



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

# **CONSULTATION PAPER**

**INVOLUNTARY MANSLAUGHTER**

**(LRC CP 44-2007)**

**IRELAND**

**Law Reform Commission  
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

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To date the Commission has published 82 Reports containing proposals for reform of the law; eleven Working Papers; 43 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at [www.lawreform.ie](http://www.lawreform.ie)

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## INTRODUCTION

### A Background

1. This Consultation Paper forms part of the Commission's *Second Programme of Law Reform 2000-2007*<sup>1</sup> and it follows the Commission's *Consultation Paper on Homicide: the Mental Element in Murder*.<sup>2</sup> The Commission intends to publish a Report on Murder and Manslaughter which will bring together the material in both Consultation Papers. This will also complement the Commission's related work under the Second Programme on defences in the criminal law.<sup>3</sup> The aim of the Commission's work in this area is to lay the groundwork for eventual codification of criminal law, as envisaged in the work of the Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*.

2. The law of homicide in Ireland is currently divided into murder and manslaughter. Murder involves the situation where a person kills another person unlawfully and where the mental element - as defined in the *Criminal Justice Act 1964* - was that they "intended to kill, or cause serious injury to, some person, whether the person actually killed or not."<sup>4</sup> Manslaughter is any other unlawful killing and is currently defined – at common law – by reference to two categories, voluntary and involuntary manslaughter.

3. Voluntary manslaughter currently comprises a number of sub-categories. First, where all the elements of murder are established but the jury is satisfied that the accused acted under provocation when he or she

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<sup>1</sup> Item 11 of the Second Programme commits the Commission to examine the law of homicide.

<sup>2</sup> LRC CP 17-2001.

<sup>3</sup> Item 12 of the Second Programme commits the Commission to examine the defences of provocation, legitimate defence and provocation. The Commission has published Consultation Papers on each of these areas: *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003), *Consultation Paper on Duress and Necessity* (LRC CP 39-2006) and *Consultation Paper on Legitimate Defence* (LRC CP 41-2006). The Commission has begun preparing a Report on these defences.

<sup>4</sup> Section 4(1) of the *Criminal Justice Act 1964*, quoted in the Commission's *Consultation Paper on Homicide: the Mental Element in Murder* (LRC CP 17-2001), at 13.

killed the other person.<sup>5</sup> Second, where all the elements of murder are established but the jury is satisfied that excessive force was used by the accused in self-defence.<sup>6</sup> Third, where - pursuant to the *Criminal Law (Insanity) Act 2006* - a plea of diminished responsibility is established in answer to a charge of murder or infanticide.

4. Involuntary manslaughter currently comprises two sub-categories. First, manslaughter by an unlawful and dangerous act, where the killing involves an act constituting a criminal offence, carrying with it the risk of bodily harm to the person killed.<sup>7</sup> The second sub-category is manslaughter by gross negligence, where the killing arose from a negligent act or omission by the accused involving a high risk of substantial personal injury.<sup>8</sup>

5. This Consultation Paper is concerned exclusively with involuntary manslaughter. The Commission's separate work on the defences of provocation and legitimate defence deals with two aspects of voluntary manslaughter, and the Commission has concluded that the diminished responsibility reforms recently introduced in the *Criminal Law (Insanity) Act 2006* have dealt with the third, infanticide. The combined effect of all this work will thus lead to a complete review of the law of homicide in Ireland.

6. The purposes of this Consultation Paper are to determine:

- a. whether the existing configuration of involuntary manslaughter should be retained as it is, or
- b. whether the scope of involuntary manslaughter should be adjusted by:
  - i. redefining unlawful and dangerous act manslaughter and/or
  - ii. placing gross negligence outside manslaughter into a separate, possibly lower homicide offence.

7. The range of offences covered by involuntary manslaughter and the differing levels of moral culpability raises the issue of potential reclassification.

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<sup>5</sup> See *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003).

<sup>6</sup> See *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

<sup>7</sup> See *The People (Attorney General) v Crosbie and Meehan* [1966] IR 490, discussed at paragraphs 2.06-2.07, below.

<sup>8</sup> See *The People (Attorney General) v Dunleavy* [1948] IR 95, discussed at paragraphs 3.07-3.10, below.



## **B Outline of this Paper**

8. Chapter 1 provides an overview of the historical distinction between murder, manslaughter and misadventure in Ireland.

9. Chapter 2 deals with unlawful and dangerous act manslaughter in Ireland, England and Australia. Judicial attempts to limit the scope of constructive manslaughter in the 19<sup>th</sup> and 20<sup>th</sup> centuries are discussed, as are recent English manslaughter by drug injection cases and issues relating to causation. Subjectivist arguments which call for reform of unlawful and dangerous act manslaughter based largely on the correspondence principle are explored. The notion of “taking the consequences” and other objectivist arguments opposing radical reform are examined.

10. Chapter 3 outlines the current law of gross negligence manslaughter in Ireland and addresses early 20<sup>th</sup> century developments leading up to *The People (AG) v Dunleavy*.<sup>9</sup> The Commission examines the concept of “failure to perform a legal duty”, looking at duties arising due to blood relationships, duties arising outside the family setting, contractual duties and those imposed by Statute. The notion of voluntary assumption of duty is discussed, and duties owed by those possessing special skill and knowledge such as doctors are critically analysed. The Commission discusses the difference between negligence and inadvertence and looks at the relevance of the capacity of the accused in relation to a finding of fault. As there is very little Irish case law on the area considerable reference is made to developments in England and Australia.

11. Chapter 4 discusses manslaughter and the related offences of dangerous driving causing death and careless driving. The relevant Irish statutory provisions, case law and sentencing patterns are discussed. The ability of judges to take account of the fact of death in careless driving cases is explored. Legal standards and sentencing developments in England and Australia in relation to motor manslaughter and the respective statutory offences which penalise bad driving that causes death are also addressed.

12. Chapter 5 sets out various possible reform proposals. It addresses arguments in favour of maintaining unlawful and dangerous act manslaughter as it is (codification of the law without reform) but discusses a number of moderate reform proposals of the law in this area as well. Reform proposals which are more radical in nature are also deliberated - the *Model Penal Code*,<sup>10</sup> the *Indian Penal Code*<sup>11</sup> and the *German Criminal Code*<sup>12</sup>

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<sup>9</sup> [1948] IR 95.

<sup>10</sup> See American Law Institute *Model Penal Code and Commentaries* (2<sup>nd</sup> ed American Law Institute 1980) Part II § 210.0 – 210.6.

<sup>11</sup> See *Indian Penal Code 1860*.

structures of homicide are used as a guide and the possibility of requiring subjective recklessness as the *mens rea* for manslaughter is investigated.

13. In Chapter 5, the Commission proceeds to analyse arguments calling for the abolition of gross negligence manslaughter. Moderate options for reform of the law in this area relate to the capacity of the accused and the possibility of raising the level of risk from “risk or likelihood of substantial personal injury” as laid down in *The People (AG) v Dunleavy*<sup>13</sup> to “risk of death” or “risk of death or serious injury”. A possible radical reform of the law whereby negligent killings would be relegated to a lesser category of homicide is also put forward.

14. Finally, Chapter 5 discusses a number of possible reform measures regarding motor manslaughter and the related offences of dangerous driving causing death and careless driving. The Commission firstly considers the possibility of simply maintaining the legal status quo – that is, permitting the statutory offences to exist alongside manslaughter. The Commission then discusses two more radical reform proposals, the first of which would remove deaths caused by negligent driving from the scope of manslaughter. The second radical reform proposal would be to abolish the statutory offences of dangerous driving causing death and careless driving and to simply prosecute all cases of bad driving causing death as manslaughter as was the case in the first half of the 20<sup>th</sup> century.

15. Chapter 6 contains a summary of the Commission’s provisional recommendations.

16. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations made are provisional in nature. The Commission will make its final recommendations on the subject of involuntary manslaughter following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its Final Report, those who wish to do so are requested to make their submissions in writing by post to the Commission or by email to [info@lawreform.ie](mailto:info@lawreform.ie) by **31 July 2007**.

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<sup>12</sup> See Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neuarbeitete Auflage, Verlag CH Beck 1999). A translation of the *German Criminal Code* is available at the German Law Archive, <http://www.iuscomp.org/gla/>

<sup>13</sup> [1948] IR 95.

## CHAPTER 1 HISTORICAL OVERVIEW

### A Introduction

1.01 As mentioned in the Introduction to this Consultation Paper,<sup>1</sup> the law of homicide in Ireland is currently divided into murder and manslaughter. Murder involves the situation where a person kills another person unlawfully and where the mental element was that they intended to kill, or cause serious injury to, some person, whether the person actually killed or not.<sup>2</sup> Manslaughter is any other unlawful killing and is currently defined by reference to two categories, voluntary and involuntary manslaughter. Voluntary manslaughter is, essentially, mitigated murder, where the accused killed under provocation, or used excessive force in self-defence or can show diminished responsibility on a charge of murder or infanticide. Involuntary manslaughter currently comprises two sub-categories: manslaughter by an unlawful and dangerous act and manslaughter by gross negligence. This Paper focuses on involuntary manslaughter.

1.02 This current structure of the law of homicide has been in place since the 19<sup>th</sup> century. The purpose of this chapter is to explain how the law of homicide – and, in particular, the distinction between murder and manslaughter – evolved up to the beginning of the 19<sup>th</sup> Century, because this provides an explanation of the current structure of the law, discussed in Chapters 2 and 3.<sup>3</sup>

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<sup>1</sup> See Introduction, paragraphs 2 to 4, above.

<sup>2</sup> Section 4(1) of the *Criminal Justice Act 1964*, quoted in the Commission's *Consultation Paper on Homicide: the Mental Element in Murder* (LRC CP 17-2001), at 13.

<sup>3</sup> See generally Blackstone *Commentaries on the Laws of England* Vol IV (A Facsimilie of the First Edition 1769); Turner "The Mental Element in Crimes at Common Law" in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (Macmillan 1945) 195-261; Buxton "By Any Unlawful Act" (1966) 82 LQR 174; Kaye "The Early History of Murder and Manslaughter" (1967) 83 LQR 569; Horder "Two Histories and Four Hidden Principles of Mens Rea" (1997) 113 LQR 95; McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) Chapters 1 and 6; Hoffheimer "Murder and Manslaughter in Mississippi: Unintentional Killings" (2001) 71 Miss LJ 35.

1.03 Part B traces the historical origins of what is now called manslaughter or what was originally “chance medley.” Part B also explains the historical difference between murder, manslaughter and misadventure. In part C, the Commission discusses the significance of the concept of “benefit of clergy” and Part D focuses on the doctrine of “heated blood,” which gave rise to the modern partial defence of provocation. Part E discusses how the objective foreseeability of death came to be relevant in deciding whether a murder or manslaughter conviction was appropriate where the accused used a weapon which resulted in a fatal injury. Part F details the close relationship between murder by unlawful act which later became the felony murder rule and, later, constructive manslaughter. The evolution of gross negligence manslaughter, (as successor to misadventure) is dealt with in Part G.

## **B The origins of manslaughter**

1.04 Under early law the defendant’s mental state played no part in establishing criminal liability for homicide – in other words, strict liability applied. At that time an accused was held accountable if he or she killed another person, regardless of whether the death was intended, foreseen or indeed wholly accidental. According to McAuley and McCutcheon, criminal liability was originally born of outlawry and the blood-feud.<sup>4</sup> The authors observe that the notion of outlawry meant that every man had the right and duty to pursue wrongdoers and punish them. With regard to the blood-feud, if a man killed a member of another kinship group, he could avoid drawing vengeance upon himself by making a payment of money to the injured family. If such money was not paid, the injured family could seek satisfaction from the wrongdoer’s kin either by killing one of that kinship group or by destroying possessions or both.

1.05 In primitive society where there was no distinction made between crime and tort, the responsibility for bringing wrongdoers to justice therefore rested with the victim and his or her kin.<sup>5</sup> McAuley and McCutcheon claim that the Anglo-Saxon and Brehon codes illustrate that pre-Norman British and Irish society:

“had long flourished under an undifferentiated law of wrongs in which the individual victim and/or his family, rather than any superordinate, central authority, was the moving principle; and in which all wrongs were essentially private matters between the parties directly concerned and could be bought off or “emended”

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<sup>4</sup> McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 1.

<sup>5</sup> *Ibid* at 2.

in money or livestock or (in the worst case scenario of the feud) blood.”<sup>6</sup>

1.06 The underlying notion during the era of absolute liability was that acts causing physical damage had to be paid for in the interests of peace. This principle applied even where the act occurred as a result of an accident or an attempt to defend oneself. Canon law sought to replace *collective* kin responsibility with the notion that people were *personally* responsible for injury or losses caused by their conduct. The developing theory of criminal responsibility seized on the ideas put forward by moral theologians regarding the role of *intention* in *sin*.<sup>7</sup>

1.07 In discussing homicide, the 13<sup>th</sup> century canonist, Bernard of Pavia emphasized killings “by corrupt intent”.<sup>8</sup> He did not view deaths caused by self-defence or misadventure<sup>9</sup> as crimes. Bracton, also writing in the early 13<sup>th</sup> century, divided homicide into intentional and unintentional killings, and stated that unintentional homicide gave rise to liability only where the death occurred following a wrongful act on the part of the killer.<sup>10</sup> Bracton broke intentional homicide into homicide committed openly and in the presence of many bystanders and homicide committed in secret where there were no witnesses which was called murder *murdrum*.<sup>11</sup>

1.08 Some forms of homicide had become eligible for the equitable defence of pardon by the early 13<sup>th</sup> century. According to McAuley and McCutcheon, the pardons were granted under the canonically inspired rubric of death by misadventure if the defendant’s culpability in causing the death

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<sup>6</sup> McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 59.

<sup>7</sup> *Ibid* at 5.

<sup>8</sup> Laspeyres (ed), *Bernardi Papiensis, Summa Decretalium* (1861) at 219, cited in McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 9.

<sup>9</sup> See Deuteronomy 19:4-5 (Revised Standard Version) where it is stated: “This is the provision for the manslayer, who by fleeing there may save his life. If any one kills his neighbour unintentionally without having been at enmity with him in time past – as when a man goes into the forest with his neighbour to cut wood and his hand swings the axe to cut down a tree, and the head slips from the handle and strikes his neighbour so that he dies – he may flee to one of these cities and save his life....” See also Exodus 21:12-13 (Revised Standard Version): “Whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee.”

<sup>10</sup> Bracton *On the Laws and Customs of England* (Thorne trans., Woodbine ed 1968) at 341.

<sup>11</sup> *Ibid* at 378-379. *Murdrum* was a fine for secret killings imposed after the Norman Conquest. Whether the fine was limited to intentional killings is unclear. The crown imposed a special fine of *murdrum* on any community, which was unable to prove that the homicide victim was not a Norman.

fell below the threshold of moral fault.<sup>12</sup> During the Middle Ages grossly negligent conduct was not regarded as felonious as the defendant did not wrongfully direct an unlawful act at the deceased. Where pardons were granted, the accused was still convicted on the principle of absolute liability but the king could pardon and spare the malefactor's life. A successful pardon did not, however, affect the forfeiture of the felon's goods to the Crown.

1.09 Until the 14<sup>th</sup> century, the English judiciary saw culpable homicide as a single undivided offence. Fourteenth-century judges treated deaths which occurred in the course of a game or as a result of immoderate chastisement as either murder or misadventure but did not focus on degrees of intermediate culpability. There was no category of liability at this stage which could describe a killing as a felony but not murder.

1.10 Gradually, from the 14th century onwards the common law began to focus on the mental element – the *mens rea* – in an effort to treat different types of homicides differently. The notion of malice aforethought was adopted to differentiate between felonious killings and homicides which were excusable or accidental. In this changed context self-defence and misadventure were seen as excusing the criminal act. Since personal, subjective blame was the hallmark of sin, it made sense that accidental and unintended harm should fall outside the boundaries of that which was considered truly criminal – anything that interfered with the exercise of free will was relevant to a person's criminal responsibility.<sup>13</sup>

1.11 The phrase “malice prepense”<sup>14</sup> was first used in 1389 in the decree of 13 Richard II, which declared that “no charter of pardon shall be henceforth allowed before any justice for murder, the death of a man killed by making assault or malice prepense.”<sup>15</sup> Stephen believed this decree heralded the birth of malice aforethought.<sup>16</sup> Many early medieval judges did not employ the term malice prepense to refer specifically to premeditated killings but envisaged a general “evil” or “wicked” intent in the sense of ill will harboured by the defendant towards the deceased.

1.12 Under the medieval law of homicide “actual” malice involved intentionally directing unlawful conduct at another person. Discussions about felonies and murder fully acknowledged the concept of *wrongful*

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<sup>12</sup> McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 9.

<sup>13</sup> *Ibid* at 8.

<sup>14</sup> This is an early expression for malice aforethought.

<sup>15</sup> St II c 1, cited in McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 14, footnote 69.

<sup>16</sup> Stephen *History of the Criminal Law of England* Vol III (MacMillan 1883) at 43.

