 1319 at 208 (India).

<sup>188</sup> *Id.*

<sup>189</sup> *Sanjeev Nanda v. The State of Dehli*, Crim. Appeal No. 807 of 2008, decided on Jul. 20, 2009 (High Ct. of Delhi), at 255.

<sup>190</sup> *Sushil Ansal v. State Through Central Bureau of Investigations*, (2014) 6 SCC 1 (India).

act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it.”<sup>191</sup>

Relying on the interpretations of negligent breach of §304A by the Indian higher judiciary,<sup>192</sup> we conclude that criminal negligence under §304A refers to negligent conduct encompassing both acts and omissions which fall below the standard of care, meaning that the defendant did something which a reasonable person would not have done or failed to do something which a reasonable person would have done in the same circumstances.

Proving a breach of a duty of care generally requires applying an objective test. However, a distinction can be identified that the common law principles in England and NSW ordains an objective test to be applied to establish a breach, attributing the defendant’s certain subjective elements to the notional reasonable person, which renders the test hybrid (further discussed below). Yet the interpretations of §304A make no mention of such imputation. Instead, the SCI mentions that “which a ‘prudent or reasonable’ person would or would not do.”<sup>193</sup> It is not always easy to equate “prudence” to “reasonableness.” We are of the view that the hybrid test suggested in common law would provide greater certainty about the relevant test and thereby proffers better protection to consumers. This is because the hybrid test works in favor of the victim, in that the defendant’s knowledge and experience could be used only to enhance the standard of defendant’s conduct. Therefore, a pure objective test in Bangladesh and India has the potential to disadvantage victims. We submit that Bangladesh can follow the interpretations by the Indian courts, alongside the common law principles, as persuasive materials.

As we stated earlier, there is a potential of over-criminalization by §304A, and we argue that criminalization of simple negligence which falls within the domain of civil law is a criminal law overreach. It apparently favors victims but may negatively impact the public perception of justice. Therefore, it needs to be addressed by either the legislature or the judiciary in Bangladesh. Further, it

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<sup>191</sup> Prabhakaran v. State of Kerala, (2007) 14 SCC 269, at 5 (India).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

is important to note that when determining a breach of the duty of care with respect to MCN, defendants cannot rely on the common law defense of honest and reasonable mistake of fact under common law principles.<sup>194</sup> The available interpretations of § 304A are silent about this, which should be clarified as well. Furthermore, the issue of reasonable foreseeability of serious and obvious risk or death or GBH has to be taken into consideration as an essential element of breach in question, as we will now discuss.

*C. It was Reasonably Foreseeable that the Breach of that Duty Gave Rise to a Serious and Obvious Risk of Death or Grievous Bodily Harm (GBH)*

The concept of foreseeability is generally relevant to *mens rea*; however, it can be considered in deciding causation as well.<sup>195</sup> This is a very critical element in which the English law differs from its Australian equivalent; the former requires a reasonably foreseeable risk of “a serious and obvious risk of death,”<sup>196</sup> whereas the latter is satisfied if the risk is one that gives rise to “GBH or death”<sup>197</sup> of anyone to whom the defendant owed the duty of care at the time of breach. The gravity of risk indicates the rationality of criminalization of negligence which could otherwise be only a civil wrong. The Court in *Zaman* stated that “[i]t is trite law that liability for gross negligence manslaughter will only arise if there is an objective foresight of a serious and obvious risk of death.”<sup>198</sup> As reaffirmed in *Kuddus*, the foreseeability of such a risk will be determined objectively that “a reasonably prudent person possessed of the information known to the defendant would have foreseen that the defendant’s actions or omissions constituting the breach of duty had exposed the deceased to an “obvious and serious” risk of death.”<sup>199</sup> The test does not seem to be purely objective as it allows

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<sup>194</sup> *Lavender*, (2005) 222 CLR at 57–60 (Austl.) (stating that mistake implies an opinion, which “would be inconsistent with what has been described as the objectivity of the test for involuntary manslaughter.”).

<sup>195</sup> See David Brown ET AL., *supra* note 195 at 854 (citing *Royall v. R* (1991) 172 CLR 378 (Austl.)).

<sup>196</sup> *Kuddus*, [2019] EWCA (Crim) 837 at 54 (UK).

<sup>197</sup> *Cittadini*, [2009] NSWCCA 302 ¶¶ 29 & 33 (Austl.).

<sup>198</sup> [2017] EWCA (Crim) 1783 at 66 (UK).

<sup>199</sup> [2019] EWCA (Crim) 837 at 45 (UK).

the ascription of a defendant's knowledge to the hypothetical reasonable person of the objective test.<sup>200</sup> The Court of Appeal in *R v. Rose* ruled, in assessing either the foreseeability of risk or the grossness of the conduct in question, that the test is both objective and prospective.<sup>201</sup> The Court in *Kuddus* reaffirmed that the assessment of the foreseeability issue is both objective and prospective.<sup>202</sup> The objective test requires determination of the issue "according to a reasonable prudent person in the shoes of the defendant" whilst denoting "it is predicated on the defendant's *actual knowledge* at the time of the breach, and not on knowledge that he or she could, or should, have had."<sup>203</sup> As regards actual subjective knowledge (as opposed to objectively assumed knowledge) with respect to foreseeability of risk for the purposes of MCN, Zaman is comparable to Rashid (manager in *Kuddus*) who did not appeal against his conviction. They both were aware of their respective orders and associated risks.<sup>204</sup>

Similar to the common law of Australia, which allows this attribution to determine the high standard of the defendant's conduct but not to exculpate him/her from the liability, the English Court of Appeal in *Rose* provides that it is untenable where the defense argues that the cause of breach was a defendant's lack of foresight of serious risk of death,<sup>205</sup> and this decision, *Rose*, was carried over to limit the imputed foresight of the hypothetical reasonable and prudent person in the defendant's position."<sup>206</sup> The obviousness and seriousness of the risk are objective facts, which are not dependent upon the state of mind or knowledge of the defendant.<sup>207</sup> If there is a real issue as to their existence, each must be proved by relevant and admissible evidence.<sup>208</sup> However, the Court of Appeal in *R v. Gurpal Singh* emphasized this test that the

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<sup>200</sup> *See id.*

<sup>201</sup> *See* [2017] EWCA (Crim) 1168, at 78 (UK).

<sup>202</sup> *See* [2019] EWCA (Crim) 837 at 33 (UK).

<sup>203</sup> Storey, *supra* note 45, at 516-518 (emphasis added).

<sup>204</sup> *See id.* at 517-18.

<sup>205</sup> [2017] EWCA (Crim) 1168 at 91 (UK).

<sup>206</sup> *Kuddus*, [2019] EWCA (Crim) 837 at 51 (citing *Rose*, [2017] EWCA Crim. 1168 at 91).

<sup>207</sup> *See id.* at 53-54.

<sup>208</sup> *Id.*

circumstances must be such that a reasonably prudent person would have foreseen a serious and obvious risk of death and a risk of injury, even serious injury would not be enough.<sup>209</sup>

An identical view in favor of a serious risk of death was expressed in *R v. Misra*,<sup>210</sup> and the England and Wales Court of Appeal in *R v. Rudling* further clarified that “a mere possibility that an assessment might reveal something life-threatening which is not the same as an obvious risk of death. An obvious risk of death is a present risk which is clear.”<sup>211</sup> The English test is drawn from *Adomako*, in which it was held that once the breach of duty is established, the next issue is to consider whether the breach should be characterized as gross negligence warranting criminal penalty. The House of Lords states that “[t]he 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.”<sup>212</sup>

The foregoing discussion reinforces previous conclusions with further substantiation that the degree of negligence required to constitute MCN is very high, and the gravity of risk is very serious. The test to establish the foresight of risk is objective and the defendant’s actual knowledge of the relevant circumstances can be taken into consideration to enhance the standard of care of the defendant, but not to lower the standard that may lead to acquittal. This provision is common in both England and NSW.<sup>213</sup> However, a sharp contrast exists between them with respect to potential consequence, where England accepts only the risk of death but NSW extends the risk of causing either death or GBH.

To the contrary, §304A in both India and Bangladesh adopts a more flexible approach to criminalizing negligent conduct, in that it would suffice if the conduct had the potential to cause even a “simple injury” but eventually ended up causing death of the victim. This creates a significant difference between the laws of England

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<sup>209</sup> [1999] Crim. LR 582 (UK).

<sup>210</sup> [2004] EWCA (Crim) 2375, at 25 (UK).

<sup>211</sup> See [2017] EWCA (Crim) 1168, at 78 (UK).

<sup>212</sup> [1995] 1 AC (HL) 171 at 187 (UK).

<sup>213</sup> See *Rose*, [2017] EWCA (Crim) 1168 at 91; see also *Cittadini*, [2009] NSWCCA 302 ¶¶ 29 & 33 (Austl.).

and NSW and those of Bangladesh and India.

Further, the degree of negligence must be very high (to be discussed shortly below) in both England and NSW. But no such succinct ruling is found in judicial interpretations of §304A, connecting with the consequence, “gross” is mentioned by the SCI.<sup>214</sup> Therefore, ambiguities exist in relation to both the required degree of negligence in connection with the required consequence and the applicable test to establish criminal negligence.

Although all of the four jurisdictions belong to the common law family, significant differences persist between their laws on foreseeable consequences and the objectivity of the test to be applied to determine the foresight of the risks involved. After the determination of foreseeability of risks, MCN requires consideration of causation of the death in question.

*D. Causation—the Breach of the Duty of Care that Caused the Victim’s Death*

Causation is a crucial consideration in all four jurisdictions at hand. With respect to causation, Lord Hoffmann in *SAAMCO* pronounced that a plaintiff suing for the enforcement of the duty of care must prove more than the defendant’s failure to comply with the duty.<sup>215</sup> The Court of Appeal in *Zaman* distinguishes between “factual causation” and “legal causation,” and declares that the factual cause was not an issue.<sup>216</sup> The Court considered the confirmation given in *Adomako* that “the prosecution is also obliged to prove legal causation, i.e. that the appellant’s breach of duty caused or made a significant contribution to the death” of the deceased.<sup>217</sup> The cause needs to be “a” cause, rather than “the” cause of the victim’s death, as Lords Hughes and Toulson underscored in *R v. Hughes* “[w]here there are multiple legally effective causes . . . it suffices if the act or omission under consideration is a significant (or substantial) cause, in the sense that it is not de minimis or minimal.”<sup>218</sup> It need not be the only or the

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<sup>214</sup> See *Sushil Ansal v. State*, (2014) 6 SCC at 66 (India) (offering no clear definition of degree of conduct required for gross negligence).

<sup>215</sup> See [1996] 3 All ER 370 (UK).

<sup>216</sup> See [2017] EWCA (Crim) 1783 [66] (UK).

<sup>217</sup> *Id.* at [49].

<sup>218</sup> Storey, *supra* note 45, at 205 (quoting *R v Hughes* [2013] UKSC 56, at 220).



principal cause.<sup>219</sup> It must, however, be a cause which is more than de minimis, more than minimal.”<sup>220</sup>

If the chain of causation is broken, the conduct of the defendant can still be accepted as satisfying the requirement of being an “operating and substantial cause” where it seems to the court that “if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating.”<sup>221</sup> Accordingly, the Court of Appeal in *Kuddus* applied this test and held that there must be a causal link between the victim’s death and the defendant’s breach of duty, and the breach need not be the sole, but a significant cause.<sup>222</sup>

The causation test in both England and Australia are identical. The NSWSC in *Justins v. R*<sup>223</sup> and the HCA in *Lane v. R*<sup>224</sup> underlined the requirement that the defendant’s negligent conduct causes the victim’s death. However, in the cases where it may not be very clear whether the defendant’s action or omission caused the death, it will suffice if the disputed conduct constitutes one cause, rather than “the sole cause.”<sup>225</sup> Further, where more than one cause is present, common law principles require that consideration be given to the determination of whether the accused’s negligent conduct was an “operating and substantial” cause of the deceased’s death.<sup>226</sup> The NSWCCA held in *R v. Andrew* that the prosecution need not prove that the accused’s act was the principal cause.<sup>227</sup> The Court further added that it is a question of fact as to whether defendant’s conduct caused the death of the victim,<sup>228</sup> as is the identification of the conduct causing the death in question, as held

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *R v. Smith* [1959] 2 QB 35, at 42-43 (UK).

<sup>222</sup> *See Kuddus*, [2019] EWCA (Crim) 837 at 32-34 (UK).

<sup>223</sup> [2010] 79 NSWLR 544, at 97 (Austl.).