*directedness* by the late 15<sup>th</sup> century. Provided the defendant wrongfully directed his conduct at the victim, there was no need for his or her *mens rea* to relate to the consequence which actually befell the victim.<sup>17</sup> Thus, during the medieval period intention rested on the belief that an accused who wrongfully directed his conduct at another person crossed a threshold of liability in relation to the consequences of that conduct. Malicious actions were deemed felonious irrespective of whether the accused foresaw the consequences.

1.13 Fifteenth-century judges used the expression “malice prepense” to contrast between voluntary wrongdoing and accident rather than intention and lesser forms of culpability like carelessness or negligence. Even as the 16<sup>th</sup> century was dawning, criminal intent did not require anything more than a voluntary wrongful act.<sup>18</sup> A mayhem case decided in 1498 provides a helpful statement of the concept of criminal intent in the late 15<sup>th</sup> century.

“Hussey [C.J.] said that a question had been put to him, which was this: A clerk of a church being in a chamber struck another with the keys of the church; which with the force of the blow flew out of his hand and through a window, and put out the eye of a woman. The question was, whether it should be called mayhem or not. And it seems that it was, because he had *a bad intent at the beginning* ...”<sup>19</sup>

Some commentators in the 16<sup>th</sup> century defined murder as though it were confined to deaths which occurred during ambushings. Every homicide entailed a trespass and also required *voluntas*<sup>20</sup> – it had to involve a voluntary act on the part of the accused. However, not every homicide committed *ex malitia praecogitata*<sup>21</sup> arose out of an ambush.

## **C The benefit of clergy**

1.14 The distinction between murder and manslaughter developed gradually. Manslaughter or chance medley evolved because the courts sought to spare those who committed less blameworthy, but nonetheless culpable homicides, from the death penalty. One way of avoiding the death

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<sup>17</sup> Horder “Two Histories and Four Hidden Principles of Mens Rea” (1997) 113 LQR 95, at 102-103.

<sup>18</sup> McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 15.

<sup>19</sup> YB 13 Hen VII, f 14 Hil 5 cited in McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 15. [Italics added] Mayhem referred to the infliction of an injury which had a negative impact on a person’s fitness for fighting.

<sup>20</sup> It had to be a voluntary act.

<sup>21</sup> This is an early expression for malice aforethought.

penalty was by claiming “benefit of clergy” which meant that a person accused of committing a felony would be tried in the church’s ecclesiastical courts which were more merciful and flexible than the common law courts.

1.15 The benefit of clergy was eventually made available to much of the general population. The immunity from trial in the common law courts afforded to clergy members was extended to lay people in minor orders and later to those who could “read” a passage from the Bible, proving their affiliation with the church. The test was based on knowledge of the 51<sup>st</sup> Psalm<sup>22</sup> so an illiterate accused had only to memorize it to escape capital punishment. A reaction against the wide-scale abuse of the benefit led to the removal of certain serious offences such as murder committed with malice aforethought from its ambit in 1512.<sup>23</sup>

1.16 By the end of the 16<sup>th</sup> century there was a massive increase in verdicts of manslaughter in cases where knife-wielding brigands had lunged at hapless passers-by and killed them for fun. It seemed that juries could not or would not understand the niceties of “implied malice”. Thus, in 1604 the “*Statute of Stabbing*” 1604<sup>24</sup> was passed in England removing the benefit of clergy from manslaughter in this situation. “*An Act to take away the Benefit of Clergy from him that doth stab another, not having a Weapon drawn*” 1695 was introduced in Ireland in 1695, which meant that a person accused of such a crime would face the death penalty although malice aforethought was not proven against him.<sup>25</sup> The Act did not affect those who killed *se defendendo*, or by misfortune or while keeping or preserving the peace or while chastising or correcting any child or servant.

1.17 By the 16<sup>th</sup> century therefore, the applicability of the death penalty to a crime was determined by whether it was subject to the benefit of clergy. Those culpable homicides, which did not involve malice aforethought were

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<sup>22</sup> This verse was termed the “neck verse”, since it saved many people from the gallows. In 1706 the reading test was abolished and benefit of clergy became automatic for any offence which had not been excluded from this privilege.

<sup>23</sup> Kaye “The Early History of Murder and Manslaughter” (1967) 83 LQR 569, at 572-573. Kaye refers to a Statute from 1512 Stat 4 Hen VIII, c 2, which withdrew clergy from homicide.

<sup>24</sup> Stat 2 Jac VI, c 8, cited in Kaye “The Early History of Murder and Manslaughter” (1967) 83 LQR 569, at 572 footnote 44.

<sup>25</sup> 1 Jac I 8 Eng. Towards the end of the 18<sup>th</sup> century an act was passed in Ireland amending “*An Act to prevent malicious cutting and wounding, and to punish Offenders called Chalkers*” which again removed the benefit of clergy in relation to the “profligate and evil disposed persons” who “with knives or other offensive weapons cut and stabbed, or with pistols have wounded, or attempted to wound, by firing, shooting, and discharging the same, many of his Majesty’s subjects either with an intent to murder, rob, or maim, or merely with a wanton and wicked intent to disable and disfigure them”. 13 & 14 G 3 C 45 1777-8.



allowed the benefit of clergy and therefore were not punished by death. Since the common law distinguished capital from non-capital killing on the basis of malice aforethought, manslaughter or chance medley came to be defined as unlawful killing without malice aforethought. Both voluntary and involuntary manslaughter were punishable by one year's imprisonment and branding on the thumb. The letter to be branded on the thumbs of those found guilty of murder was M. In Britain branding ended in 1779, but benefit of clergy remained for some offences until it was entirely abolished in the 1820s.

#### **D The doctrine of "heated blood"**

1.18 By the late 16<sup>th</sup> century the judiciary set about developing new principals for distinguishing murder and manslaughter.<sup>26</sup> In 1576 a man named Robinson was indicted for murder following a killing during the course of a sudden combat. Here an altercation took place between the accused and the deceased. A number of blows were exchanged, after which the deceased fled. The accused went into his nearby house, located a staff, chased the deceased and killed him. This was held to be manslaughter because everything was done in a continuing fury.<sup>27</sup>

1.19 A similar undated case reached a different result. A man who was embroiled in a sword fight broke his sword, went into his house to fetch another one, and killed his opponent upon his return. The accused was found guilty of murder. The court considered the time that had elapsed between fetching a new sword and resuming the fight too long for the fury to have persisted.<sup>28</sup> According to Kaye, judges earlier in the century would not have drawn any distinction between a killing done at a time when the killer flew into an angry rage and one done after he had time to mull over his actions. Here however, the court recognised the difference between such killings. The doctrine of "heated blood" had been born.<sup>29</sup>

1.20 By the late 16<sup>th</sup> century chance medley or manslaughter was defined so that the element of *chance* related to the unplanned and unexpected nature of the fight. The law of manslaughter recognised the infirmity of man's nature and thus operated as a dispensation to violent

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<sup>26</sup> See Baker *An Introduction to English Legal History* (3<sup>rd</sup> ed Butterworths 1990) at 601 footnote 40. According to Baker "chance medley" may be a corruption of the expression "chaude mellee". Chaude mellee literally means "hot conflict".

<sup>27</sup> Kaye "The Early History of Murder and Manslaughter" (1967) 83 LQR 569, at 589.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at 590.

anger.<sup>30</sup> So long as the blood had not cooled any killing that occurred in the course of a chance encounter would amount to manslaughter. Murder and manslaughter were differentiated on the basis of fights which took place “on the sudden” - the old law of implied malice was therefore reconciled with “heated blood” killings.

1.21 In its Consultation Paper on *Homicide: The Plea of Provocation*<sup>31</sup> the Commission stated:

“Killings carried out in “hot blood” or anger could provide a valid rebuttal of the presumption of malice under the doctrine [of implied malice]. To rebut the presumption, the accused had to show that the killing was caused by some provocation on the part of the deceased and not as a result of any malice aforethought or premeditation on his part. In this way, the doctrine of implied malice laid the foundation stone for the law of provocation.”

1.22 Regarding the sufficiency of provocation Hale stated that the service of a subpoena on the accused by the deceased, the making of an offensive facial expression and the scolding of a wife would not merit a verdict of manslaughter – the provocative conduct was too slight to negate the presumption of malice.<sup>32</sup> He also observed that the contemporary view was that:

“bare words of fighting, disdain, or contumely would not of themselves make such a provocation, as to lessen the crime to manslaughter”.<sup>33</sup>

1.23 In the case of *R v Mawgridge*<sup>34</sup> Holt LCJ identified four distinct categories of provocation including (i) a grossly insulting assault (ii) witnessing a friend being attacked (iii) witnessing an Englishman unlawfully deprived of his liberty and (iv) catching someone in the act of adultery with one’s wife. A fifth situation was recognised in *R v Fisher*<sup>35</sup> allowing a defence of provocation to a father who witnessed his son being sodomised. In the recognised categories of provocation the element of wrongfulness on the part of the provoker was emphasised.

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<sup>30</sup> See the Law Reform Commission’s *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003) for an in-depth analysis of the law on provocation in Ireland.

<sup>31</sup> The Law Reform Commission *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003) at 5.

<sup>32</sup> See 1 *History of the Pleas of the Crown* (1736) at 455.

<sup>33</sup> *Ibid* at 456.

<sup>34</sup> (1706) Kel 119; 84 ER 1107.

<sup>35</sup> (1837) 8 Car & P 182; 173 ER 452.

1.24 In relation to sudden combat and heated blood killings, the old conception of malice aforethought in the sense of an intent to kill, to harm or to do an unlawful and violent act was maintained for three categories of killing:

- A person who suddenly attacked another, catching their victim unawares, would be guilty of murder even though the attack was unpremeditated.<sup>36</sup>
- The sudden, unpremeditated killing of officers of justice, for example bailiffs, constables, sheriff's officers in the course of their employment amounted to murder. Here public policy concerns trumped the "sudden encounter" doctrine – attacks on officers were rarely premeditated, since they invariably arose when officers attempted to carry out their duties.
- A person who killed another while committing an unlawful act of violence would be guilty of murder, even though he/she did not intend to kill or cause harm. It did not matter whether the violent act was directed at the deceased, or a group of people, of which he was a member.

## **E Weapons and the foreseeability of death**

1.25 Hale wrote:

“regularly he that voluntarily and knowingly intends hurt to the person of a man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least; as if A intends to beat B but not to kill him, yet if death ensues, this is not per infortunium, but murder or manslaughter, as the circumstances of the case happen.”<sup>37</sup>

1.26 In distinguishing between murder and manslaughter courts began to discuss the relevance of the foreseeability of death in cases where the accused used an object to beat the deceased. If the object was one which was likely, in the ordinary course of nature to kill, then the appropriate verdict would be murder. However, if the object was small or light and unlikely to cause fatal harm a verdict of manslaughter would often suffice.

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<sup>36</sup> See the Law Reform Commission's *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003) at 6 where it is observed that chance medley began to differentiate between "situations where the defendant was an innocent victim of a sudden outburst of violence and situations where he was responsible for starting the *mêlée* in the first place."

<sup>37</sup> Hale 1 *History of the Pleas of the Crown* (1736) at 472.

1.27 In *Rowley's Case*<sup>38</sup> two boys had been fighting and one ran home to his father bleeding. When the father saw the state of his son, he ran three-quarters of a mile and struck the other boy on the head with a small cudgel. The boy died as a result of the cudgel blow. The father was convicted of manslaughter. Foster interprets the verdict as stemming from the fact that a stroke with a cudgel was not likely to kill.<sup>39</sup> *Rowley's Case* did not state that the father intended to inflict less than grievous bodily harm on the boy. The deciding factor which led to the manslaughter verdict was that the blow was “not likely to kill”. The test was an objective one which related to the foreseeability of death rather than an inquiry into subjective intent of the accused.<sup>40</sup>

1.28 In *Turner's Case*<sup>41</sup> a master who struck a servant with a clog so that the boy died, was convicted of manslaughter. As a master, he could lawfully correct a servant in a reasonable manner for an error and since the clog was so small, there had been no intention to do any great harm to the deceased, much less to kill him.<sup>42</sup>

1.29 In *R v Oneby*<sup>43</sup> the accused was convicted of murder following a fight in which he killed the deceased. The court held that the accused had harboured malice towards the deceased long before the fight, thus making the defence of provocation unavailable to him. During its deliberations the court addressed both murder and manslaughter and concluded that the appropriate verdict would be murder by implied malice where the accused struck the deceased with any dangerous weapon, such as a pistol, hammer or large stone which was likely to kill the deceased or do him some great bodily hurt.<sup>44</sup>

1.30 In *R v Wiggs*<sup>45</sup> a shepherd boy negligently allowed some sheep to escape. His employer picked up a stake that was lying on the ground and

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<sup>38</sup> Cro Jac 296. Discussed in (1611) 12 Co Rep 87, 77 ER 1364 and in *R v Oneby* (1727) 2 Ld Raym 1485, 1498; 92 ER 465, 473.

<sup>39</sup> See *Foster Report and Discourses* (2<sup>nd</sup> ed Brooke 1776) at 295 where he writes: “the accident happened by a *single stroke* with a cudgel *not likely to destroy*, and ... death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import the *malitia*, the malignity of heart ... and therefore manslaughter.” Other reports mention that provocation might have been a reason for the verdict which Foster doubts, at 294.

<sup>40</sup> See the High Court of Australia comments in *Wilson v R* 107 ALR 257, 268-269.

<sup>41</sup> Discussed in *R v Oneby* (1727) 2 Ld Raym 1485, 1498; 92 ER 465, 473.

<sup>42</sup> *Ibid* at 1499; 473.

<sup>43</sup> (1727) 2 Ld Raym 1485; 92 ER 465.

<sup>44</sup> *R v Oneby* (1727) 2 Ld Raym 1485, 1488-1489; 92 ER 465, 467-468.

<sup>45</sup> Discussed in *R v Hazel* (1784) 1 Leach 69, 378(a); 168 ER 287, 291-2.

threw it at him in anger. The stake hit the boy on the head and fractured his skull causing death shortly afterwards. The report makes reference to provocation, the right of a master to chastise his servants and the degree of dangerousness of the act. In relation to dangerousness the judge stated that using a weapon:

“from which death is likely to ensue, imports a mischievous disposition, and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder.”<sup>46</sup>

The jury was told to consider whether it was probable that the weapon was used with an intent to kill. A verdict of murder would be appropriate where the jury concluded that the accused intended to kill but if they were persuaded that there had been no such intent, the crime would amount at most to manslaughter. The jury reached a verdict of manslaughter.

1.31 The great 19<sup>th</sup> century authority, Sir James Fitzjames Stephen, gives some illustrations of situations which would give rise to murder or manslaughter convictions depending on the level of violence or the weapon used.

“(4) A waylays B, intending to beat, but not intending to kill him or do him grievous bodily harm. A beats B and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death.

(5) A strikes at B with a small stick, not intending either to kill or to do him grievous bodily harm. The blow kills B. A commits manslaughter.”<sup>47</sup>

1.32 Blackstone observed that where a parent moderately corrected his child, or a master chastised his servant or scholar, or an officer punished a criminal - and happened to cause death - it would only be misadventure, because the act of correction was lawful, yet if the punishment was immoderate due to the manner, the instrument, or the quantity of the punishment, and death ensued, it would be manslaughter at the least, and in some cases murder because immoderate chastisement was unlawful.<sup>48</sup>

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<sup>46</sup> Discussed in *R v Hazel* (1784) 1 Leach 69, 378(a); 168 ER 287, 291-2.

<sup>47</sup> Stephen *Digest of the Criminal Law* (6th ed MacMillan & Co 1904) at 183-184. For illustration (4) Stephen cites *Rowley's Case* Cro Jac 296, discussed in (1611) 12 Co Rep 87, 77 ER 1364 and in *R v Oneby* (1727) 2 Ld Raym 1485, 1498; 92 ER 465, 473.

<sup>48</sup> Blackstone *Commentaries on the Laws of England* Vol IV (A Facsimile of the First Edition 1769 University of Chicago Press) at 181-2.

1.33 Thus, in *R v Connor*<sup>49</sup> a woman was found guilty of manslaughter for throwing a poker at one son but unintentionally killing another child as he entered the room. The court held that where a mother adopts an improper mode of correction - if she strikes her son with an unsuitable implement and kills him - it is manslaughter even if she did not intend to kill or seriously injure the child in question.

## **F Constructive manslaughter and the felony-murder rule**

1.34 In his *Abridgement*, Brooke CJ extended the application of the unlawful act rule to cases in which the wrongful act was not directed at anyone's physical person. In limiting the application of the defence of *infortunium* in the context of stone throwing, Brooke stated that there should be liability for manslaughter if death resulted accidentally due to reckless or wanton stone throwing.<sup>50</sup> Brooke's comments provide the first clear source for what became known as involuntary manslaughter.<sup>51</sup>

1.35 Brooke also assumed that participation in unlawful hunting belonged in the same category as robbery, riot and affray although unlawful hunting might only coincidentally involve violent behaviour whereas in the robbery, riot and affray violence is a habitual factor.<sup>52</sup> It is strange that Brooke forgot the *ratio* of *Lord Dacre's Case*,<sup>53</sup> which had established *not* that the accused and his companions were murderers because they had participated in an illegal hunt during which a person happened to die - but that the group members who were not physically present at the time of the killing were nevertheless principals in the second degree due to the doctrine of constructive presence. Having conspired to kill anyone who might resist them while hunting, they shared in the *mens rea* and could not distance themselves from the killing that took place.

1.36 Brooke's misinterpretation of *Lord Dacre's Case*<sup>54</sup> inspired Coke to make the infamous statement that a man who shot at a deer or fowl with an intent to steal the carcass would be guilty of murder if the arrow happened to kill a boy lying hidden in a bush.<sup>55</sup>

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<sup>49</sup> (1835) 7 Car & P 438; 173 ER 194.

<sup>50</sup> Brooke *Corone* 172, cited in Kaye "The Early History of Murder and Manslaughter" (1967) 83 *LQR* 569 at 593.

<sup>51</sup> Kaye "The Early History of Murder and Manslaughter" (1967) 83 *LQR* 569, at 593.

<sup>52</sup> *Ibid.*

<sup>53</sup> Moo KB 216; 72 ER 458.

<sup>54</sup> Moo KB 216; 72 ER 458.

<sup>55</sup> See Coke 3 *Institutes of the Laws of England* (1660) at 56. As far back as 1697 Holt CJ said "In the case of killing the hen, my Lord Coke is too large, there must be a

1.37 According to Coke's explication of the law, deaths caused as the result of any unlawful act were murder. Foster later limited the rule to instances where the unlawful act was a felony.<sup>56</sup> The felony-murder rule punished those who killed during the commission of a felony without examining the underlying *mens rea*. As a result some felons were convicted of murder and executed simply because an "accidental" death was caused during the commission of the felony.

1.38 Over time felony murder was considerably reduced in scope. In an attempt to counter the harshness of the doctrine of constructive malice judges began to limit murder liability to those felons who caused death while perpetrating or attempting to perpetrate very serious felonies of violence such as rape, arson, burglary or robbery.<sup>57</sup> In *R v Skeet* Pollock C.B. stated that:

"the doctrine of constructive homicide ... only applies in cases where all the parties were aware that deadly weapons are taken with a view to inflict death or commit felonious violence, if resistance is offered".<sup>58</sup>

1.39 Stephen, thought Coke's rule was "astonishing"<sup>59</sup> and he stated that Foster's modest alteration of it was "cruel, and indeed, monstrous".<sup>60</sup> In the case of *R v Serné*, Stephen stated that:

"instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder. As an illustration of this, suppose that a man intending to commit a rape upon a

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design of mischief to the person, or to commit a felony, or a great riot." See *R v Keate* (1697) Comerbach 406, 409; 90 ER 557, 559.

<sup>56</sup> According to Foster the act had to be felonious rather than merely unlawful – "if his intention was to steal the poultry ... it will be murder by reason of the felonious intent." Foster's *Report and Discourses* (3<sup>rd</sup> ed Brooke 1792) at 258-9.

<sup>57</sup> See *R v Luck* (1862) 3 F & F 483, 490 (b); 176 ER 217, 221 where the editors write of "the reaction against the old doctrine of constructive homicide and of the return to the more rational and humane rule or test of complicity which characterises the modern cases, viz a participation not merely in a common design but a common design to commit a felony and a felony homicidal in its nature and likely to lead to homicide."

<sup>58</sup> (1866) 4 F & F 931, 936; 176 ER 854, 857.

<sup>59</sup> Stephen *A History of the Criminal Law of England* Vol III (Routledge 1996 reprint of 1883 edition) at 57.

<sup>60</sup> *Ibid* at 75.

woman, but without the least wish to kill her, squeezed her by the throat to overpower her, that would be murder.”<sup>61</sup>

1.40 Constructive or unlawful act manslaughter developed alongside the felony-murder rule whereby an intention to commit any unlawful act was deemed to suffice for the *mens rea* of manslaughter. A person’s criminal liability increased if death ensued not because his or her state of mind was any the more blameworthy but because he or she wrongfully directed harm at the victim.<sup>62</sup>

1.41 In 1827 the benefit of clergy for manslaughter was abolished and the malice principle *simpliciter* came to satisfy the *mens rea* of unlawful act manslaughter. Thus, an accused would be liable to a conviction for manslaughter where death occurred accidentally as a result of an act calculated to cause some harm.

1.42 Although Stephen was keen to improve the law of murder,<sup>63</sup> he was not very interested in tempering the harshness of the related doctrine of constructive manslaughter.<sup>64</sup> Stephen believed that any death caused by a person who committed an unlawful act even though he or she did not foresee that harm or injury would occur amounted to manslaughter. The learned judge had a very wide understanding of the term “unlawful” in this context. The word encompassed:

“all crimes, all torts, and all acts contrary to public policy or morality, or injurious to the public.”<sup>65</sup>

1.43 Stephen was largely responsible for the ambitious *Criminal Code (Indictable Offences) Bill 1879*.<sup>66</sup> Clause 174 gives a clear definition of the

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<sup>61</sup> *R v Serné* (1887) 16 Cox 311, 313. Felony murder was abolished in England by sections 5 and 6 of the *Homicide Act 1957*. In Ireland it was abolished by section 4 of the *Criminal Justice Act 1964*.

<sup>62</sup> Buxton “By Any Unlawful Act” (1966) 82 LQR 174, at 174.

<sup>63</sup> See Stephen *A History of the Criminal Law of England* Vol III (Routledge 1996 reprint of 1883 edition) at 83. The author stated that “the present law is ... generally supposed to make it murder to kill a man accidentally by shooting at a domestic fowl with intent to steal it, or to kill a man unintentionally by violence used in order to rob him, which violence was neither likely nor intended to kill. Under the Draft Code such offences would be manslaughter.” See clauses 174 and 175 of *Criminal Code (Indictable Offences) Bill 1879* at 80.

<sup>64</sup> Turner “The Mental Element in Crimes at Common Law” in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261 at 214.

<sup>65</sup> Stephen *A History of the Criminal Law of England* Vol III (Routledge 1996 reprint of 1883 edition) at 16.

<sup>66</sup> The Bill was never enacted in England but served as a model for the Indian Penal Code which will be discussed in Chapter 5. See paragraphs 5.54-5.66 below.



mental element in murder, but manslaughter was “not so well handled.”<sup>67</sup> Under Clause 177 culpable homicide not amounting to murder is manslaughter. Clause 167 defines culpable homicide in the following broad terms:

Homicide is culpable when it consists in the killing of any person either by an unlawful act or by a culpable omission to perform or observe any legal duty, or by both combined, or by causing a person by threats or fear of violence to do an act which causes that person’s death, or by wilfully frightening a child or sick person.

1.44 In relation to the foreseeability of the consequences of unlawful felonious activity in the medical context, *R v Whitmarsh*<sup>68</sup> concerned a doctor who was indicted for murder because he performed an illegal abortion which caused a woman’s death. Bigham J stated that if the jury were of the opinion that the girl died as a result of the unlawful operation performed by the accused, they should find him guilty of murder. The judge went on to say that there are cases where the death was so remote a contingency that no reasonable person could have taken it into his or her consideration. The jury was told that they could bring a verdict of the lesser crime of manslaughter if they thought that the accused could not have contemplated that the abortion was likely to cause death.<sup>69</sup>

1.45 Five years later, in *R v Bottomley and Earnshaw*,<sup>70</sup> Lawrence J likewise instructed the jury to find the accused guilty of manslaughter if they were of the opinion that he could not, as a reasonable person, have expected death to result. In *R v Lumley*,<sup>71</sup> an abortion case from 1911, Avory J told the jury that they would be justified in convicting the accused of manslaughter if they were satisfied that he did the unlawful act but that he had not at the time in contemplation, and would not as a reasonable man have contemplated, that either death or grievous bodily harm would result.

1.46 None of the above three cases made reference to “violence” or violent felonies and there was nothing to suggest that the absence of violence should influence the jury in reaching a verdict of manslaughter as opposed to murder. According to Turner, the juries were simply instructed to reach

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<sup>67</sup> Turner “The Mental Element in Crimes at Common Law” in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261 at 215.

<sup>68</sup> (1898) 62 JP 711.

<sup>69</sup> *Ibid* at 712.

<sup>70</sup> (1903) LJ Vol 38 311.

<sup>71</sup> *R v Lumley* (1911) 22 Cox 635.

their verdict on the basis of whether the accused doctors could or could not foresee the tragic consequences of their actions.<sup>72</sup>

## **G Manslaughter by gross negligence**

1.47 During the medieval period deaths caused by misadventure, that is, accidental killings caused by carelessness were treated as excusable homicide. Since there was no malice in the sense of an unlawful act wrongfully directed at the victim, the person who caused the fatality simply forfeited his or her chattels

1.48 In a case from 1664 a man accidentally shot his wife after taking care to ensure that the pistol was unloaded. The man was found guilty of manslaughter. When Foster commented on the case a century later, he stated that the case was not “strictly legal” and referred to a similar case he tried, where he directed the jury to acquit the defendant.<sup>73</sup>

1.49 Foster believed that judges should not perpetually hunt after forfeitures where the heart was free from guilt. He was only in favour of holding people responsible for negligent killings where the circumstances clearly showed:

“the plain indications of an heart regardless of social duty and fatally bent on mischief.”<sup>74</sup>

1.50 In the 18<sup>th</sup> century Blackstone wrote in his *Commentaries* that homicide by misadventure was generally excusable because it always arose as a result of a lawful act.<sup>75</sup> Nevertheless, misadventure presumed a want of

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<sup>72</sup> Turner “The Mental Element in Crimes at Common Law” in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261 at 253.

<sup>73</sup> Foster, *Report and Discourses* (3<sup>rd</sup> edition Brooke 1792) at 264-265.

<sup>74</sup> Foster, *Report and Discourses* (3<sup>rd</sup> edition Brooke 1792) at 264. See section 7 of the *Offences against the Person 1861* (24 & 25 Vict c 100) which abolished forfeiture in the case of excusable homicide in England and Ireland: “No Punishment or Forfeiture shall be incurred by any Person who shall kill another by Misfortune or in his own Defence, or in any other Manner without Felony.”

<sup>75</sup> Blackstone *Commentaries on the Laws of England* Vol IV (A Facsimile of the First Edition 1769 The University of Chicago Press) at 192. See the author’s comments at 182, where homicide *per infortunium* or misadventure is discussed. “Where a man, doing a lawful act, without intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man: for the act is lawful, and the effect is merely accidental.” Blackstone is obviously referring to Deuteronomy 19:4-5 (Revised Standard Version).

sufficient caution in the accused person who was therefore not altogether faultless.<sup>76</sup>

1.51 Blackstone proceeded to state that:

“where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have care, it is misadventure only: but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing and gives no warning at all, for then it is malice against all mankind.”<sup>77</sup>

1.52 Cases decided in the 19<sup>th</sup> century established that mere *inadvertence* did not give rise to criminal liability at common law. The insistence that negligence be “gross” or “criminal” gathered pace at this time following the increase in maximum penalties for manslaughter in 1822.

1.53 The case of *R v Long*<sup>78</sup> from 1830 involved an unlicensed physician who continued to apply a lotion to the female victim’s back despite the fact that the lotion was causing sickness and inflammation. The defendant assured her that the sickness was part of the cure. The victim died and the defendant was charged with, and convicted of, manslaughter.

1.54 According to Park J, the issue was whether there was gross ignorance in the accused, or scandalous inattention in his treatment of the deceased. Although the accused was unlicensed he could have gained sufficient medical experience over time. Thus, the jury was directed to judge whether the experience acquired undermined the supposition of any gross ignorance or criminal inattention.<sup>79</sup> Horder claims that Park J’s directions point to a possible manifestation of a great departure from expected standards through a deficiency in point of attentiveness, where the accused failed to utilise a vital piece of knowledge that he or she had when discharging some risky task.<sup>80</sup>

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<sup>76</sup> Blackstone *Commentaries on the Laws of England* Vol IV (A Facsimile of the First Edition 1769 The University of Chicago Press) at 186.

<sup>77</sup> *Ibid* at 192.

<sup>78</sup> (1830) 4 Car & P 398; 172 ER 756.

<sup>79</sup> *R v Long* (1830) 4 Car & P 398, 405; 172 ER 756, 759

<sup>80</sup> Horder “Gross Negligence and Criminal Culpability” (1997) 47 UTLJ 495, at 500.

1.55 *R v Markus*<sup>81</sup> was a case from 1864 involving an unqualified doctor who ran an herbalist shop. He prescribed seeds for the victim's cold although he did not know the likely effect of using such seeds for medicinal purposes. The victim died as a result of taking the seeds. Willes J directed the jury in the following terms:

“Every person who dealt with the health of others was dealing with their lives, and every person who so dealt was bound to use reasonable care, and not to be grossly negligent. Gross negligence might be of two kinds; in one sense, where a man, for instance, went hunting and neglected his patient, who dies in consequence. Another sort of gross negligence consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, or the properties of which he was ignorant, or how to administer a proper dose. A person who with ignorant rashness, and without proper skill in his profession, used such a dangerous medicine acted with gross negligence ... A person who took a leap in the dark in the administration of medicines was guilty of gross negligence.”<sup>82</sup>

1.56 In the 1867 case of *R v Spencer* the same judge directed the jury to convict the accused if they thought that the circumstances evidenced such gross and culpable negligence as would amount to a criminal wrong and “show an evil mind”.<sup>83</sup> Brett J directed the jury in *R v Nicholls*<sup>84</sup> that in order to find an accused guilty of gross negligence, mere negligence would not suffice. There had to be “wicked” negligence - negligence so great, that the jury had to be of the opinion that the accused had a wicked mind and was reckless and careless as to whether the victim died or not.<sup>85</sup>

1.57 It is submitted that in describing the behaviour of the accused, Brett J used the word “reckless” as a synonym for *thoughtless* or *inattentive* – that is, he gave the word its ordinary, everyday meaning and was not employing it as a legal term of art as modern judges and academic commentators do, to connote conscious awareness or advertence to risk.

1.58 In the 1887 case of *R v Doherty*<sup>86</sup> Stephen J described the level of negligence which would support a conviction for gross negligence manslaughter of a doctor. He stated:

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<sup>81</sup> (1864) 4 F & F 356; 176 ER 598.

<sup>82</sup> *Ibid* at 358-9; 599.

<sup>83</sup> (1867) 10 Cox 525, 527.

<sup>84</sup> [1875] 13 Cox CC 75.

<sup>85</sup> *Ibid* at 76.

<sup>86</sup> (1887) 16 Cox CC 306.

“if there was only the kind of forgetfulness which is common to everybody, or if there was a slight want of skill, any injury which resulted might furnish a ground for claiming civil damages, but it would be wrong to proceed against a man criminally in respect of such injury. But if a surgeon was engaged in attending a woman during her confinement, and went to the engagement drunk, and through his drunkenness neglected his duty, and the woman’s life was in consequence sacrificed, there would be culpable negligence of a grave kind. It is not given to everyone to be a skilful surgeon, but it is given to everyone to keep sober when such a duty has to be performed.”<sup>87</sup>

1.59 Stephen discussed the common law approach to killing by omission, stating an omission would never give rise to criminal liability unless it involved the failure to perform a legal duty. Such legal duties are those that tend to the preservation of life.<sup>88</sup> Stephen made a list of these duties, which included a duty to do dangerous acts in a careful manner, and a duty to take proper precautions in dealing with dangerous things. He addressed the issue of the degree of want of care in the following passage:

“There must be more, but no one can say how much more negligence than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused. No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case.”<sup>89</sup>

## **H Summary**

1.60 The purpose of this chapter was to give the reader a comprehensive overview of the early development of involuntary manslaughter in its two forms, manslaughter by unlawful and dangerous act and gross negligence manslaughter. Once the period of absolute liability for wrongful conduct (where the kinship group was as responsible for the perpetrator’s transgression as he was himself) gave way to the canonically inspired concept of individual responsibility based on sin, judges began to turn away from the notion of culpable homicide as a single undivided

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<sup>87</sup> R v Doherty (1887) 16 Cox CC 306, 309.

<sup>88</sup> See Stephen *History of the Criminal Law of England* Vol III (Routledge 1996 reprint of 1883 edition) at 9-11.

<sup>89</sup> Stephen *History of the Criminal Law of England* Vol III (Routledge 1996 reprint of 1883 edition) at 11.

offence and came to differentiate intentional or deliberate criminal conduct from wrongdoing that came about by accident, or due to mere carelessness.

1.61 Fourteenth-century judges distinguished murder, which was a capital offence from pardonable misadventure killings but did not recognise intermediate levels of culpable killing. The concept of malice prepense or malice aforethought slowly evolved, and eventually killings, which were intended or planned such as ambushes or those which arose due to the existence of previous ill will between the parties, were exempted from the “benefit of clergy” and were punishable by death.