<sup>224</sup> [2013] 241 A Crim R 321, at 61 (Austl.).

<sup>225</sup> *R v. Pagett* (1983) 76 Cr. App. R(S) 279, 288 (UK).

<sup>226</sup> *See Royall v The Queen* [1991] HCA 27 (Austl.); *see also R v Lam & Ors* [2008] 185 A Crim R 453, at 64-65 (Austl.).

<sup>227</sup> *See* [2000] NSWCCA 310, at 60 (Austl.).

<sup>228</sup> *See id.*

by the NSWCCA in *R v. Katarzynski*.<sup>229</sup>

Unlike England and NSW laws, Indian law requires death to be the “direct result” of the accused’s negligent conduct. The SCI in *Suleman Rehiman Mulani v. State of Maharashtra*, adopted an old judicial decision, *Emperor v. Omkar Rampratap*,<sup>230</sup> as “the true legal position.” It reads:

To impose criminal liability under §304A . . . it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another’s negligence. It must be the cause causans, it is not enough that it may have been the cause sine qua non.<sup>231</sup>

The SCI quoted the meaning of “cause causans” (causa causans) from the Advance Law Lexicon edited by Justice Chandrachud (former Chief Justice of India) as being “the immediate cause, as opposed to a remote cause; the last link in the chain of causation; the real effective cause of damage,”<sup>232</sup> and the meaning of “proximate cause” was adopted from Black’s Law Dictionary which states that it is the cause “which in a natural and continuous sequence unbroken by any efficient, intervening cause, produces injury and without which the result would not have occurred.”<sup>233</sup>

This significantly differs from the causation requirements in England and NSW. The higher requirement under §304A as interpreted above would arguably operate in favor of the defendant, which seems to frustrate the social expectation of justice, as seen in the following outcomes of an appeal.<sup>234</sup>

The SCI on appeal in *Suleman Rehiman Mulani* set aside conviction of manslaughter under §304A and acquitted the accused who seriously injured the victim while driving a jeep with a “learner license” without being accompanied by a qualified license holder, also known as a trainer.<sup>235</sup> The driver along with his passenger of

<sup>229</sup> [2005] NSWCCA 72 ¶¶ 17-18 (Austl.).

<sup>230</sup> (1902) 4 Bom. L.R. 679 (India).

<sup>231</sup> See *Suleman Rehiman Mulani v. State of Maharashtra*, (1968) 2 SCR 515 at 6 (citing *Emperor v Omkar Rampratap*, (1902) 4 Bom. L.R. 679 (India)).

<sup>232</sup> *Sushil Ansal*, (2014) 6 SCC at 80 (India).

<sup>233</sup> *Id.* at 81.

<sup>234</sup> See *Suleman Rehiman Mulani*, (1968) 2 SCR 515 (India).

<sup>235</sup> *Id.*

the same jeep pulled the injured into the same vehicle in order to take him to a hospital, but the victim died on the way.<sup>236</sup> The appellant driver was convicted by the trial court under §304A.<sup>237</sup> The conviction was affirmed by the Court of Sessions Judge in appeal as well as by the State High Court in revision.<sup>238</sup> However, on final appeal, the SCI held that there was no evidence that the appellant driver was responsible for the accident; therefore, the conviction was quashed.<sup>239</sup> The SCI emphasized that the conviction under §304A requires the prosecution to prove that the death must have been caused by the accused's rash or negligent act.<sup>240</sup> The Court added that there must be "direct nexus" between the death of a person and the disputed act of the accused.<sup>241</sup> To substantiate its decision, the SCI emphasized two points. The victim was taken to a hospital, a doctor of which refused to treat and called it a "medico-legal case" and advised the accused to take the victim to a government dispensary – the victim died on the way.<sup>242</sup> The SCI held that there was no evidence to find out the circumstances under which the accident took place, and the prosecution needed to prove that the accused's negligent act caused the death, but they could not do so.<sup>243</sup> Notably, the Court did not find the circumstances in which the fatal accident occurred, so the defendant could not be held liable, but it appears that the Court did not ask itself why the victim was taken to the hospital.<sup>244</sup> The answer would be certainly for the accident. Then the accident was obviously at least a significant and an operating cause which would be sufficient to punish the defendant in both England and NSW.<sup>245</sup>

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<sup>236</sup> *Id.* at 1.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 3.

<sup>239</sup> *Id.*

<sup>240</sup> *See* Suleman Rehiman Mulani, (1968) 2 SCR 515 at 5 (India) ("The requirements of this section are that the death of any person must have been caused by the accused by doing any rash or negligent act.").

<sup>241</sup> *Id.* at 4.

<sup>242</sup> *Id.* at 3.

<sup>243</sup> *Id.* at 2.

<sup>244</sup> *Id.*

<sup>245</sup> *See* R v. Zaman [2017] EWCA (Crim) 1783 [49] (UK); *see also* R v Andrew [2000] NSWCCA 310 ¶ 60 (Austl.) (requiring that the defendant "made a significant

Similarly, the SCI acquitted the defendants in *Ambalal D. Bhatt v. The State of Gujarat*, a case involving adulteration of a solution of glucose in normal saline. This solution contained more than the permitted quantity of lead nitrate, resulting in the deaths of 13 people who were administered the drug.<sup>246</sup> In this case, the trial court convicted the accused, a Chemist In-Charge of the Injection Department of Sanitax Chemical industries Ltd, under §304A.<sup>247</sup> The first appeal was lodged with the Additional Sessions Judge who acquitted the appellant of the offenses, then the prosecution appealed against the acquittal to the Gujrat High Court, which convicted the appellant again.<sup>248</sup> The appellant lawyer claimed with respect to causation that:

Inasmuch as in all cases [sic] under Section 304A there is a casual chain which consists of many links, it is only that which contributes to the cause of all causes, namely, the *causa causans* and not *causa sine qua non* which fixes the culpability. In other words, it is submitted that it is not enough for the prosecution to show that the appellant's action was one of the causes of death. It must show that it is the direct consequence, which in this case has not been established.<sup>249</sup>

To counter the defense lawyer, the State prosecutor argued that the appellant had negligently failed to comply with the relevant rules and the death in question was the direct consequence of that negligence.<sup>250</sup> The SCI accepted the prosecution's arguments, however and asserted that:

the mere fact that an accused contravenes certain rules or regulations in the doing of an act which causes death of another, does not establish that the death was the result of a rash or negligent act or that any such act was the proximate and efficient cause of the death.<sup>251</sup>

The Court then considered "whether the appellant's act is the

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contribution to the death" of the victim).