1.62 Those unpremeditated killings, which took place “on the sudden” as a result of “heated blood” came to be known as manslaughter or chance medley, and were clergyable, punishable by one year imprisonment and branding on the thumb. This “concession to human frailty” marked the beginning of the partial defence of provocation.

1.63 The notion of wrongful directedness was central to the application of criminal liability in early times. Thus, provided the accused intended to aim some wrongful conduct at someone, that is, provided he or she meant to hurt or harm another person, then he or she would be held liable for any and *all* consequences that ensued from that wrongful behaviour, regardless of whether the outcome was foreseen or foreseeable or was the result of mistaken identity or misapplication of force.

1.64 This concept of wrongful directedness still underpins unlawful and dangerous act manslaughter to this day. Where an accused gives a fellow brawler a single punch to the face with the result that the victim stumbles against a wall, hits his head and dies, the accused will not necessarily escape liability by saying “it was just an accident, I never meant to kill him.” Although it is open to the jury to acquit such an accused if they think fit, under a strict application of the law such a death would amount to unlawful and dangerous act manslaughter because the accused decided to embark on an unlawful course of violence directed at the deceased.

1.65 The relationship between the felony-murder rule and constructive manslaughter was also explained in this chapter. Initially any killing which took place during the course of an unlawful act amounted to murder even where no “malice prepense” existed – this harsh doctrine was eventually modified so that the unlawful act had to be a felony and later a felony of violence. The doctrine of constructive manslaughter developed alongside the felony-murder rule so that deaths caused during the commission of minor unlawful acts – which Stephen claimed included all crimes, all torts and all acts contrary to public policy or morality, or injurious to the public – would automatically amount to manslaughter regardless of whether death was unforeseen and indeed unforeseeable.

1.66 Courts came to refer to the foreseeability of death in relation to the use of weapons and also in relation to unlawful medical practices such as illegal abortions which went fatally wrong. If a person used a weapon unlikely to cause death then manslaughter rather than murder would be a just verdict where the victim died. Similarly, juries were entitled to find the doctor who performed the illegal abortion, which resulted in death, guilty of manslaughter if he or she did not foresee that the patient could die as a result of the operation.

1.67 In medieval times killings which resulted from carelessness or negligence came under the category of misadventure and were generally pardonable. This was because the level of wrongdoing which caused the killing was thought to fall short of the required culpability, that is there was no “malice” or wrongful directedness involved.

1.68 The category of gross negligence manslaughter emerged in the 18<sup>th</sup> century. The Commission discussed various early cases so as to provide the reader with an insight into judicial conceptions of the level of carelessness or ineptitude necessary to give rise to criminal liability for deaths caused by culpable negligence.





## CHAPTER 2 UNLAWFUL AND DANGEROUS ACT MANSLAUGHTER

### A Introduction

2.01 The previous chapter provided an account of the early development of constructive manslaughter and gross negligence manslaughter. This chapter focuses on constructive manslaughter in Ireland, that is, manslaughter by an unlawful and dangerous act. The Commission looks at a number of significant cases dealing largely with manslaughter caused by assaults. Various judicial attempts to limit the scope of constructive manslaughter in the 19<sup>th</sup> and 20<sup>th</sup> centuries are discussed and the issues of causation and taking victims “as you find them” are investigated. Recent English manslaughter by drug injection cases are analysed and the Australian approach to unlawful and dangerous act manslaughter is analysed.

2.02 Subjectivist arguments calling for reform of unlawful and dangerous act manslaughter (the concepts of moral luck, moral distance and the correspondence principle) are explored. Objectivist arguments against reform are also examined, whereby the Commission delves into the notions of “acting”, “taking the consequences” and “tough luck”.

### B Unlawful and dangerous act manslaughter in Ireland

2.03 In Ireland a conviction for unlawful and dangerous act manslaughter (generally the unlawful act is an assault) will arise where:

- The act which causes death constitutes a criminal offence and poses the risk of bodily harm to another;
- The act is one which an ordinary reasonable person would consider to be dangerous, that is, likely to cause bodily harm (dangerousness is judged objectively).

2.04 The fact that an accused did not foresee, or indeed that a reasonable person in his or her position would not have foreseen death as a likely outcome of the unlawful conduct is irrelevant to a finding of guilt. Liability is *constructive* in that an accused’s intention to inflict some trivial injury to another person would make it justifiable for the law to hold him accountable for the unexpected result of his behaviour, that is, death.

2.05 In *The People (AG) v Maher*,<sup>1</sup> a case of motor manslaughter, the accused killed a man while driving a car without a licence. There was no evidence of negligence involved. The Court of Criminal Appeal held that the defendant's failure to have a valid driving licence was not a sufficient "unlawful act" to justify a conviction for manslaughter.

2.06 In *The People (AG) v Crosbie and Meehan*<sup>2</sup> the Court of Criminal Appeal said that the act must be both unlawful and *dangerous* to ground a manslaughter conviction. As to "unlawful" the Court said that a mere unlawful act was not sufficient, though under the law as understood in the 19<sup>th</sup> century,<sup>3</sup> this would have justified a manslaughter conviction. Dangerousness was to be judged from the point of view of the reasonable person and did not take into account whether the accused considered the act to be dangerous.

2.07 The victim died from a knife-wound inflicted during the course of a fight at the docks. No clear evidence was given as to how the wound was inflicted. The accused claimed he produced the knife in self-defence and that he accidentally hit the victim whilst waving the knife around to frighten off attackers. The Court of Criminal Appeal held that the act amounted to a criminal and dangerous act if the knife was brandished in order to frighten or intimidate and not in self-defence.

2.08 Manslaughter by assault may involve varying degrees of culpability due to the varying degrees of violence which may be employed. The more brutal the assault (for instance if several punches or kicks are applied to the head or if the accused brandishes a knife), the more foreseeable death or serious injury are and the more reprehensible the criminal conduct.

2.09 Different levels of culpability are reflected in sentencing decisions. O'Malley states:

"Of those imprisoned for manslaughter in 1993 and 1994, exactly 50% got five years or less and 50% got five to ten years. Sentences in excess of 10 years are rare, though not unknown, and are generally reserved for manslaughters which in terms of gravity are bordering on murder. The general trend seems to be that the more deliberate and gratuitous the assault or violence leading to the victim's death, the heavier the punishment deserved."<sup>4</sup>

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<sup>1</sup> (1937) 71 ILTR 60.

<sup>2</sup> [1966] IR 490.

<sup>3</sup> See Chapter 1.

<sup>4</sup> O'Malley *Sentencing Law and Practice* (Roundhall Sweet and Maxwell 2000) at 403.

2.10 In *The People (DPP) v Murphy*<sup>5</sup> the accused was convicted on three counts of manslaughter, one count of arson contrary to section 2(1) of the *Criminal Damage Act 1991*, and three counts of arson contrary to section 2(2)<sup>6</sup> of the 1991 Act. This arose from him setting fire to a house, which resulted in the death of three occupants. The appellant was sentenced to concurrent terms of 14 years imprisonment on each of the counts of manslaughter.

2.11 At the time of the incident, the accused was taking prescription anti-inflammatory and analgesic drugs due to an injury to the ribs that he had recently sustained. He had been drinking in a public house during the evening and had attracted attention for his peculiar and at times aggressive behaviour. Several witnesses gave evidence that they thought that he was drugged. The proprietor of the public house eventually asked him to leave the public house, at which the accused left and set fire to the house in question due, he later said, to rage and a sense of revenge for having being turned out of the public house.

2.12 At his trial, a medical expert testified that the drugs which had been prescribed for the accused's injury were commonly used in general practice, but that that each had the potential in rare cases to cause unwanted side effects including disorientation, possible drowsiness, memory loss, depression and psychotic reactions. The trial judge directed the jury that "if one is so intoxicated, involuntarily or innocently, to the extent that one doesn't know what one is doing and one has not control over one's action, that can be used as a defence." The Court of Criminal Appeal held that the jury was entitled to reject the defence of involuntary intoxication in the light of the accused's admitted motive for revenge for having been turned out of the public house, his confessions to a garda and a civilian about his involvement in the crime months after it took place, and the compatibility of those confessions with the evidence found at the crime scene.

2.13 Although the accused's consumption of alcohol and prescribed medication was not sufficient to deprive him of the capacity to commit the crime, the Court of Criminal Appeal considered whether it could rightly be considered a mitigating factor that altered the quality of his actions for sentencing purposes. The Court remarked that the appellant's state of mind

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<sup>5</sup> Court of Criminal Appeal 8 July 2003.

<sup>6</sup> Section 2(2) of the *Criminal Damage Act 1991* provides that: "A person who without lawful excuse damages any property, whether belonging to himself or another— ( a ) intending to damage any property or being reckless as to whether any property would be damaged, and ( b ) intending by the damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered, shall be guilty of an offence." Under section 2(4) offences by damaging property by fire shall be charged as arson. Section 5(b)(i) provides that a person who is found guilty of arson may be subject to a fine or imprisonment for life or both.

at the time of the incident was “vicious, almost feral,” but that his criminal actions were not caused by any form of insanity, or by being unable to control his actions. The Court concluded that his conduct had been caused by a grossly exaggerated and totally self-centred sense of resentment at being put out of a bar, which he then transferred from the bar staff to the people of the area generally. The Court noted that manslaughter offences vary widely, but that the killings in this case, caused by the accused’s enraged pursuit of “revenge” against the general public, displayed a “callous disregard for human life” and therefore belong in an aggravated category.<sup>7</sup>

2.14 In upholding the 14 year manslaughter sentences, the Court stated that they were a justified reaction to acts of unprovoked savagery which have gross consequences for the lives and well being of other people. The Court concluded:

“Those who yield to emotions of rage or resentment and thereby bring about the death of innocent people must realise that, as a consequence of their feral acts, their own lives will be gravely blighted by lengthy custodial sentences. This measure is necessary in the interest of the protection of society as a whole and in particular the reinforcement of the basic social norms which require from every citizen a measure of self restraint without which social and community life would be quite impossible.”<sup>8</sup>

2.15 Two recent Court of Criminal Appeal decisions addressed the issue of sentencing defendants convicted of manslaughter by killing someone with a knife. In *The People (DPP) v Dillon*<sup>9</sup> the Court held that the trial judge had erred when he stated that in manslaughter cases where a knife is used, there should be a minimum sentence of 20 years, before taking into account the accused’s personal circumstances. The Court of Criminal Appeal stated that this seemed to put manslaughter by killing with a knife in a different position from any other form of manslaughter, which was wrong in principle. The Court held that judges cannot and should not divide up elements to impose a minimum in relation to a particular category.

2.16 In *The People (DPP) v Kelly*<sup>10</sup> the accused had been acquitted of murder, but convicted of manslaughter for stabbing the unarmed deceased with a kitchen knife during a fracas involving many people at a house party where alcohol and drugs had been consumed. In imposing a sentence of 14

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<sup>7</sup> *The People (DPP) v Murphy* Court of Criminal Appeal 8 July 2003 at 32.

<sup>8</sup> *Ibid.*

<sup>9</sup> Court of Criminal Appeal 17 December 2003.

<sup>10</sup> Court of Criminal Appeal 5 July 2004.

years imprisonment for manslaughter the trial judge (who had also been the trial judge in *The People (DPP) v Dillon*)<sup>11</sup> observed that there was a lack of regard for human life in society at present which manifested itself in the use of knives during disputes.

2.17 The trial judge stated:

“A halt must be called to this type of conduct and deterrent sentences must be imposed in cases involving death and serious injury on the use of knives in the hope that such a halt will be effected. The penalty permissible for manslaughter is life imprisonment and in a case such as this one I consider that a sentence of not less than 20 years is appropriate.”<sup>12</sup>

He then proceeded to take the mitigating factors into account before reaching a final sentence. Although the trial judge’s approach to sentencing was prompted by the “laudable motive” of deterring killings by knife use, the Court of Criminal Appeal held that it was wrong in principle and marked a departure from the established sentencing principles without any supporting authority.<sup>13</sup>

2.18 The Court referred to its decision in *The People (DPP) v McAuley & Another*<sup>14</sup> where it had dismissed an appeal by the prosecution against the leniency of the 14 year sentence for the manslaughter of a garda in the course of his duty. The accused in *McAuley* had been charged with “capital” murder and the Court noted that, while they had been convicted of manslaughter, the crime had been perpetrated with firearms as part of “an organised and premeditated criminal enterprise”.<sup>15</sup>

2.19 In *The People (DPP) v Kelly*, the Court held that, although the accused’s crime was grave, it did not belong in the most aggravated category of manslaughter cases such as *The People (DPP) v McAuley & Another*. However, the Court also stated that, while it did not occur in “any similar context of premeditated criminality”, the use of a knife was a “gravely aggravating feature.” Nonetheless the Court was satisfied that the knife was not carried “with a view to being used as a weapon”<sup>16</sup> since the accused was given or took possession of it only moments before the fatal incident, when many of the assembled people were “on edge”. Ultimately, the Court of

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<sup>11</sup> Court of Criminal Appeal 17 December 2003.

<sup>12</sup> *The People (DPP) v Kelly* Court of Criminal Appeal 5 July 2004 at 2.

<sup>13</sup> *Ibid* at 5.

<sup>14</sup> [2001] 4 IR 160.

<sup>15</sup> *The People (DPP) v Kelly* Court of Criminal Appeal 5 July 2004 at 25.

<sup>16</sup> *The People (DPP) v Kelly* Court of Criminal Appeal 5 July 2004 at 25.

Criminal Appeal substituted a sentence of 8 years in place of the 14 years imposed at trial.

2.20 In *The People (DPP) v O' Donoghue*<sup>17</sup> the defendant was convicted of unlawful and dangerous act manslaughter against the following background. The defendant was an adult male in his twenties who had forcefully gripped an 11-year-old boy, a neighbour who he knew very well, in a headlock. He was charged with murder, and he pleaded not guilty to murder but guilty of manslaughter. In a statement to the Gardai, he claimed that he had grabbed the boy after the boy had thrown stones at his car, and that the death had been an accident. At his trial, he was acquitted of murder, but was found guilty of manslaughter and was sentenced to 4 years imprisonment. The prosecution appealed against the sentence imposed on the grounds of undue leniency.

2.21 The Commission is not here concerned with the sentencing issue in this case. Nonetheless, in the course of dismissing the appeal, the Court of Criminal Appeal noted that the death arose out of the catching of the young boy in a headlock and, even with the additional forcible grasping of the neck, this could not be described as “a deliberate, violent or prolonged assault” on the deceased. However, the Court also noted that the conclusion by the trial judge that this might be described as being at the “horseplay end of things” was not inconsistent with its description as being “dangerous”. In that respect, the Court affirmed that the death fell within the definition of unlawful and dangerous act manslaughter.

## **C Judicial attempts to limit the scope of constructive manslaughter in the 19<sup>th</sup> and 20<sup>th</sup> centuries.**

### **(a) Causation and unlawfulness**

2.22 Many courts have been struck by the harshness of constructive manslaughter and judges have devised rules designed to limit the circumstances in which a person can be convicted of manslaughter for causing an unforeseen death. Buxton observes that the foundations of a reasonable restriction of constructive manslaughter were laid down in the 19<sup>th</sup> century.

“The requirement that for a manslaughter conviction that death must be “by” or “in the course of” the unlawful act opened the way to an important limitation on the doctrine, namely, that the death should have been caused by the specifically “unlawful” element in the accused’s conduct.”<sup>18</sup>

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<sup>17</sup> [2006] IECCA 134.

<sup>18</sup> Buxton “By Any Unlawful Act” [1966] LQR 174, at 175.

2.23 For instance, in *R v Van Butchell*<sup>19</sup> a case involving an unlicensed medical practitioner, Hullock B. stated that provided the accused had exercised reasonable care in the operation, the mere fact that he was liable to a statutory penalty for practicing without a license was irrelevant to a manslaughter charge.

2.24 *R v Bennett*<sup>20</sup> involved a tragedy caused by fireworks which the accused had on his premises in contravention of an Act passed in 1697 which outlawed fireworks.<sup>21</sup> Due to the negligence of the accused's servants a fire broke out which sent a rocket flying across the street where it set fire to a house with fatal results. The manslaughter conviction was quashed by the Court for Crown Cases Reserved. Cockburn CJ said that whilst the keeping of the fireworks had been unlawful, it caused the death "only by the superaddition of the negligence of someone else"<sup>22</sup>. The break in the chain of causation caused by the servants' negligence thus exempted the accused. Willes J stated that:

"the keeping of the fireworks in the house, was disconnected with the negligence of his servant which caused the fire, [therefore] my impression is very strong that the conviction cannot be legally sustained."<sup>23</sup>

2.25 Buxton argues that these cases are examples of the eagerness of judges:

"to apply causal tests more stringently than they were applied in the law generally, in order to limit constructive manslaughter, and the principle behind this development, although nowhere overtly stated, seems to be that the death must be the direct outcome of the distinctly unlawful element in the defendant's conduct."<sup>24</sup>

2.26 The defendants in *R v Fenton*<sup>25</sup> threw stones down a mine-shaft and broke the scaffolding. As a result, several minors were killed when the lift in which they were descending over-turned. Once again the court stressed the need for a clear connection between the unlawful act and the death. Where death followed from a wrongful act the offence would be manslaughter, but where it was wholly unconnected with it then it was a case

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<sup>19</sup> (1829) 3 Car & P 629; 172 ER 576.