<sup>246</sup> (1972) 3 SCC 525, [1] (India).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 6.

<sup>250</sup> *Id.* at 7.

<sup>251</sup> *Id.* at 8.

direct result of a rash and the negligent act and that act was the proximate and efficient cause without the intervention of another's negligence."<sup>252</sup> Again, referring to a case from 1902, *Omkar Rampratap*,<sup>253</sup> the SCI asserted that the act of causing the deaths in question "must be the cause causans; It is not enough that it may have been the causa sine qua non."<sup>254</sup> Accordingly, the Court held that accused's negligent act was a cause, but not "cause causans," and there were intermediate causes, so the defendant was acquitted.<sup>255</sup> The SCI also took the same approach in acquitting accused persons previously.<sup>256</sup>

In the absence of available judicial interpretations of §304A by the Supreme Court of Bangladesh, we tend to consider that the courts in Bangladesh are likely to concur with the causation requirements set forth by the Indian highest court.<sup>257</sup> The differences shown above are substantial for the outcome of a prosecution, and arguably, they favor the defendants unduly. Therefore, the courts of both India and Bangladesh need to pay heed to the interpretations of causation by their counterparts in England and NSW as presented above.<sup>258</sup> Such a revisit to the decisions of the SCI is desirable to deliver justice, create deterrence and maintain public confidence in the judicial system.

Even though it is proven that the conduct of the defendant has caused the victim's death in a given case, the offense cannot be a MCN unless the degree of negligence merits criminal penalties, as explained below.

*E. The Circumstances of the Breach were so Bad and so Reprehensible as to Justify the Conclusion that it Amounted to Gross Negligence and Required Criminal*

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<sup>252</sup> *Ambalal D. Bhatt*, (1972) 3 SCC 525, [1] (India).

<sup>253</sup> (1902) 4 Bom. L.R. 679.

<sup>254</sup> *Ambalal D. Bhatt*, (1972) 3 SCC 525, [8] (India).

<sup>255</sup> *Id.* at [9]-[23].

<sup>256</sup> *Kurban Hussein Mohammedali Rangwalla v. State of Maharashtra*, (1965) 2 SCR 622 (India); *Suleman Rehimani Mulani v. State of Maharashtra*, (1968) SCR 515 (India).

<sup>257</sup> *See* *Ambalal D. Bhatt*, 3 SCC 525 [8] (India).

<sup>258</sup> *See* *R v. Zaman* [2017] EWCA (Crim) 1783 [49] (UK); *see also* *R v Andrew* [2000] NSWCCA 310 ¶ 60 (Austl.).

### *Sanction*

Only gross negligence can create criminal liability, as we have discussed with previous elements.<sup>259</sup> Therefore, the degree of negligence is a decisive factor. Gross negligence is the *mens rea* of MCN. In explaining to jurors the appropriate test “to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as ‘culpable,’ ‘criminal,’ ‘gross,’ ‘wicked,’ ‘clear,’ or ‘complete.’”<sup>260</sup> The House of Lords in *Adomako* then added:

[W]hatever epithet be used and whether an epithet be used or not, in order to establish criminal liability, the facts must be such that, in the opinion of the jury, 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.<sup>261</sup>

Both England and NSW require grossly negligent conduct to commit MCN, as mentioned earlier.<sup>262</sup> In this respect, the House of Lords in *Adomako* held that it is the grossness in negligence which makes the conduct criminal, and whether the negligence is gross is a question of fact.<sup>263</sup> In England, the trier of facts needs to be sure that the accused’s conduct is “truly exceptionally bad,” demonstrating such a departure from the proper conduct of a reasonable person in the accused’s circumstances as to be regarded reprehensible, and properly characterized as gross or criminal negligence.<sup>264</sup> Similarly, the common law of Australia requires that the negligent conduct be grossly or wickedly negligent.<sup>265</sup> Although an objective test applies to determine the nature of negligent, as alluded to earlier, the objective test is significantly influenced by the

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<sup>259</sup> *Kelly v. R* (1923) 32 CLR 509, 515 (Austl.).

<sup>260</sup> *R v. Adomako* [1995] 1 AC (HL) 171 (UK).

<sup>261</sup> *Id.*

<sup>262</sup> See *Zaman*, [2017] EWCA (Crim) [49] (UK); see also *Andrew*, [2000] NSWCCA 310 ¶ 60 (Austl.).

<sup>263</sup> *R v. Adomako* [1995] 1 AC (HL) 171 (UK).

<sup>264</sup> *R v. Kuddus* [2019] EWCA (Crim) 837 [56] (UK); see e.g., *R v. Adomako* [1995] 1 AC (HL) 171 (UK); *R v. Sellu* [2016] EWCA (Crim) 1716 [150] (UK).

<sup>265</sup> *The Queen v. Lavender* [2005] 222 CLR 67 ¶ 58 (Austl.); *R v. Taktak* [1988] 14 NSWLR 226, 243-44 (Austl.).

same subjective attributes of the defendant to upgrade the standard of conduct in common law.

In *Zaman*, the accused was not aware of the declared allergy of the victim, nor did he prepare any part of the deceased's meal. Nevertheless, he was convicted, even though he was a man of good character.<sup>266</sup> The conviction and sentence were justified by arguing that Zaman: (i) was negligent in imparting relevant training to their employees;<sup>267</sup> (ii) was "secretly" using materials for saving money that had the potential to harm some customers (though not all);<sup>268</sup> and (iii) used the materials that cause death of a person who declared his problem with those ingredients.<sup>269</sup> Putting all these failures together, the court found Zaman's personal gross negligence in breaching the duty of care owed to the victim.<sup>270</sup> It was so because Zaman had "accepted that he knew that customers with a peanut allergy were at risk of fatal consequences if they ingested peanut" and had "conceded that there was a serious and obvious risk of death" in relation to the deceased.<sup>271</sup>

As shown above, and as similar to the position in the United Kingdom, Australian common law also requires the negligence to be gross or wicked.<sup>272</sup> The New South Wales Court of Criminal Appeal ("NSWCCA") highlighted the significance of the degree of negligence required to commit MCN in *The Queen v. Lavender* and mentioned that the negligence has to be of a high degree which merits criminal punishment.<sup>273</sup> The HCA also approved the word "wicked" alongside "gross" to be used to characterize the required degree of negligence.<sup>274</sup> However, the term "wickedness" was not a constituent element of the offense; it "was simply an epithet designed to bring home to the jury in a colorful way the very high test to be met by the Crown" as explained by the Supreme Court of

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<sup>266</sup> R v. Zaman [2017] EWCA (Crim) 1783 [81] (UK).

<sup>267</sup> *Id.* at 27-31.

<sup>268</sup> *Id.* at 6-22.

<sup>269</sup> *Id.* at 14.

<sup>270</sup> *Id.* at 63-64.

<sup>271</sup> *Id.* at 65-66.

<sup>272</sup> *See R v Lavendar* [2005] 222 CLR 67 ¶ 58 (Austl.).

<sup>273</sup> *R v. Lavender* [2004] NSWCCA 120 ¶ 323 (Austl.); David Brown ET AL., *supra* note 195, at 822.

<sup>274</sup> David Brown ET AL., *supra* note 195, at 822.

NSW in *R v. Sood* (Ruling No 3).<sup>275</sup> Whether the negligence was gross or wicked is a question of fact, and it must be proved by applying an objective test placing the reasonable person in the defendant's position.<sup>276</sup> To minimize the impact of the accused's subjective attributes in establishing the grossness, the HCA adopted the view of the House of Lords that the Crown is not required to prove the accused's subjective appreciation that "he was being negligent or that he was being negligent to such a high degree."<sup>277</sup> The HCA in *R v. Lavender* implicitly approved the trial judge's direction to the jury to consider the reaction of "a reasonable person in the position of the accused:"

[A] reasonable person who possesses the same personal attributes as the accused, that is to say a person of the same age, having the same experience and knowledge as the accused and the circumstances in which he found himself, and having the ordinary fortitude and strength of mind which a reasonable person would have, and determine on that basis whether the Crown has made out its case.<sup>278</sup>

To conclude, the test to establish "gross" negligence is not purely objective, but hybrid with a limited consideration of the accused's subjective attributes.<sup>279</sup> It is a similar test as applicable to determine the foreseeability of risks in both England and NSW.<sup>280</sup>

The SCI expressed an identical view about such grossness in several cases when it ruled that conviction under §304A essentially requires grossly negligent of the accused, even though the statutory provisions do not use this expression.<sup>281</sup> The SCI in *Sushil Ansal* adopted its previous interpretation of §304A and stated that:

For negligence to amount to an offense, the element of mens

<sup>275</sup> [2006] NSWSC 762 [53] (per Simpson J) (Austl.); David Brown ET AL., *supra* note 182, at 822.

<sup>276</sup> See *Lavender*, (2005) 222 CLR 67 at 59 (Austl.); see also *R v. Taktak* (1988) 14 NSWLR 226, 243-244 (Austl.).

<sup>277</sup> *Lavender*, (2005) 222 CLR 67 at 14 (Austl.).

<sup>278</sup> *Id.*

<sup>279</sup> David Brown ET AL., *supra* note 195, at 823.

<sup>280</sup> See e.g., *Lavender*, (2005) 222 CLR at 14 (Austl.); *Zaman*, [2017] EWCA (Crim) at [81].

<sup>281</sup> See e.g., *Sushil Ansal v. State Through Central Bureau of Investigations*, (2014) 6 SCC 1, 72-73 (India); *Ambalal D. Bhatt v State of Gujarat*, (1972) 3 SCC 525 (India); *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 (India).



rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree . . . The word gross has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence . . . to be so held, must be of such a high degree as to be gross. The expression rash or negligent act as occurring in Section 304-A IPC has to be read as qualified by the word grossly.<sup>282</sup>

Although the SCI repeatedly states the requirement of grossness, it does not define “gross negligence,” nor did it set forth an appropriate test to determine the grossness. Instead, the Court left this to the discretion of lower courts to decide on a case-by-case basis.<sup>283</sup>

The above discussion reinforces the need for the very high degree of negligence that must be proven in order to convict an accused of MCN in all the jurisdictions at hand, except Bangladesh. The articulation of the common law MCN succinctly includes this grossness, whilst the judiciary adds this requirement to §304A through interpretations in India.<sup>284</sup> Therefore, based on the interpretations of the highest court of India, we can conclude that the word “gross” is inherent in §304A for India.<sup>285</sup> Bangladesh as a separate common law jurisdiction has the liberty to accept or reject these Indian interpretations. However, we argue that the courts in Bangladesh should be convincingly persuaded by these widely accepted annotations to, and qualifications of, §304A in interpreting this statutory provision.

## V. Punishments

Punishment should be sufficient to deter future crime.<sup>286</sup> If the punishment outweighs the benefit of breaching law, people and businesses are unlikely to care about that law.<sup>287</sup> The legislature

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<sup>282</sup> *Sushil Ansal*, (2014) 6 SCC at 71 (India).

<sup>283</sup> *Id.* at 72-73 (“What is gross would depend upon the fact situation in each case.”).

<sup>284</sup> *See Sushil Ansal*, (2014) 6 SCC at 71 (India).

<sup>285</sup> *Id.*

<sup>286</sup> *See Hofford*, *supra* note 11, at 57 (“A penalty has to be sufficient to deter a company from breaching regulations, rather than allow the cost to be low enough that breaching regulations . . . is the better alternative.”).