<sup>20</sup> (1858) Bell 1; 8 Cox 74; 169 ER 1143.

<sup>21</sup> 9 & 10 Will 3 c 7.

<sup>22</sup> *R v Bennett* (1858) 8 Cox 74, 76.

<sup>23</sup> *Ibid* at 76.

<sup>24</sup> Buxton "By Any Unlawful Act" 174 [1966] LQR, at 178.

<sup>25</sup> (1830) 1 Lew 179; 168 ER 1004.

of accidental death. Here the wrongful conduct was directed at the mine and the minors working there and consequently amounted to unlawful act manslaughter.

2.27 In *R v Franklin*<sup>26</sup> the accused was walking along a pier when he picked up an empty crate belonging to a stall keeper and threw it into the sea where it unluckily hit and killed a bather. The Court ruled that the case was not to go to the jury on the basis of gross negligence since:

“the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case ... the civil wrong against the refreshment-stall keeper is immaterial to this charge of manslaughter.”<sup>27</sup>

2.28 *R v Franklin* has been viewed as a landmark case because the court refused to recognise that a tort is capable of being an “unlawful” act for involuntary manslaughter – that is the mere trespass against the civil right of the stall keeper could not transform an act into the very serious offence of manslaughter.<sup>28</sup> The case was one of the earliest to decide that the act must involve a breach of the criminal law. Buxton argues that *R v Franklin* requires that the act should be unlawful because it is directed against the actual deceased.<sup>29</sup>

2.29 In *R v Hayward*<sup>30</sup> the accused had threatened to harm his wife and ran after her. She fell down and the accused kicked her on the left arm. When she was picked up, she was dead. Ridley J stated:

“The medical evidence showed that the bruise on her arm, due to the kick, could not have been the cause of death ... [She] was suffering from a persistent thymus gland ... lying at the base of the heart. Such a state of affairs was proved to be quite abnormal at the deceased’s age ... any combination of physical exertion and fright or strong emotion might occasion death in such a fashion.”<sup>31</sup>

Ridley J was of the view that the crime of manslaughter rather than murder was at issue and an awareness of the victim’s fragile health was not

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<sup>26</sup> (1883) 15 Cox 163.

<sup>27</sup> *Ibid* at 165.

<sup>28</sup> See Buxton “By Any Unlawful Act” [1966] LQR 174, at 183. The author maintains that a superior interpretation of the case may be that the commission of an unlawful act “prior to the throwing of the box into the sea was not sufficiently related to the consequences prohibited by the law of manslaughter.”

<sup>29</sup> *Ibid*.

<sup>30</sup> (1908) 21 Cox 692.

<sup>31</sup> *R v Hayward* (1908) 21 Cox 692, 692-3.



necessary for the accused to be guilty of the former. A mild sentence of 3 months imprisonment with hard labour was imposed.

2.30 In *Andrews v DPP*<sup>32</sup> which involved dangerous driving, Lord Atkin observed that in the law of manslaughter there was a marked difference between “doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal.”<sup>33</sup> Thus, the act must be unlawful for a reason other than the negligent way in which it is performed. Buxton interprets Lord Atkin’s comment to mean that “unlawful” in these terms must have entailed the intentional infliction of some harm upon the deceased. Cases of careless anti-social behaviour were dealt with under manslaughter by gross negligence.<sup>34</sup>

2.31 As discussed in this section and in part B, the court in the Irish motor manslaughter case of *The People (AG) v Maher*<sup>35</sup> held that the lack of a valid driving licence was insufficient to give rise to a manslaughter conviction where there was no evidence of negligent driving.

**(b) Dangerousness**

2.32 Decisions in the 19<sup>th</sup> century did not require that the act must have been dangerous as well as unlawful. However, in *R v Bradshaw*<sup>36</sup> where the accused killed a person as a result of a foul tackle during a football match, the Court held that acts were unlawful for the purposes of manslaughter if they were dangerous in the sense that they involved the intentional infliction of injury.

2.33 In *R v Bradshaw* it was held that if the accused intended to seriously hurt the deceased or was aware that:

“in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful.”<sup>37</sup>

Hence the act of charging at a football player amounted to an unlawful battery due to the intentional or reckless infliction of injury upon him and was capable of constituting constructive manslaughter if death resulted.

2.34 The cases referred to in this section reflect just a few judicial attempts to reduce the situations where a person who commits an unlawful

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<sup>32</sup> [1937] 2 All ER 552.

<sup>33</sup> *Ibid* at 557.

<sup>34</sup> Buxton “By Any Unlawful Act” [1966] LQR 174, at 189.

<sup>35</sup> (1937) 71 ILTR 60.

<sup>36</sup> (1878) 14 Cox 83.

<sup>37</sup> (1878) 14 Cox 83, 85 per Bramwell B.

act can be held criminally liable for causing a death which was neither intended nor foreseen. Clearly many judges were conscious that the common law of involuntary manslaughter was quite severe in holding people legally responsible for unforeseen (and indeed often unforeseeable) consequences brought about by some wrongful conduct. Thus, by insisting that the “unlawful” element of the accused’s act (a) cause the death (b) be a crime rather than a tort and (c) be dangerous in the sense of being likely to injure another person, courts attempted to introduce albeit modest measures to temper the doctrine of constructive manslaughter.

#### **D 20<sup>th</sup> century unlawful and dangerous act cases**

2.35 In *R v Larkin*<sup>38</sup> the court addressed the issue of dangerousness. The accused claimed that he cut his lover’s throat accidentally when she drunkenly stumbled against a razor he was wielding. The Court of Criminal Appeal held that the attempt to frighten the deceased’s male companion had amounted to an unlawful act. Moreover:

“where the act which a person is engaged in performing is unlawful, then, if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter.”<sup>39</sup>

2.36 In *The People (AG) v Crosbie and Meehan*<sup>40</sup> discussed in part B, the Irish Court of Criminal Appeal held that in order to ground a manslaughter conviction, the act causing death must be both unlawful and *dangerous*. The dangerousness of the wrongful act or conduct was to be judged from the point of view of the reasonable man and it was entirely irrelevant whether the accused considered his or her behaviour to be dangerous.

2.37 In *R v Lamb*,<sup>41</sup> two young boys who did not understand the mechanics of guns were playing with a revolver. The appellant was aware that there were two bullets in the chambers of the gun but because neither bullet was opposite the firing pin he thought that it was safe to pull the trigger which he aimed in the direction of his friend. However, when he pulled the trigger it brought one of the bullets into a position opposite the firing pin and his friend was shot and killed. Lamb appealed his manslaughter conviction. The Court of Appeal held that in relation to

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<sup>38</sup> [1943] 1 All ER 217.

<sup>39</sup> *Ibid* at 219.

<sup>40</sup> [1966] IR 490.

<sup>41</sup> [1967] 2 All ER 1282.

unlawful and dangerous act manslaughter, the only possible unlawful act which could have taken place was an assault. The Court was of the view that on the evidence no assault had taken place.

2.38 *R v Lamb* was a case where recklessness was imported into manslaughter, making the state of mind of the accused a relevant consideration. The appellant had not intended to make his friend fear an immediate application of unlawful force, nor was he subjectively reckless in this regard. Moreover the deceased thought the whole thing was a joke. He was not fearful for his life since he was labouring under the same misunderstanding regarding the mechanics of the revolver as the appellant. The Court allowed the appeal because the prosecution had not established that any unlawful act had occurred for the purposes of unlawful and dangerous act manslaughter.

2.39 In putting forward the defence of honest and reasonable mistake, the accused asserted that he honestly and reasonably believed that no bullet would or could be fired under the circumstances and that his act of pulling the trigger was therefore innocent. Sachs LJ made reference to gross negligence manslaughter and stated that the honest belief of the accused was relevant.

“When the gravamen of a charge is criminal negligence – often referred to as recklessness – of an accused, the jury have to consider among other matters the state of his mind, and that includes the question of whether or not he thought that that which he was doing was safe. In the present case it would, of course, have been fully open to a jury, if properly directed to find the defendant guilty because they considered his view as to there being no danger was formed in a criminally negligent way. But he was entitled to a direction that the jury should take into account the fact that he had undisputedly formed that view and that there was expert evidence as to this being an understandable view.”<sup>42</sup>

Sachs LJ later said that *mens rea* had evolved into “an essential ingredient in manslaughter”.<sup>43</sup>

2.40 *R v Church*<sup>44</sup> is an English case which clearly underlines the fact that an act must be both unlawful and dangerous before a conviction for manslaughter will be sustained. Here the accused caused the death of a woman by throwing her into a river. The accused parked his van by the river intending to have sexual intercourse with the deceased. The deceased jeered

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<sup>42</sup> *R v Lamb* [1967] 2 All ER 1282, 1285.

<sup>43</sup> *Ibid* at 1284.

<sup>44</sup> [1965] 2 All ER 72.

at him for failing to satisfy her and he struck her in anger. Thinking his blow had killed her, the accused threw her into the river where she drowned. Edmund Davies LJ stated that a manslaughter verdict will not be the inevitable result of a court's conclusion that death was caused by an unlawful act.

“For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm ...”<sup>45</sup>

2.41 In *DPP v Newbury and Jones*<sup>46</sup> two teenage boys were convicted of manslaughter for causing the death of a rail worker when they threw paving stones off a bridge onto an oncoming train. The exact unlawful act in question was never expressly identified (most commentators assume it involved the offence of criminal damage) but the House of Lords were satisfied that some unlawful act had indeed been committed and held that there was no need to prove that the accused foresaw that their conduct would cause harm to anyone. According to the court, a purely objective test applied, whereby the dangerousness of an act was to be judged from the point of view of the reasonable person. If the reasonable person would have recognised that the unlawful act would expose another to the risk of some harm, then it was irrelevant whether or not the accused foresaw any risk of injury.

2.42 Thus, although the prosecution is required to prove that the accused intended to do the unlawful act in question, it is not always clear what exactly is meant by this requirement. Certain parts of the reasoning in *DPP v Newbury and Jones*<sup>47</sup> imply that it may be sufficient for the prosecution to show that the accused deliberately, in the sense of voluntarily did the act which formed the unlawful act, rather than prove he did the act with the specified *mens rea* to constitute the criminal offence.

2.43 Reed states that this cannot be right.

“The defendant in *Lamb* clearly intended to point the gun at the defendant and to pull the trigger; this was a voluntary act on his part. It could not, however, constitute an unlawful act unless he intended to cause his friend to apprehend the immediate application of unlawful violence. Perhaps the answer is that the accused must be proved to have deliberately thrown a punch and that he has the necessary *mens rea* for battery, namely an intent to

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<sup>45</sup> [1965] 2 All ER 72 at 76.

<sup>46</sup> [1976] 2 All ER 365.

<sup>47</sup> [1976] 2 All ER 365 at 369.

apply unlawful force or consciously take an unjustified risk of applying unlawful force.”<sup>48</sup>

2.44 In *R v Slingsby*<sup>49</sup> a case involving vigorous sexual activity, the defendant inserted his hand into the deceased’s vagina and rectum with her consent. At the time the defendant was wearing a signet ring which cut the deceased internally. Following the death of his sexual partner from septicaemia, the defendant was charged with unlawful and dangerous act manslaughter. On the facts of the case the only unlawful act which could have occurred was a battery. The court had to decide whether the consensual sexual activity was transformed into a battery due to the accidental injury caused to the deceased by the defendant’s signet ring. Judge J held that no battery occurred. He was of the opinion that it would be contrary to principle to deem activity criminal merely because an unforeseen injury was sustained in the course thereof.

2.45 *R v Slingsby*<sup>50</sup> can be differentiated from the sado-masochistic case of *R v Brown*<sup>51</sup> where consent was held to be no defence to assault occasioning actual bodily harm. In *R v Slingsby* the defendant neither intended nor foresaw any injury, whereas in the latter the defendant had clearly intended to injure.

2.46 In *R v Scarlett*<sup>52</sup> the landlord of a pub was convicted of manslaughter on the basis of having used excessive force in ejecting a drunken, troublesome man from his premises. The deceased arrived at the pub shortly after closing time and demanded drink. The appellant told him to leave or he would throw him out. The deceased refused to leave voluntarily and the appellant then proceeded to escort him from the pub. At first the appellant took hold of the deceased’s right arm, but later pinned his arms to his sides from behind, thinking that the deceased might hit him otherwise. The appellant then bundled the deceased to the door and left him with his back against the wall in the lobby. As the appellant turned to go back into the pub the deceased fell backwards down a flight of five steps leading to the street where he struck his head. The appellant telephoned for an ambulance and the deceased was taken to hospital where it was established that he sustained a serious head injury from which he later died.

2.47 The appellant was told by investigating officers that he would be arrested for murder. During the course of three interviews with the police he

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<sup>48</sup> Reed “Court of Appeal” (2003) JoCL 67 (450) (Lexis).

<sup>49</sup> [1995] Crim LR 570.

<sup>50</sup> *Ibid.*

<sup>51</sup> [1993] 2 All ER 75.

<sup>52</sup> [1993] 4 All ER 629; 98 Cr App R 290.

denied using excessive force and indeed denied intending to cause any harm whatsoever to the deceased.<sup>53</sup> During his manslaughter trial, the Crown alleged that in manhandling the deceased towards the door the appellant had used excessive force and therefore committed an unlawful act. It was contended that the appellant attempted to expel the deceased with such momentum that it caused the latter to fall and therefore the death amounted to manslaughter.

2.48 Basing his formulation of the law on *R v Church*<sup>54</sup> and *DPP v Newbury and Jones*,<sup>55</sup> the trial judge told the jury that:

“if the killing is the result of the accused man’s unlawful act, like an assault, which all reasonable people would inevitably realise must subject the victim to some form of harm, even if it is not serious, if the killing takes place in that situation it is manslaughter.”<sup>56</sup>

He instructed the jury to convict the appellant of manslaughter if they concluded that he used more force than was necessary in removing the deceased from the pub. The appellant was convicted and appealed against his conviction on the basis that the judge misdirected the jury.

2.49 In the Court of Appeal Beldam LJ referred to *R v Williams*<sup>57</sup> a case where the issue was whether the accused should be acquitted if he mistakenly believed that he was justified in using force. The court held that even if the jury concluded that the mistake was unreasonable, if the defendant had genuinely been labouring under the mistake he was entitled to rely on it and could be acquitted because he did not intend to apply unlawful force. Lane LJ emphasised the need for a careful direction in cases where the accused is entitled to use reasonable force either in self-defence, for the purposes of preventing crime or in order to remove a trespasser as was the case here.

2.50 Lane LJ stated that in these cases:

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<sup>53</sup> See *R v Scarlett* [1993] 4 All ER 629, 633. The appellant stated at trial that the only thing he intended was to remove the deceased from the premises. He said: “I didn’t intend to cause him to fall down the steps; and I didn’t think he would fall down the steps in the position I had put him in. I thought I had used the minimum amount of force. When I pushed him out of the bar area I may have been holding him more tightly than necessary but even if I was I thought it was reasonable at the time and I didn’t think there was any likelihood that he would fall down the steps. I didn’t think he would get hurt at all.”

<sup>54</sup> [1965] 2 All ER 72; [1966] 1 QB 59.

<sup>55</sup> [1976] 2 All ER 365; [1977] AC 500.

<sup>56</sup> *R v Scarlett* [1993] 4 All ER 629, 634.

<sup>57</sup> [1987] 3 All ER 411.

“the defendant will be guilty if the jury are sure that first of all he applied force to the person of another, and secondly that he had the necessary mental element to constitute guilt. The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.”<sup>58</sup>

2.51 Beldam LJ was of the view that following the decision in *R v Williams*,<sup>59</sup> there was no logical basis for differentiating between an accused who objectively is not justified in using force but mistakenly believes he is, and an accused who is justified in using force but mistakenly believes that “the circumstances call for a degree of force objectively regarded as unnecessary”.<sup>60</sup> He stated that where:

“an accused is justified in using some force and can only be guilty of an assault if the force used is excessive, the jury ought to be directed that he cannot be guilty of an assault unless the prosecution prove that he acted with the mental element necessary to constitute his action an assault”.<sup>61</sup>

2.52 The Court of Appeal quashed the manslaughter conviction, finding that the verdict was unsafe and unsatisfactory. The Court was of the view that the evidence put forward by the prosecution was insufficient and the trial judge’s directions were inadequate. The judge was particularly criticised for his failure to direct the jury that in order to establish an assault, the prosecution had to prove that the appellant intentionally or recklessly applied excessive force in evicting the deceased. It stated that the miscarriage of justice could have been avoided if “the clear advice” of the Criminal Law Revision Committee’s Fourteenth Report on *Offences Against the Person*<sup>62</sup> had been implemented. In 1980 the Criminal Law Revision Committee recommended that the antiquated relic of manslaughter by an unlawful act be abolished and that a more rational and systematic approach to the offence of manslaughter be introduced.<sup>63</sup>

2.53 Thus, the Court of Appeal held that in the future juries should not convict people of manslaughter unless they are satisfied that the level of

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<sup>58</sup> [1987] 3 All ER 411, 413-414.

<sup>59</sup> [1987] 3 All ER 411.

<sup>60</sup> *R v Scarlett* [1993] 4 All ER 629, 636.

<sup>61</sup> *Ibid.*

<sup>62</sup> Cmnd 7844 (1980).

<sup>63</sup> See Criminal Law Revision Committee’s *Fourteenth Report on Offences Against the Person* Cmnd 7844 (1980) paragraphs 120-124 at 56-57.

force used was much more than was necessary in the circumstances as the accused believed them to be. Provided the accused believed that the circumstances demanded the degree of force used, he or she should not be convicted, even if his belief was unreasonable.<sup>64</sup>

## **E Causation and taking victims “as you find them”**

2.54 In *R v Jordan*<sup>65</sup> the appellant’s conviction for murder was quashed following the Court of Criminal Appeal’s decision to allow fresh medical evidence which was not available during the original trial. The court was persuaded that the jury might well have found that a break in the chain of causation had occurred and brought a different verdict, had the evidence been available to them at trial.

2.55 The appellant, and three other men, all airmen in the United States Forces, were charged with the murder of deceased, who was stabbed by the appellant during a fracas at a café in Hull. The deceased was taken swiftly to hospital and the wound was stitched up. Nevertheless, he died a few days later. There was no evidence that any of the other three men had used a knife or had acted in concert with the appellant who did the stabbing, so the trial judge directed their acquittal. During his murder trial, the appellant raised various defences, including accident, self-defence, provocation and stabbing in the course of a quarrel.

2.56 Counsel for the appellant made no complaint in relation to the trial judge’s charges to the jury on those defences and admitted that there would not have been any appeal if the doctor who treated the deceased in hospital had not contacted the US Airforce, because he disagreed with the cause of death as articulated at the trial. On appeal, two medical experts were called by counsel for the appellant who expressed the opinion that death had not been caused by the stab wound, but rather by the introduction of terramycin after it had become apparent that the deceased was intolerant to the antibiotic, and also by the intravenous introduction of excessive quantities of liquid.

2.57 The stab wound inflicted by the appellant had penetrated the deceased’s intestine in two places, but the wound was almost healed at the time of death. The deceased was given terramycin with a view to preventing infection. The medical witnesses stated that the administration of terramycin was the proper course to take. There was no problem with the dosage of terramycin. However, the deceased was intolerant to the antibiotic and

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<sup>64</sup> *R v Scarlett* [1993] 4 All ER 629, 636.

<sup>65</sup> (1956) 40 Cr App R 152.



developed diarrhoea, which was attributable to the deceased's intolerance to terramycin.

2.58 The administration of terramycin was stopped, but unfortunately recommenced the following day on the orders of another doctor. According to the appellant's medical experts, the reintroduction of a substance after the intolerance of the patient was known "was palpably wrong".<sup>66</sup> The witnesses also heavily criticised the intravenous introduction of abnormal quantities of liquid which resulted in the lungs becoming waterlogged and pulmonary odema. Pulmonary odema leads to broncho-pneumonia – it was from broncho-pneumonia that the deceased died.

2.59 In quashing the appellant's conviction the court held that death resulting from any normal medical treatment employed to deal with a felonious injury was to be regarded as caused by the felonious injury, but where the treatment employed was abnormal the same principle does not apply.

2.60 In *R v Smith*<sup>67</sup> a soldier who was involved in a fight between two army regiments stabbed three men with a bayonet, including the deceased. Following a threat by the sergeant major of the regiment that he would keep all the assembled men on parade until the perpetrator came forward, the appellant confessed that he did the stabbing. One of the deceased's lungs was pierced following a stab wound to the back. On the way to the medical reception, the soldier carrying the deceased dropped him twice. The treatment given to the deceased at the busy medical centre was inappropriate and harmful and he died two hours after being stabbed. It had been submitted in evidence that he would have had a 75% chance of survival had he been given a blood transfusion, but the medical centre had no blood transfusion facilities.

2.61 In relation to causation, counsel for the appellant argued that a correct direction to the court would have been that they must be satisfied that the death of the Private in question:

"was a natural consequence and the sole consequence of the wound sustained by him and flowed directly from it."<sup>68</sup>

Any other cause which impeded the deceased from recovering, such as negligence in his medical treatment would, according to counsel for the appellant, mean that death was not caused as a result of the wound. *R v Jordan*<sup>69</sup> was cited in support of the contention that the deceased was subject

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<sup>66</sup> *R v Jordan* (1956) 40 Cr App R 152, 157.

<sup>67</sup> [1959] 2 All ER 193; [1959] 2 QB 35.

<sup>68</sup> *R v Smith* [1959] 2 All ER 193,198.

<sup>69</sup> (1956) 40 Cr App R 152.

to abnormal medical treatment from the moment he arrived at the medical centre right up until his demise.

2.62 The court held that *R v Jordan* was a very exceptional case which was dependant on its very unique facts. In dismissing the appeal, it was found that the judge-advocate's directions on causation were adequate, despite the fact that he did not "go into the refinements of causation."<sup>70</sup> Lord Parker CJ stated:

"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. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound."<sup>71</sup>

In the opinion of Courts-Martial Appeal Court no properly directed jury or court could reach any other conclusion that that the deceased died as a result of the bayonet wound inflicted by the appellant.

2.63 In *R v Blaue*<sup>72</sup> the appellant stabbed a young Jehovah's Witness girl who refused to have sexual intercourse with him in chest, piercing her lung. The girl who lost a large amount of blood was taken to hospital and informed that she needed a blood transfusion. She refused to have a blood transfusion on the grounds that it conflicted with her religious beliefs. Although the girl was told that she would die if she did not have the transfusion, she continued to refuse the necessary medical intervention and died the next day. The actual cause of death was the bleeding into the pleural cavity arising from the stab wound to the lung.

2.64 At trial, the Crown admitted that the girl would not have died had she undergone a blood transfusion when advised that it was necessary. All the evidence adduced by the Crown showed that the deceased was fully aware and conscious of the fact that she would die if she did not have the transfusion and that she deliberately and knowingly made her decision to forego the treatment. In his final speech to the jury, the prosecutor accepted that the girl's refusal to have a blood transfusion was *a* cause of her death.

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<sup>70</sup> *R v Smith* [1959] 2 All ER 193, 199.

<sup>71</sup> *Ibid* at 198.

<sup>72</sup> [1975] 3 All ER 446.

2.65 The Crown submitted that manslaughter by reason of diminished responsibility was the only relevant verdict and that the judge should direct the jury to convict the appellant. However defence counsel argued that the judge should instruct the jury to fully acquit the appellant of murder on the basis that the deceased's refusal to have a blood transfusion had broken the chain of causation between the knife attack and her death. As an alternative he submitted that the jury should be left to decide whether the chain of causation had indeed been broken by the deceased's own decision not to accept the transfusion.

2.66 In directing the jury, the trial judge placed a good deal of emphasis on the court's decision in *R v Holland*<sup>73</sup>, a case decided 133 years earlier, where the defendant injured one of the victim's fingers in the course of a violent assault. Although a surgeon had advised the victim to have the injured finger amputated in order to prevent complications developing, the victim disregarded the advice. He died two weeks later from lockjaw. According to Maule J, the real question was whether:

“in the end the wound inflicted by the prisoner was the cause of death”<sup>74</sup>.

In *R v Holland* the judge left that question to the jury to decide.

2.67 The trial judge in *R v Blaue* told the jury that:

“This is one of those relatively rare cases, you may think, with very little option open to you but to reach the conclusion that was reached by your predecessors as members of the jury in *R v Holland*, namely “Yes” to the question of causation that the stab was still, at the time of this girl's death, the operating cause of death, or a substantial cause of death. However, that is a matter for you to determine after you have withdrawn to consider your verdicts.”<sup>75</sup>

2.68 The appellant was acquitted of murder but convicted of manslaughter by virtue of diminished responsibility. He appealed against his conviction on the basis that the victim's unreasonable refusal to have a transfusion broke the chain of causation between his initial act of stabbing and her eventual death. On appeal, counsel for the appellant referred to the case of *R v Smith*<sup>76</sup> where the victim of a stab wound would probably not

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<sup>73</sup> *R v Holland* (1841) 2 M & Rob 351; 174 ER 313.

<sup>74</sup> *R v Holland* (1841) 2 M & Rob 351, 352; 174 ER 313, 314.

<sup>75</sup> [1975] 3 All ER 446, 448.

<sup>76</sup> [1959] 2 All ER 193; [1959] 2 QB 35.

have died but for a series of mishaps. These mishaps were held to have broken the chain of causation.

2.69 Counsel for the appellant criticised the trial judge's direction, arguing that:

- *R v Holland*<sup>77</sup> should no longer be considered good law;
- *R v Smith*<sup>78</sup> envisaged the possibility of unreasonable conduct on the part of the victim as capable of breaking the chain of causation; and
- the judge effectively directed the jury to find causation proved although his language seemed to leave the matter open to them to decide.

2.70 Lawton LJ held that the trial judge in the instant case had left the jury to decide whether the Crown had proved causation as had Maule J in *R v Holland*.<sup>79</sup> According to Lawton LJ, Maule J's jury direction reflected the common law response to the problem.

“He who inflicted an injury which resulted in death could not excuse himself by pleading that his victim could have avoided death by taking greater care of himself ... The common law in Sir Matthew Hale's time probably was in line with contemporary concepts of ethics. A man who did a wrongful act was deemed *morally* responsible for the natural and probable consequences of that act. Counsel for the appellant asked us to remember that since Sir Matthew Hale's day the rigour of the law relating to homicide has been eased in favour of the accused. It has been – but this had come about through the development of the concept of intent, not by reason of a different view of causation.”

2.71 The Court of Appeal discussed *R v Jordan*<sup>80</sup> where medical evidence was allowed on appeal which established that the cause of death was not the blow upon which the Crown based its case, but abnormal medical treatment following the deceased's admission to hospital. Significantly, the deceased's injury had almost healed prior to the bad medical treatment. Lawton LJ held that *R v Jordan*<sup>81</sup> should be viewed:

“as a case decided on its own special facts and not as an authority relaxing the common law position.”

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<sup>77</sup> (1841) 2 M & Rob 351; 174 ER 313.

<sup>78</sup> [1959] 2 All ER 193; [1959] 2 QB 35.

<sup>79</sup> (1841) 2 M & Rob 351; 174 ER 313.

<sup>80</sup> (1956) 40 Cr App R 152.

<sup>81</sup> *Ibid.*

2.72 Lawton LJ held that the physical cause of death, that is, the bleeding into the pleural cavity in *R v Blaue*<sup>82</sup> had not been brought about by the deceased's decision to reject a blood transfusion, but by the stab wound inflicted by the appellant. In relation to the reasonableness of the deceased's decision, based on her ardent religious belief, not to have a blood transfusion, his Lordship questioned whose standards of reasonableness should apply.

“Those of Jehovah's Witnesses? Humanists? Roman Catholics? Protestants of Anglo-Saxon descent? The man on the Clapham omnibus? But he might well be an admirer of Eleazar who suffered death rather than eat the flesh of swine<sup>83</sup> or of Sir Thomas Moore who, unlike nearly all his contemporaries, was unwilling to accept Henry VIII as Head of the Church in England. Those brought up in the Hebraic and Christian traditions would probably be reluctant to accept that these martyrs caused their own deaths.”<sup>84</sup>

2.73 His Lordship continued that it has been the policy of the law for a long time that those who use violence on other people must take their victims as they find them, which means the whole man, not just the physical man.

“It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.”<sup>85</sup>

2.74 Thus, in dismissing the appeal the Court of Appeal held that in a murder or manslaughter trial, the issue of the cause of death is one of fact for the jury to decide. Moreover, in a case such as *R v Blaue*<sup>86</sup> where there was no conflict of evidence, and the jury simply had to apply the law to the admitted facts, the court was of the view that it was permissible for the trial judge to tell the jury what the result of that application will be – that is, in this case the trial judge would have been within his rights to charge the jury that the appellant's stab wound was an operative cause of death.

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<sup>82</sup> [1975] 3 All ER 446.

<sup>83</sup> See 2 *Maccabees* 6:18-31 Revised Standard Version.

<sup>84</sup> *R v Blaue* [1975] 3 All ER 446, 450.

<sup>85</sup> *Ibid.*

<sup>86</sup> [1975] 3 All ER 446.

## **F Manslaughter by drug injection cases**

2.75 The issue of causation and the nature of the “unlawful” aspect of an act for the purposes of constructive manslaughter has arisen in a number of cases in Britain dealing with drug injections. In these cases, the accused assisted the deceased by either supplying the drugs, preparing the syringe containing heroin, holding the belt as a tourniquet or indeed directly injecting the substance. The English courts have struggled to identify an unlawful act which would justify a conviction for unlawful and dangerous act manslaughter where a person dies due to a drug injection.

2.76 Reed has suggested that a voluntary act of self-injection should relieve the accused of liability.<sup>87</sup> In *R v Cato*<sup>88</sup> the accused injected the deceased with heroin upon request. The injection proved fatal and the accused was charged with unlawfully and maliciously administering a noxious substance under section 23 of the *Offences Against the Person Act 1861* and with unlawful and dangerous act manslaughter. The Court’s finding that the accused was guilty of manslaughter on the basis of section 23 of the 1861 Act is not problematic because the unlawful act was unambiguous. Nonetheless, Reed argues – convincingly, in the Commission’s view - that the Court of Appeal was wrong in suggesting that that the unlawful act need not be a specific criminal offence for the purposes of manslaughter.<sup>89</sup> On this basis, the Commission is firmly of the view that it would not be appropriate to institute manslaughter charges in such cases in this jurisdiction: this is because death occurs as a result of a voluntary act of self-injection. Nonetheless, for the sake of comprehensiveness, the Commission believes that a discussion of English manslaughter by drug injections cases is worthwhile.

2.77 Reed claims that the reasoning of the Court of Appeal in *R v Cato*<sup>90</sup> is seriously flawed as there is no offence under the *Misuse of Drugs Act 1971* of administering a controlled drug. He argues that the court relied on the offence of possessing a controlled substance but since, the unlawful act must be dangerous, that is, likely to cause some harm to another it is difficult to see how merely possessing the drug could suffice. The victim did not die through Cato’s possession of the drug.<sup>91</sup> It was the injection of heroin rather than the possession of it which *caused* the death.

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<sup>87</sup> Reed “Unlawful Act Manslaughter and Causation” (2002) JoCL 66.6 (504) (Lexis).

<sup>88</sup> [1976] 1 All ER 260.

<sup>89</sup> Reed “Unlawful Act Manslaughter and Causation” (2002) JoCL 66.6 (504) (Lexis).

<sup>90</sup> [1976] 1 All ER 260.

<sup>91</sup> Reed “Unlawful Act Manslaughter and Causation” (2002) JoCL 66.6 (504) (Lexis).

2.78 In *R v Kennedy*<sup>92</sup> the accused supplied a syringe filled with heroin to the deceased who paid him for so doing. The deceased injected the drugs and died. The accused was convicted of manslaughter on the basis that in preparing the syringe rather than merely supplying the drugs he was unlawfully assisting or encouraging the deceased to inject himself. In affirming the conviction, the Court of Appeal was satisfied that the trial judge was correct in telling the jury that the preparation of the drugs in the syringe by the accused amounted to a significant cause of death. In self-injecting heroin the deceased committed no crime. The victim could lawfully kill himself since there is no crime of self-manslaughter. Therefore, Reed maintains that the accused could not reasonably be found guilty of helping him to commit any crime.<sup>93</sup>

2.79 Owing to criticism of *R v Kennedy*,<sup>94</sup> a differently composed Court of Appeal in *R v Dias*<sup>95</sup> quashed the appellant's manslaughter conviction for having prepared heroin, which the deceased self injected. The trial judge instructed the jury that the self-injection of heroin was itself an unlawful act and that if the defendant had assisted and encouraged the deceased to take heroin he would be liable as a secondary party for the unlawful act which caused death. On appeal the main question was whether the trial judge had been correct to direct the jury that it was unlawful to inject oneself with heroin. The Court of Appeal held that self-injection of a controlled substance was not a crime. Under the *Misuse of Drugs Act 1971* it was not an offence to inject oneself with a prohibited substance such as heroin.

2.80 In *R v Rogers*<sup>96</sup> the accused held a tourniquet on the arm of the deceased who injected himself with heroin. The trial judge held that the application of the tourniquet was "part and parcel of the unlawful act of administering heroin" and that the accused had no defence to the charges of manslaughter and administering a noxious substance under section 23 of the *Offences Against the Person Act 1861*. On appeal it was submitted that there had been no unlawful act for the purposes of section 23 or for manslaughter. It was argued that neither the appellant's application of a tourniquet nor the deceased's self-injection was unlawful for the purposes of manslaughter. Accordingly, the appellant simply facilitated an act which was not unlawful.