<sup>287</sup> *See Hofford*, *supra* note 11, at 57.

must realize that no scale can truly measure the actual cost of prematurely losing a human life. Therefore, the prime objective of law should be to prevent causing that harm. Penalties should be fit for purpose, reflecting the seriousness of the offense and incentivizing potential offenders to be deterred.<sup>288</sup> We are concerned about the punishments stipulated under §304A in both Bangladesh and India. The punishments are a maximum five years of imprisonment or fine, or both, in Bangladesh, whilst in India the term of maximum imprisonment is two years, with identical provisions of fines in both countries.<sup>289</sup>

We subscribe to the view that the punishment should be proportionate to the gravity of the offense and the degree of culpability of the offender.<sup>290</sup> We are uncomfortable with the wording of §304A that killing by doing any rash or negligent act does not amount to culpable homicide.<sup>291</sup> Notably, the offense of culpable homicide is defined separately in §299 of both the BPC1860 and IPC1860, which is meant to be a lower degree of homicide compared to murder defined in §300.<sup>292</sup> Culpable homicide as defined in §299 is approximately equivalent to common law manslaughter by unlawful and dangerous acts, which can also be compared with manslaughter by rash acts under §304A.<sup>293</sup> Raising this point, the High Court of Bombay (India) notes that a plain reading of §304A means that it “completely excludes culpable homicide” and adds that the act mentioned in this section “is not at all a culpable homicide.”<sup>294</sup> The Court clarifies that §304A only applies to cases in which the death is caused by

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<sup>288</sup> See Victoria Roper, *The Corporate Manslaughter and Corporate Homicide Act 2007—A 10-Year Review*, 82 J. CRIM. L. 48, 75 (2018) (“[T]he purpose of a fine is to punish the offender, discourage the offending, and to reflect the seriousness of the offence.”); David Brown ET AL., *supra* note 195, at 823.

<sup>289</sup> Bangl. Penal Code, 1860, §304A.

<sup>290</sup> See Mirko Bagaric, *Proportionality in Sentencing: Its Justification, Meaning and Role*, 12 CURRENT ISSUES IN CRIM. JUST. 145 (2000); Austin Lovegrove, *Proportionality Theory, Personal Mitigation, and the People’s Sense of Justice*, 69 CAMBRIDGE L. J. 321 (2010).

<sup>291</sup> See Indian Penal Code § 304A; Bangl. Penal Code § 304A.

<sup>292</sup> See Indian Penal Code § 299; Bangl. Penal Code § 299.

<sup>293</sup> See Gavin Leigh, *Reconstructing Unlawful and Dangerous Act Manslaughter* 83 J. CRIM. L. 272 (2019); David Brown ET AL., *supra* note 195, at 823.

<sup>294</sup> *Salman Salim Khan v. The State of Maharashtra*, (2015) SCC 6096, 136 (India).

rash and negligent acts without any intention or knowledge to kill anyone.<sup>295</sup> It means the legislators did not consider “negligent killings” or killing by rash acts as culpable, probably for which the punishments are very low. This perception of the offense of MCN is untenable and does not match with MCN in England and NSW. In the absence of any specific statutory prescription for punishment, the Sentencing Council of the United Kingdom mentions in the current (Sentencing) Guideline that MCN is a serious offense and the maximum penalty can be life imprisonment. However, the Guideline suggests a range between one and eighteen years of custody.<sup>296</sup> Fairly similarly, the statutorily prescribed term of incarceration may be up to twenty-five years in NSW.<sup>297</sup>

We argue that the lenient concept of the offense in the law enacted in 1860 is now obsolete, and §304A needs to be amended by deleting the words “not amounting to culpable homicide” and by increasing punishments significantly in parallel with England and NSW. Perhaps because of this downgrading of the offense, the punishment under §304A remains unreasonably low when compared to that of the offense under §299 of the BPC and IPC1860.<sup>298</sup> Unlike §304A, §299 only defines culpable homicide not amounting to murder, and its punishments are stated in §304, which stipulates the maximum life term imprisonment.<sup>299</sup> As per §57 of the BPC1860, life sentence “shall be reckoned as equivalent to rigorous imprisonment for thirty years.”<sup>300</sup> However, the Appellate Division of the Supreme Court of Bangladesh recently ruled that the life term means thirty years in jail unless “till natural death” is mentioned.<sup>301</sup> Like the definitional similarity, a culpable homicide under §299 is further comparable with common law manslaughter by unlawful and dangerous acts in England and NSW

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<sup>295</sup> *Id.* at 172.

<sup>296</sup> U.K. SENTENCING COUNCIL, ‘Manslaughter – Definitive Guideline’ (Nov 2018) at 9, <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-definitive-guideline-Web.pdf> [<https://perma.cc/NFV6-C83U>].

<sup>297</sup> Crimes Act 1900 (NSW), § 24 (Austl.).

<sup>298</sup> Compare Indian Penal Code § 304A; Indian Penal Code § 299 (differing only by degree of culpability).

<sup>299</sup> *See id.*

<sup>300</sup> Bangl. Penal Code, 1860, §57.

<sup>301</sup> *Ataur Mridha v. State*, 2 LNJ (AD), at 35 (2017) (Bangl.).

with respect to punishments as well.<sup>302</sup>

The preceding analysis of the statutory elements of MCN and punishments thereof should be helpful in understanding the comparative standing of the common law MCN and the negligent homicide under §304A in order to justify the deletion of “not amounting to culpable homicide” and to increase punishments in both Bangladesh and India.

## VI. Conclusions

The law of any State should be helpful to ensure good food for its subjects. Bee Wilson, a reputed analyst of the contemporary food safety issues, comments that a “good life without good food should be a logical impossibility.”<sup>303</sup> This is in agreement with the SCI’s view that enactment and enforcement of laws are equally important, particularly where such laws are concerned with the safety and security of people and create continuing obligations for constant attention of those who are entrusted with the responsibility of administration of those laws in the public interest.<sup>304</sup> Law generally aims to create and maintain social order,<sup>305</sup> and food crimes adversely affect that order by taking away human life and causing other harm.<sup>306</sup> This erodes public confidence in both the market and the regulatory system. Given the importance of food safety for human life, the Food and Agriculture Organization (“FAO”) advocates adopting a “farm to table” approach requiring regulatory attention to every stage of our food, such as how food is grown or raised, collected, processed, packaged, sold and consumed.<sup>307</sup>

The analysis of the laws of four different jurisdictions carried out in this essay reveals both similarities and dissimilarities between

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<sup>302</sup> See e.g., Crimes Act 1900 (NSW) § 24; U.K. SENTENCING COUNCIL, *supra* note 296.

<sup>303</sup> Wilson, *supra* note 4.

<sup>304</sup> Sushil Ansal v. State Through Central Bureau of Investigations, (2014) 6 SCC 1, 1 (Per T.S. Thakur, J.) (India).

<sup>305</sup> Jasmine Hebert, Steven Bittle & Steve Tombs, *Obscuring Corporate Violence: Corporate Manslaughter in Action*, 58 HOWARD J. CRIM. JUST. 554, 556 (2019).

<sup>306</sup> Spink *et al.*, *supra* note 8, at 2708.