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<sup>92</sup> See [1999] Crim LR 65.

<sup>93</sup> Reed "Unlawful Act Manslaughter and Causation" (2002) JoCL 66.6 (504) (Lexis).

<sup>94</sup> See [1999] Crim LR 65.

<sup>95</sup> [2001] EWCA Crim 2896.

<sup>96</sup> [2003] 1 WLR 1374.

2.81 In dismissing the appeal, the Court of Appeal held that by applying the tourniquet the appellant was playing a crucial part in the mechanics of the fatal injection and was therefore engaged as a principal in relation to the drug injection. It was therefore immaterial whether the deceased was committing an offence or not, because a person who actively engaged in the injection process committed the actus reus and could not dispute a charge under section 23 or indeed a manslaughter charge. Reed states that an alternative perspective is that the injection of heroin was a purely voluntary act, merely ‘assisted’ by the appellant.<sup>97</sup>

2.82 *R v Andrews*<sup>98</sup> placed the limits of consensual activity under the microscope. Here the appellant pleaded guilty to manslaughter. The prosecution had argued that the appellant had injected the deceased and others with insulin to give them a rush. This was done with their full consent. The deceased, who was malnourished and prone to heavy drinking, died as a result of her insulin injection.

2.83 Although the injection of insulin was consensual, it was an unlawful act contrary to sections 58(2)(b) and 67 of *The Medicines Act 1968*. Appealing his conviction on the basis that the trial judge was wrong, to rule that the deceased’s consent to the injection did not render his act lawful, the appellant contended that there was no ‘base’ unlawful act upon which to rest the manslaughter by unlawful and dangerous act charge.

2.84 In dismissing the appeal, the Court of Appeal held that the appellant had committed an unlawful and dangerous act, sufficient to sustain a manslaughter conviction. Since consent to assault provided no defence in cases where actual bodily harm resulted, the Court of Appeal held that as a matter of public policy the deceased’s consent to the administration of insulin in contravention of *The Medicines Act 1968* was invalid. Reed states that the prosecution should have had to prove that the accused in *R v Andrews* intended to cause injury to the deceased through the administration of the insulin, or at least foresaw that he might in order for consent to be rendered defunct.<sup>99</sup>

2.85 *R v Andrews*<sup>100</sup> poses problems because the base offence in question falls under section 67 of the *Medicines Act 1968*, a strict liability offence which does not call for any *mens rea* to be proven against the defendant. The Court of Appeal in *R v Andrews* did not address the issue of

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<sup>97</sup> Reed, “Involuntary Manslaughter And Assisting Drug-Abuse Injection” (2003) JoCL 67 (431) (Lexis).

<sup>98</sup> [2002] EWCA Crim 3021; [2003] Crim LR 477.

<sup>99</sup> Reed “Court of Appeal” (2003) JoCL 67 (450) (Lexis).

<sup>100</sup> [2002] EWCA Crim 3021; [2003] Crim LR 477.



whether strict liability offences can justly form the base offence for unlawful and dangerous act manslaughter. Reed states that the issue of gross negligence is relevant to *R v Andrews*.<sup>101</sup> A literal interpretation of Lord Atkin's statement in *Andrews v DPP*<sup>102</sup> is that only crimes beyond mere negligence satisfy the elements of an unlawful act manslaughter offence. The corollary of this, Reed argues, is that strict liability crimes or those based on negligence are excluded. The offence in *R v Andrews*, under the *Medicines Act 1968*, was one of strict liability, and did not require any *mens rea*. Reed maintains that prosecution for gross negligence manslaughter would have been more suitable in this case.<sup>103</sup>

2.86 In *R v Kennedy*<sup>104</sup> the appellant was convicted of manslaughter and supplying a Class A drug. He was sentenced to 5 years imprisonment for manslaughter and 3 years imprisonment for supplying heroin. The accused prepared a 'hit' of heroin for the deceased. The deceased injected himself and later died. His appeal against his conviction for manslaughter was dismissed.<sup>105</sup>

2.87 A further appeal came before the court of Appeal as a result of reference by the Criminal Cases Review Commission under section 9(1) of the *Criminal Appeal Act 1995*. The Commission argued that recent decisions of the Court of Appeal had cast doubt on the reasoning of Waller LJ in the initial appeal and that the trial judge had not instructed the jury that a free, deliberate and informed act by a third party would break the chain of causation between the supply of heroin and the death of the drug user.

2.88 In dismissing the Commission's appeal the Court held that the appellant had acted in concert with the deceased in that he facilitated the deceased in the act of self-injection by preparing the heroin and handing him the syringe. The Court concluded that no break in the chain of causation had occurred through the deceased's voluntary act of self-injection. Basing its judgment on the combined presumption of acting in concert and joint responsibility the Court held that the unlawful act which caused death was the offence under section 23 of the *Offences Against the Person Act 1861*.

2.89 The fundamental question in cases such as *R v Kennedy*<sup>106</sup> is whether a conviction for unlawful and dangerous act manslaughter is ever appropriate when there has been voluntary self-injection of heroin prepared

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<sup>101</sup> [2002] EWCA Crim 3021; [2003] Crim LR 477.

<sup>102</sup> [1937] 2 All ER 552.

<sup>103</sup> Reed "Court of Appeal" (2003) JoCL 67 (450) (Lexis).

<sup>104</sup> [2005] EWCA Crim 685; [2005] 2 Cr App R 348.

<sup>105</sup> See *R v Kennedy* [1999] Crim LR 65.

<sup>106</sup> [2005] EWCA Crim 685.

by the accused. Reed argues that the unfortunate lack of consistency in this area has transpired because English courts have been preoccupied with the moral fault attached to drug administration than with strict legal principles. He claims that there needs to be express acknowledgment as soon as possible by the House of Lords that:

“a free, deliberate and knowing act of a third party can break the chain of causation even where that conduct is not only foreseeable but foreseen.”<sup>107</sup>

## **G The Australian approach to unlawful and dangerous act manslaughter**

2.90 According to Stanley Yeo, the Australian courts have been a lot more assiduous and thorough than their English counterparts in embarking upon a comparison of the different types of fault elements for involuntary manslaughter. Arguably they have also taken more trouble than Irish judges in comparing fault levels for homicide. Yeo states that comparisons have been made in the Australian jurisdictions to guarantee that the degree of moral culpability of each type of manslaughter corresponds with the others, advancing the principle of fair labelling in the process.<sup>108</sup>

2.91 Yeo views the evolution of battery manslaughter which is not a feature of Irish or English law as a “notable blemish” in Australian involuntary manslaughter jurisprudence. Although he felt that its demise was proper, he nonetheless thinks that this form of manslaughter (which will be discussed in detail in this section) may be a means:

“of tightening up the present law of unlawful act manslaughter so as to become more commensurate with the level of moral culpability expected of so serious an offence.”<sup>109</sup>

### **(a) Unusually susceptible victims and the concept of “accident”**

2.92 In *R v Martyr*,<sup>110</sup> a decision of the Queensland Court of Criminal Appeal, Mansfield CJ stated that the term accident does not include;

“an existing physical condition or an inherent weakness or defect of a person, such as an egg-shell skull, or ... a possible inherent weakness in the brain.”<sup>111</sup>

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<sup>107</sup> Reed “Court of Appeal: Causation and Assisting Drug-abuse Injection” (2005) JoCL 69 (5) (384) (Lexis).

<sup>108</sup> Yeo *Fault in Homicide* (The Federation Press 1997) at 197.

<sup>109</sup> *Ibid.*

<sup>110</sup> [1962] Qd R 398.

According to Philp J, the fact that the deceased had a constitutional abnormality did not make his death an accident for the purposes of section 23 of the *Queensland Criminal Code 1899*. His Honour gave the example of a haemophiliac bleeding to death due to a small cut, and said the death could not be said to be an accidental outcome of the cut.<sup>112</sup>

2.93 In *R v Martyr* the death was the immediate and direct result of the willed act of violence. Philp J believed that his statement regarding accidents was not merely applicable to homicide.

“If a man, not knowing whether a vase is fragile or not, deliberately taps it and it thereupon shatters, the shattering, in my view, is not an event which occurs by accident.”<sup>113</sup>

2.94 Section 296 of the *Criminal Code 1899* (Qld) provides that a person who does any act or omission which hastens the death of another person who, at the time, is labouring under a disorder or disease arising from another cause, is deemed to have killed that person. In relation to section 296 Philp J stated that:

“the legislature intended that no defence to homicide could arise from the fact that death was partly due to the victim’s disease or disorder which word I think includes constitutional weakness.”<sup>114</sup>

2.95 In the High Court decision of *Mamote-Kulang v R*<sup>115</sup> the accused, a native of New Guinea, was convicted of manslaughter for having given his wife a hard, back-handed blow to the stomach. The blow caused her enlarged spleen to rupture and death resulted. The deceased’s spleen was abnormally large due to malaria, which apparently was not an unusual occurrence in New Guinea. At trial the judge held that the accused had hit his wife in order to punish her, that he intended to hurt her but that her spleen would probably not have ruptured as a result of such a blow had it been of a normal size. Moreover, the trial judge believed that the accused was unaware of his wife’s condition and also considered that a reasonable person who was unaware of the deceased’s diseased spleen would not have foreseen that the blow would cause death.

2.96 The appeal was heard under the provisions of the *Criminal Code of Papua and New Guinea*.<sup>116</sup> In relation to the meaning of the word

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<sup>111</sup> *R v Martyr* [1962] Qd R 398, 407.

<sup>112</sup> *Ibid* at 415.

<sup>113</sup> *Yeo Fault in Homicide* (The Federation Press 1997) at 415.

<sup>114</sup> *R v Martyr* [1962] Qd R 398, 415.

<sup>115</sup> (1964) 111 CLR 62; [1964] ALR 1046.

<sup>116</sup> This is based on the *Criminal Code Act 1899* (Qld).

“accident” under section 23 of the Code, McTiernan J stated that whilst it could not be presumed that the accused knew the victim’s spleen was diseased when he struck her, ignorance of her medical condition did not make the killing an accidental one.

“What is missing is proof of an accidental cause of death. Certainly the blow was not an accidental occurrence; nor was the disease to her spleen such an occurrence. The defence of accident must fail because the accused struck the blow intentionally and it directly and immediately caused the injury to Donate-Silu from which she died.”<sup>117</sup>

2.97 As the instant case involved the deliberate striking of a blow (with the intention of causing some hurt) which resulted directly in the death of the accused’s wife, Taylor and Owen JJ were satisfied that there was no *chain* of circumstances which could cast doubt on the accused’s liability. The 2 judges also remarked that the accused cannot assert that he faces conviction for an “event occurring by accident” if death results immediately and directly from an intentional blow, even if the victim has some physical defect (such as an enlarged spleen or an egg-shell skull), which the attacker does not know makes the victim more susceptible to death.<sup>118</sup>

2.98 Windeyer J was likewise satisfied that no accidental occurrence intervened between the blow and its tragic outcome, death.<sup>119</sup> In discussing the common law Windeyer J stated that it was no longer enough to constitute manslaughter at common law that a man killed in the course of an unlawful act. For an unexpected and unintended killing to amount to a crime at common law, it must result from an act that is not only unlawful but also dangerous, or from what the judge called *reckless* negligence. Windeyer J proceeded to remark that there was no doubt that a person is guilty of manslaughter at common law if he or she kills another by an unlawful blow, intended to hurt, although not intended to be fatal or to cause grievous bodily harm.<sup>120</sup>

2.99 It is not apparent from Windeyer J’s judgment whether he thought that causing death by the intentional infliction of some harm but not grievous harm or death amounted to manslaughter, because it came under unlawful and dangerous act manslaughter or negligent manslaughter, or simply

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<sup>117</sup> *Mamote-Kulang v R* (1964) 111 CLR 62, 64.

<sup>118</sup> *Mamote-Kulang v R* (1964) 111 CLR 62, 70. In *R v Martin* (1832) 5 Car & P 128; 172 ER 907 the court stated that “if the deceased was in a bad state of health ... that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it”.

<sup>119</sup> *Mamote-Kulang v R* (1964) 111 CLR 62, 82.

<sup>120</sup> *Ibid* at 79.

because of the application of the old common law principle that all deaths caused by any unlawful act were at a minimum manslaughter.

2.100 Despite Windeyer J's recitation of the common law in *Mamote-Kulang v R*<sup>121</sup> he believed the category of manslaughter by intentional infliction of hurt was in need of judicial modification. He noted that many academics supported the redefinition of the mental elements of manslaughter which would make an accused guilty of the crime only if the death were caused by recklessness or gross negligence. He remarked further that some of the judgments referred to in the case anticipated the redefinition of manslaughter as part of the development of the common law and revealed sympathy towards this point of view, a sympathy which he shared.<sup>122</sup>

2.101 In the Victorian case of *R v Longley*,<sup>123</sup> the appellant was acquitted of murdering his wife, but was convicted of manslaughter. The appellant claimed that he and his wife had a drunken fight about an ex-lover of hers after a family party, during which the appellant brandished a loaded shotgun. At some point the father of the deceased who lived nearby intervened and told the appellant to leave the house. A struggle for the shotgun ensued between the father of the deceased and the appellant and a shot was accidentally discharged. The appellant denied that the shotgun was in his hands when it discharged, claiming that it was the deceased's father who fired the shot.

2.102 The court held that the trial judge had misdirected the jury and accordingly quashed the conviction and ordered a new trial on a charge of manslaughter. According to Smith J, the jury should have been directed that if they rejected the applicant's account of the wounding, but did not think that he was guilty of murder, they could bring a verdict of manslaughter if they were satisfied beyond reasonable doubt that he caused the death by using the gun to commit an unlawful and dangerous assault; or caused the death by handling the pistol with criminal negligence, realising the danger he was creating and recklessly choosing to run the risk.<sup>124</sup>

2.103 Sholl J observed that there is authority for the view that, where manslaughter by unlawful and dangerous act is raised, the assault "must be of a character such that the accused must have realised that it involved an appreciable danger of death or serious injury."<sup>125</sup>

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<sup>121</sup> (1964) 111 CLR 62, [1964] ALR 1046.

<sup>122</sup> *Mamote-Kulang v R* (1964) 111 CLR 62, 83.

<sup>123</sup> 1961 VIC LEXIS 602; [1962] VR 137.

<sup>124</sup> *R v Longley* 1961 VIC LEXIS 602, paragraph 37.

<sup>125</sup> *Ibid* at paragraph 16.

**(b) Manslaughter by the intentional inflict of bodily harm**

2.104 In *R v Holzer*<sup>126</sup> a later Victorian case involving Smith J, the accused was convicted of manslaughter, having punched the deceased on the mouth, causing him to fall backwards whereupon he struck the back of his head off the pavement.<sup>127</sup> The punch also cut the membrane of the inside of the deceased's lip – there was a half inch tear. Regarding the accused's intention and subjective awareness of the risk of injury, when asked at trial what he was hoping to achieve by punching the deceased, he testified that:

“I didn't hope to cause any real serious harm but when I threw the punch at him I hit him in the mouth and it would have cut his lip or bruised his lip or something.”

He also remarked: “In my opinion, it would have just cut his lip to tell him to wake himself up”.<sup>128</sup>

2.105 At trial the prosecution had argued that *Mamote-Kulang v R*<sup>129</sup> should be followed and that the jury should be instructed that manslaughter occurs where death is caused by an unlawful act which a reasonable person would realise is dangerous in the sense that it would create a risk of bodily injury, albeit not serious injury. Defence counsel contended that the English case of *R v Church*<sup>130</sup> had stated an excessively wide test for unlawful and dangerous act manslaughter and that *Mamote-Kulang v R* understated the degree of harm which must have been intended. *R v Longley*<sup>131</sup> was cited as requiring proof of *mens rea* and the defence urged the trial judge to direct the Victorian jury that manslaughter would not be established unless a reasonable man would have realised that it was probable that the unlawful act would cause grievous bodily harm.

2.106 Smith J in the Supreme Court of Victoria stated that the case concerned the doctrine of manslaughter by *the intentional infliction of bodily harm*, and secondly, the doctrine of manslaughter by unlawful and dangerous act. However, it did not involve the doctrine of manslaughter by

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<sup>126</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>127</sup> In relation to causation, the reported judgment does not refer to any medical evidence which showed that it was the contact of the deceased's head with the road which caused death. Nonetheless, it seems highly probable that it was this contact with the road rather than Holzer's punch which was the proximate medical cause of death.

<sup>128</sup> 1968 VIC LEXIS 228, paragraph 2.

<sup>129</sup> (1964) 111 CLR 62; [1964] ALR 1046.

<sup>130</sup> [1966] 1 QB at 70; [1965] 2 All ER 72.