<sup>307</sup> Mubashar Hasan, *Why Food Can Kill in Bangladesh*, THE NEW HUMANITARIAN (Apr. 11, 2013), <https://www.thenewhumanitarian.org/analysis/2013/04/11/why-food-can-kill-bangladesh> [<https://perma.cc/5UV7-MPBK>].

them. Below is a summary of our major findings with corresponding recommendations.

*a. Similarity and Dissimilarity in Terms of Culpability of the Conduct*

A major similarity is that an individual causing death of another by criminally negligent conduct can be held liable for unlawful homicide in common law, called MCN in England and NSW. The identical codified laws of Bangladesh and India term it causing death by negligence “not amounting to culpable homicide.”<sup>308</sup> The latter name is flawed in itself in that killing someone should be a culpable homicide and should be punished accordingly. The wording of §304A in both Bangladesh and India needs to be revised and the expression of “not amounting to culpable homicide” should be deleted in recognition of the actual gravity of the offense.

*b. Commonality in Relation to the Required Gravity of Negligence*

As our reasonable inquiries suggest, the word “negligence” contained in §304A of the BPC1860 has not been the subject of any judicial interpretation. However, we have considered its interpretations proffered by the Indian higher judiciary as it is also included in the IPC1860.<sup>309</sup> Only if the judiciary of Bangladesh accepts the interpretations of the highest court of India can it be concluded that the four jurisdictions unanimously require the conduct causing death must be “grossly negligent.” Otherwise, this point will only be clarified subsequently following interpretation by the Supreme Court of Bangladesh, which has absolutely no obligation to embrace others’ interpretations. However, we recommend adoption of “gross negligence” for § 304A in Bangladesh in conformity with others.

*c. Dissimilarity and Ambiguity with Respect to the Defendant’s Foreseeability of Risks*

Common law principles in both England and NSW are greatly

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<sup>308</sup> Compare *R v. Zaman* [2017] EWCA (Crim) 1783 [49] (UK); *R v Andrew* [2000] NSWCCA 310 ¶ 60 (Austl.); Indian Penal Code § 304A; Bangl. Penal Code § 304(a).

<sup>309</sup> See *Ambalal D. Bhatt v. State of Gujarat*, (1972) 3 SCC 525, 8 (India) (requiring the perpetrator’s “act is the direct result of a rash and negligent act and that act was the proximate and efficient cause without the intervention of another’s negligence.”).

similar except for the defendant's foreseeability of risks. The former requires the foreseeability of risk of death of the victim belonging to a specific class who may be injured by the defendant's negligent conduct, whereas the latter extends this risk to both death or GBH.<sup>310</sup> The scope of liability is, therefore, wider in NSW compared to England. From the perspective of consumer protection, the provision of NSW is favorable. In sharp contrast, §304A in India and Bangladesh seems to be excessively generous in setting the foreseeable risk, as it needs only a risk of "injury," typically inclusive of simple injury.<sup>311</sup> It seems to be an overreach of criminal law in criminalizing negligent conduct. We have not found any credible interpretation of the meaning of injury for §304A by the courts in Bangladesh or India. The clarity of law is always necessary for its efficacy and efficient enforcement.<sup>312</sup> It is recommended that the word "injury" be replaced with "death or grievous bodily harm" in order to make the offense truly criminal and facilitate its enforcement.<sup>313</sup>

*d. Similarity and Differences Regarding Causation*

A significant causation difference exists between the common law principles and the interpretation of §304A. The causation requirement is satisfied in both England and NSW if the defendant's act or omission was "a cause" or "an operating cause" and need not be "a major cause," but it must be more than *de minimis*.<sup>314</sup> By contrast, as interpreted by the SCI, §304A requires the defendant's conduct must be "an immediate and direct cause" (*causa causans*), as opposed to "a remote cause."<sup>315</sup> This has the potential to make a huge difference in favoring defendants unduly in denial of justice

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<sup>310</sup> See *R v. Cittadini* [2009] NSWCCA 302, ¶¶ 29 & 33 (Austl.); see also *R v Kuddus* [2019] EWCA (Crim) 837 [54] (UK) (showing that the foreseeability risk of GBH or death in NSW and only death in England).

<sup>311</sup> See Indian Penal Code § 304A; Bangl. Penal Code § 304(a).

<sup>312</sup> See S. M. Solaiman, *Investor Protection and Judicial Enforcement of Disclosure Regime in Bangladesh: A Critique*, 34 COMMON L. WORLD REV. 229 (2005).

<sup>313</sup> See *id.* at 231 ("Clarity in the law of its purpose and purview, and the efficiency and honesty of the enforcement institutions are essential for the enforcement of any law.").

<sup>314</sup> See *R v. Kuddus* [2019] EWCA (Crim) 837 [32]-[34] (UK); see also *Lane v The Queen* (2013) 241 A Crim R 321, at 61 (Austl.).

<sup>315</sup> *Suleman Rehiman Mulani v. State of Maharashtra*, (1968) 2 SCR 515 (India) (citing *Emperor v Omkar Rampratap*, (1902) 4 Bom. L.R. 679 (India)).

for society, as shown by examples earlier in the analysis. Such a high requirement can also cause erosion of public confidence in the judiciary. In the absence of relevant interpretation of the courts in Bangladesh, reliance is placed upon the SCI. We submit that both Bangladesh and India should ease the requirement in line with the common law principles by changing the requirement to “a cause” or “an operating cause.”

*e. Similarity and Ambiguity in Respect of Owing the Duty of Care*

A criminal breach of the duty of care is imperative to constitute MCN. The provision of owing the duty is, therefore, significant. The common law principles in both England and NSW are identical in that there is no need to prove that the duty was owed to the victim in particular. Instead, the duty must be owed to a class of people in accordance with the neighborhood principle, and the victim should belong to that specific class. No interpretation of § 304A is found properly clarifying this important issue. In *Sushil Ansal*, the SCI noted that the duty has to be owed to the victim specifically.<sup>316</sup> It does not correspond to the common law interpretations, and the English Court of Appeal in *Kuddus* has effectively negated such a narrow view by rejecting the first ground of appeal, as alluded to earlier.<sup>317</sup> Our recommendation is that the legislature or the judiciary in Bangladesh and India clarify the existence of duty of care in line with the common law principles.

*f. Similarities and Dissimilarity with Regard to Conduct Constituting MCN*

The four jurisdictions obviously require the conduct element of the offense to be “negligence.” However, §304A includes both rash and negligent acts, and Indian courts have sometimes mixed them together by using “and” instead of “or” between these different concepts.<sup>318</sup> This conjunctive “and” may have a serious implication

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<sup>316</sup> *Sushil Ansal v. State Through Central Bureau of Investigations*, (2014) 6 SCC 1, 66 (India).

<sup>317</sup> *See Kuddus*, [2019] EWCA (Crim) [32]-[34] (UK).

<sup>318</sup> *See, e.g., Suleman Rehiman Mulani v. State of Maharashtra*, (1968) SCR 515, at 6 (India); *Kurban Hussein Mohammedali v. State of Maharashtra*, (1965) SCR 622 (India); *Ambalal D. Bhatt v. State of Gujarat*, (1972) 3 SCC 525, at 8 (India); *Salman Salim Khan v. State of Maharashtra*, (1968) SCR 515, at 172 (India).

for prosecution which may be required to prove that the conduct constituting MCN satisfies both rashness and negligence. We have not analyzed the meaning of “rash act,” which falls beyond the scope of this article. In our understanding, a “rash act” is more comparable with a reckless act requiring subjective awareness of potential serious consequence and nonetheless taking the risk with a belief that the consequence will not eventuate.<sup>319</sup> These two different *mens rea* elements, one subjective and the other objective, have been merged under the heading of “causing death by negligence.”<sup>320</sup> However, the text of §304A uses “or,” and the use of “and” by courts seems erroneous. We recommended that the “rash act” part be taken away from §304A and be added to §299 of the BPC1860 and IPC1860, which defines “culpable homicide,” widely known as general manslaughter.

*g. Dissimilarity about Subjectivity in the Objective Test to Prove Foreseeability of Relevant Risks*

How to determine whether a risk associated with a defendant’s negligent conduct is foreseeable is a serious question. Both England and NSW commonly follow an objective test with some subjective elements of the defendant to be attributed to the reasonable person for the test.<sup>321</sup> The test is therefore hybrid in practice. However, both English and Australian (including NSW) courts ruled that the subjective elements of the defendant cannot be considered for lowering the defendant’s standard of care.<sup>322</sup> Instead such attributes can be taken into consideration to enhance the standard of care.<sup>323</sup> The use of such subjectivity conforms to strengthening the protection of consumers. To the contrary, the SCI requires application of a pure objective test, in avoidance of subjective elements of the defendant.<sup>324</sup> It is suggested that both India and

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<sup>319</sup> See *Rashidullah v. State*, 21 DLR 709 (1969) (Bangl.); *Zaburoni v R* (2016) 256 CLR 482, at 62 (Austl.); *Brown ET AL.*, *supra* note 195, at 822.

<sup>320</sup> See Indian Penal Code § 304A; Bangl. Penal Code § 304A.

<sup>321</sup> See *R v Lavender* (2005) 222 CLR 67, at 60 (Austl.); *R v. Adomako* [1995] 1 AC (HL) 171 (UK).

<sup>322</sup> See *R v. Zaman* [2017] EWCA (Crim) 1783 [49] (UK); *Lavender*, (2005) 22 CLR at 67 (Austl.).

<sup>323</sup> See *Patel v The Queen* [2012] HCA 29, at 90 (Austl.); *Adomako*, [1995] 1 AC (HL) 171 (UK).

<sup>324</sup> See *Prabhakaran v. State of Kerala*, (2007) 14 SCC 269, 5 (India).



Bangladesh should revise their requirement and apply a hybrid test as applicable in England and NSW.

*h. Similarity and Dissimilarity Concerning Punishments*

Finally, there is an attitudinal similarity, though not parity, between the maximum punishments of MCN in the U.K. (life term) and NSW (twenty-five years), implying that both jurisdictions regard the offense as serious.<sup>325</sup> By contrast, the maximum limit in Bangladesh is five years (changed from two years in 1982), whereas the term of two years remains unchanged in India to date.<sup>326</sup> The provisions of punishment are further diluted by the options that it can be only a nominal fine or any amount of fine along with any term of imprisonment below the prescribed limits in both Bangladesh and India.<sup>327</sup> Hence, the current maximum punishments in India and Bangladesh are unreasonably low, and the punishments may be too low to create effective deterrence. Our submission recommends raising of maximum punishments to twenty-five years of imprisonment in both Bangladesh and India in similarity with the other two jurisdictions.

Food fraud is generally a regulatory offense in itself driven by the desire for increased financial gains and not intended to cause harm to consumers (if intended to cause harm, it is known as food-terrorism or bioterrorism).<sup>328</sup> Such a regulatory offense translates into food-manslaughter when the offense results in the death of a consumer. The accused can be simultaneously charged under the regulatory law for the breach of food safety as well as criminal law for manslaughter.<sup>329</sup> This article discussed the offense's manslaughter aspects and found that Bangladeshi and Indian laws significantly differ from their equivalents in England and NSW, though all four jurisdictions broadly follow the common law

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<sup>325</sup> U.K. SENTENCING COUNCIL, *Manslaughter – Definitive Guideline* (Nov 2018) at 9, <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-definitive-guideline-Web.pdf> [<https://perma.cc/NFV6-C83U>]; Crimes Act 1900 (NSW), § 24 (Austl.).

<sup>326</sup> See Indian Penal Code § 57; Bangl. Penal Code § 57 (outlining the specifics of punishment for MCN).

<sup>327</sup> See Indian Penal Code § 57; Bangl. Penal Code § 57.

<sup>328</sup> See Spink ET AL., *supra* note 8, at 2708.

<sup>329</sup> See *e.g.*, *Zaman*, [2017] EWCA (Crim) at [49] (UK); *R v. Kuddus* [2019] EWCA (Crim) 837 [56] (UK).

system. This article also specified several deficiencies in Bangladeshi and Indian laws in various respects and submitted specific recommendations to address the shortcomings in light of the England and NSW counterparts. Given the continued and unrestrained food safety law violations in both Bangladesh and India, those countries need to clarify and improve the laws as recommended above, which includes enhancing punishments for food-manslaughter under the existing provisions of MCN. We believe that our findings will benefit India and Bangladesh. Further, our findings can assist other nations that have similar legislative provisions for this serious offense and also still follow the *Penal Code 1860* inherited from the British colonial rule, such as Pakistan, Singapore, and Malaysia.