<sup>131</sup> 1961 VIC LEXIS 602.

criminal negligence which he stated had been authoritatively laid down in the House of Lords' decision *Andrews v DPP*.<sup>132</sup>

2.107 Under the doctrine of intentional infliction of bodily harm, Smith J held that a man is guilty of manslaughter if he committed a battery on the deceased and death resulted directly from it, and the beating or other application of force was done with the intention of inflicting on the deceased some physical injury or pain not merely of a trivial or negligible character.<sup>133</sup> Smith J identified three elements which must be proved by the prosecution to satisfy manslaughter by the intentional infliction of bodily harm, which also became known as battery manslaughter following *R v Holzer*.<sup>134</sup>

2.108 There must have been:

- a battery or blow by the accused;
- this battery or blow must have caused the death of the victim;
- in committing the battery or striking the blow the accused did not intend to cause grievous bodily harm or death, but did intend to cause some harm which was not merely negligible or trivial.<sup>135</sup>

2.109 Some support for the category of manslaughter by the intentional infliction of some harm can be gleaned from the remarks of Windeyer J in *Mamote-Kulang v R*<sup>136</sup> which Smith J cited as authority for this category of manslaughter. Windeyer J stated in *Mamote-Kulang*:

“If death is a consequence, direct not remote, of an unlawful act done with intent to do grievous bodily harm, it is murder. If it is a consequence, direct not remote, of an unlawful act done with

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<sup>132</sup> [1937] AC 576; [1937] 2 All ER 552. Smith J misstated the test for gross negligence manslaughter as established in *Andrews*. The consequences of this misinterpretation will be discussed further in Chapter 3 devoted to gross negligence manslaughter.

<sup>133</sup> 1968 VIC LEXIS 228, paragraph 5.

<sup>134</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>135</sup> See Willis “Manslaughter by the Intentional Infliction of Some Harm: A Category that should be Closed” (1985) 9 Crim LJ 109, at 110. Regarding element (a) above, Willis states: “it would appear that the blow must make contact with the victim; if D attempted to strike V and V in evading the blow fell and died, D would not be guilty under the doctrine of “intentional infliction of bodily harm”, although he could well be guilty under “unlawful and dangerous act” manslaughter. In *Holzer*, Smith J. used the term “battery” and “application of force”, both of which involve actual contact. In particular, the choice of the technical and precise word “battery” rather than the more general word “assault” lends strong support to this view.”

<sup>136</sup> (1964) 111 CLR 62.

intent to hurt but not to do grievous bodily harm, it is manslaughter.”<sup>137</sup>

By mentioning that consequences must be “direct not remote”, Windeyer J was merely demanding that the general rules of causation in homicide cases apply.

2.110 Smith J’s third element of manslaughter by the intentional infliction of some harm requires a subjective intention on the part of the accused to do harm which is more than merely negligible or trivial, but which is less than grievous bodily harm. Thus, at the upper limit, the harm intended must be less than grievous bodily harm, if not it would amount to murder. At the lower end of the spectrum, the harm intended must not be so slight that the law would regard it as trifling such as a scuff mark on the back of a man’s hand caused by a fingernail or drawing some object across it.<sup>138</sup>

2.111 Smith J set the minimum level of intended harm at a very low level. Any assault which was more serious than a slap which caused the hand to tingle or ache would be deemed “harm that is more than trivial or negligible”. Willis observes that this third factor adds little to the requirement that there be an unlawful blow or application of force to the deceased.<sup>139</sup> Under this head of manslaughter, the type of situations which could give rise to convictions include slaps, punches and back-handers which prove fatal when nobody would reasonably have expected such a result.<sup>140</sup>

2.112 Yeo states that battery manslaughter was not unlike reckless manslaughter under English law in cases such as *R v Stone and Dobinson*<sup>141</sup> as both forms of manslaughter involved a mental element concerning the causing of some harm. The difference between battery manslaughter and reckless manslaughter is that the more culpable mental state of intention was required for battery manslaughter as opposed to a mere awareness of risk for reckless manslaughter.<sup>142</sup>

2.113 Yeo comments further that the comparison between battery manslaughter and reckless manslaughter exposes the emphasis placed by courts on the fact that in the former the fault element is premised on

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<sup>137</sup> *Mamote-Kulang v R* (1964) 111 CLR 62, 79.

<sup>138</sup> 1968 VIC LEXIS 228, paragraph 11.

<sup>139</sup> Willis “Manslaughter by the Intentional Infliction of Some Harm: A Category that should be Closed” (1985) 9 Crim LJ 109, at 112.

<sup>140</sup> *Ibid* at 112. *Mamote-Kulang v R* (1964) 111 CLR 62; [1964] ALR 1046 involved a back-hander to a woman’s stomach.

<sup>141</sup> [1977] 2 All ER 341.

<sup>142</sup> Yeo *Fault in Homicide* (The Federation Press 1997) at 201-202.



intention. The recognition of Australian judges of battery manslaughter displayed a judicial readiness to convict people of manslaughter who caused death by intentional as opposed to reckless acts because:

“intentional conduct represents a much higher degree of moral culpability than recklessness, and so lends itself more to a manslaughter conviction.”<sup>143</sup>

2.114 During its life-span commentators levelled many criticisms against battery manslaughter. One such criticism was that this form of manslaughter is similar in its operation to the felony-murder rule. In both instances the fault element for a lesser offence is held to satisfy the fault element for a more serious offence.<sup>144</sup> Battery manslaughter operates so that an intention to inflict minor injury suffices to form the basis for the serious offence of manslaughter. Yeo remarks that this harsh legal position results from placing undue emphasis on the fatal consequences of a person’s conduct.<sup>145</sup> Another criticism about battery manslaughter is that it provides little deterrent effect on violent behaviour.

2.115 The conviction and punishment of a person for manslaughter in a case such as *Mamote-Kulang v R*<sup>146</sup> would fail to deter would-be batterers because the fatal consequences were unexpected. Arguably a conviction for battery would have been an adequate deterrent. Although the particular circumstances of a case can be reflected when sentencing a person convicted of battery manslaughter, Yeo argues that the stigma of a manslaughter conviction is far greater than for assault and cannot be off-set by the imposition of a light sentence.<sup>147</sup>

2.116 Prior to the abolition of battery manslaughter in *Wilson v R*,<sup>148</sup> Willis argued that the doctrine of manslaughter by the intentional infliction of some harm or battery manslaughter was undesirable in principle because it allowed and indeed seemed:

“to demand (subject to the jury’s power to acquit) conviction for manslaughter in cases where D has assaulted V intending to hurt him and where as a result of the assault V has died, although the fatal consequence was not intended or expected by D and could not have reasonably been expected by anyone ... In effect, the

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<sup>143</sup> Yeo *Fault in Homicide* (The Federation Press 1997) at 202.

<sup>144</sup> *Ibid* at 203.

<sup>145</sup> *Ibid*

<sup>146</sup> (1964) 111 CLR 62, [1964] ALR 1046.

<sup>147</sup> Yeo *Fault in Homicide* (The Federation Press 1997) at 203.

<sup>148</sup> (1992) 107 ALR 257.

mens rea of assault has become the mens rea of manslaughter. The focus is on the fatal consequences, not on D's action or intention."<sup>149</sup>

It seems the Australian judiciary came to share the view that the category of battery manslaughter otherwise known as manslaughter by the intentional infliction of some harm was undesirable in principle, since in 1991 the High Court of Australia in *Wilson v R*<sup>150</sup> officially abolished battery manslaughter. *Wilson v R* will be discussed in detail later in the chapter.

**(c) An appreciable risk of really serious injury**

2.117 In addressing manslaughter by unlawful and dangerous act in *R v Holzer*,<sup>151</sup> Smith J said that this category must involve a breach of the criminal law

“The weight of authority, as it appears to me, is against the view that the accused must be shown to have acted with realization of the extent of the risk which his unlawful act was creating. Authorities differ as to the degree of danger which must be apparent in the act. The better view, however, is I think that 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.”<sup>152</sup>

2.118 Smith J explicitly stated that the standard of dangerousness established in the English case *R v Church*<sup>153</sup> which required that the unlawful act pose a risk of some harm, albeit not serious harm was too low. By demanding that the Crown prove that the accused's conduct posed an appreciable risk of “really serious injury”, he imposed a stricter test than had been applied in *R v Church* and subsequent English decisions.

2.119 Therefore *R v Holzer* established that a man such as the accused who killed a person following a single punch to the face could be liable for the serious crime of manslaughter if he:

- did an unlawful act such as commit a battery;
- the unlawful act caused the death of the deceased;

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<sup>149</sup> Willis “Manslaughter by the Intentional Infliction of Some Harm: A Category that should be Closed” (1985) 9 Crim LJ 109, at 119.

<sup>150</sup> (1992) 107 ALR 257.

<sup>151</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>152</sup> *R v Holzer* 1968 VIC LEXIS 228, paragraph 5.

<sup>153</sup> [1966] 1 QB 59; [1965] 2 All ER 72.

- and the intended injury was not merely negligible or trivial,
- or alternatively, if the unlawful act was one which a reasonable person in the accused's position would have realised was exposing the victim to an appreciable risk of really serious injury<sup>154</sup>

2.120 In *Timbu-Kolian v The Queen*,<sup>155</sup> a native of the territory of Papua and New Guinea quarrelled with his wife and then left the house and sat outside in the pitch darkness. His wife pursued him and continued the argument. The accused picked up a stick and aimed a blow in the direction of his spouse's voice, unaware that she was carrying their five month old child in her arms. The blow landed on the baby's head and killed him. The accused was unable to see due to the darkness and had no reason to think that his wife had brought the baby with her. Although the stick used by the accused was not heavy, he clearly intended to hurt his wife

2.121 He was convicted of manslaughter and appealed to the High Court. In interpreting section 23 of the *Criminal Code* of the territory, the judges disagreed as to which limb of the section applied. Barwick CJ and McTiernan J held that the relevant act, that is, the striking of the baby on the head was not an exercise of the will of the accused, whereas Menzies, Kitto and Owen JJ considered the interception of the blow by the baby's head to be an accidental "event" so that the accused was neither responsible for that event nor for the baby's ensuing death.<sup>156</sup>

2.122 Windeyer J went so far as to say that the striking of the baby was not a willed act. It was an accident:

because it was not intended and it occurred as the result of the accused being both ignorant of a circumstance (the presence of the child) in which he wielded the stick, and without any foresight of the consequence of his doing so. These facts remove it from the area of mens rea and bring it within the description of an accidental event."<sup>157</sup>

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<sup>154</sup> There are numerous later Australian cases which support the approach taken by Smith J in *R v Holzer* 1968 VIC LEXIS 228; [1968] VR 481, for example, *R v Wills* 1983 VIC LEXIS 73; [1983] 2 VR 201, 211-3, although the court in that case was concerned primarily with the objective nature of the test to be applied.

<sup>155</sup> (1968) 119 CLR 47.

<sup>156</sup> See Brennan J's account in *R v Van Den Bemd* (1994) 119 ALR 385 of the various judgments in *Timbu-Kolian*. See Kitto, Menzies and Owen JJ's comments in *Timbu-Kolian v R* (1968) 119 CLR 47 at 56 on "events which occurred by accident".

<sup>157</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47, 69.

2.123 As was the case in *Mamote-Kulang v R*<sup>158</sup> the Court was required to decide the case based on the provisions under the *Criminal Code of Papua New Guinea* and consequently Windeyer J's lengthy discussion of the common law were *obiter*. His Honour discussed the subject of manslaughter by the intentional infliction of physical injury, stating the only thing which would stand in the way of the killing of the baby being excusable by the common law was that in striking at his wife the accused was attempting to commit an unlawful act.

“He made an attempt to do an unlawful act. But there is nothing to show that it was an act of such a character as, within the present day doctrine of the common law, would render inexcusable the unintended and unexpected killing of the child. Nor is there any finding that the killing was the result of criminal negligence; and the facts as found would not, it seems, have supported such a finding. I think, therefore, that the killing of the child was ... excused ... by the common law.”<sup>159</sup>

2.124 Windeyer J's comments in *Timbu-Kolian v The Queen*<sup>160</sup> are very difficult to square with his previous statement of the common law in *Mamote-Kulang v R*, although the learned judge did recap his *Mamote-Kulang* propositions. He said that it had always been the law that if a man struck another without his consent intending to hurt but not to kill him, if death is the result of the blow, the homicide is a criminal offence. If the intention was to cause grievous bodily harm, the crime is murder; if some lesser hurt was intended, it is manslaughter.<sup>161</sup>

2.125 Nevertheless, the decision reached by Windeyer J in *Timbu-Kolian v The Queen* seems out of step with his application of the common law to that case and to *Mamote-Kulang v R*. Under the common law doctrine of transferred malice, the defendant would appear to be guilty of manslaughter according to the law as set out by Windeyer J in *Mamote-Kulang v R* and affirmed by him in *Timbu-Kolian v The Queen*. Under this doctrine the mens rea of manslaughter is the mens rea of an assault and the accused caused the death of a child by an assault.<sup>162</sup> Windeyer J's comments

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<sup>158</sup> (1964) 111 CLR 62; [1964] ALR 1046.

<sup>159</sup> *Timbu-Kolian v The Queen* (1968) 119 CLR 47, 59-60.

<sup>160</sup> (1968) 119 CLR 47.

<sup>161</sup> *Ibid* at 68.

<sup>162</sup> Willis “Manslaughter by the Intentional Infliction of Some Harm: A Category that should be Closed” (1985) 9 Crim LJ 109, at 119. Willis remarks that it is also noteworthy that Windeyer J's comments in *Timbu-Kolian* were delivered after Smith J had ruled on the doctrine of manslaughter by “the intentional infliction of some harm” in *R v Holzer* 1968 VIC LEXIS 228; [1968] VR 481.

in *Timbu-Kolian v The Queen* undoubtedly weaken the force of his statements of the common law in *Mamote-Kulang v R*.<sup>163</sup>

2.126 In *R v Wills*<sup>164</sup> the appellant was tried for murder and was convicted of manslaughter. Following an incident with the appellant and his former wife, his former wife's de facto spouse S and her brother C drove to the house where the appellant lived with his de facto wife. The appellant and S had an argument during which the appellant tried to shut the door on S. S put his fist through the door and punched the appellant in the eye causing it to bleed. Before S and C left, C threatened to return and "get" the appellant another time. S and C went and sat in C's car which was parked across the road from the appellant's house. As soon as the pair had left his house, the appellant located a rifle, loaded it, went down the driveway and fired a single shot in the direction of the parked car. The shot hit and killed C who was sitting in the driver's seat.

2.127 The trial judge ruled that self defence was not available as a defence and therefore did not instruct the jury on the issue. However the questions of provocation<sup>165</sup> and unlawful and dangerous act manslaughter were put to the jury. In dismissing the appeal against conviction for manslaughter, the Supreme Court of Victoria reaffirmed that self defence was not available to the appellant under the circumstances. The court held that the test for the doctrine of unlawful and dangerous act manslaughter had been clearly laid down by Smith J in *R v Holzer*.<sup>166</sup> It was an objective test and always had been objective. Thus, the prosecution had to prove that the circumstances were 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.

2.128 The court held that neither the personal idiosyncrasies of the accused nor his ephemeral emotional or mental state were relevant to a finding of guilt under this category of manslaughter. Lush J stated that:

"the lawfulness of the act is determined by considerations extraneous to the subjective state of the accused man, except so far as the unlawful act may involve some concept of mens rea.

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<sup>163</sup> (1964) 111 CLR 62; [1964] ALR 1046.

<sup>164</sup> 1983 VIC LEXIS 73; [1983] 2 VR 201.

<sup>165</sup> After they had been sent out to consider its verdict, the jury returned with a question and during the discussion of that question the jury indicated that they had found against the Crown's assertions regarding intention and recklessness on the murder charge. Thus the jury reached its verdict on the basis of manslaughter by unlawful and dangerous act.

<sup>166</sup> 1968 VIC LEXIS 228; [1968] VR 481.

The unlawfulness of the act stands parallel with the criminal negligence of negligent manslaughter, and equally the risk factor relevant to manslaughter by unlawful and dangerous act stands as an objective consideration parallel with the objective danger assessment of negligent manslaughter.”<sup>167</sup>

In the instant case the judge held that the circumstances relevant to whether a reasonable person would appreciate danger included the physical features of the situation and of the action of the accused.

2.129 Lush J referred to the House of Lords decision in *DPP v Newbury and Jones*<sup>168</sup> which involved two teenage boys who had pushed a piece of paving stone off a bridge onto an oncoming train. The stone fell through the window of the driving cabin and killed one of the train crew. On appeal it had been suggested that the trial judge should have directed the jury to acquit the boys unless they were satisfied beyond a reasonable doubt that the boys had foreseen that they might injure someone by their actions. The House of Lords rejected that submission. According to Lush J in *R v Wills*, it was implicit in the English decision that:

“one simply looks at what was physically done and decides whether it was likely to produce the appropriate degree of danger.”<sup>169</sup>

2.130 In *R v Wills* it had not been disputed at trial that there had been an unlawful act. The accused did more than merely point a firearm – he pulled the trigger and discharged a bullet. The discharge was intended “to have a discouraging effect” on the people at whom the gun was pointed.<sup>170</sup>

2.131 In *Wilson v R*<sup>171</sup> the High Court of Australia abolished the category of battery manslaughter in 1992. The facts of the case were very similar to those of *R v Holzer*.<sup>172</sup> The appellant was convicted of the manslaughter of the deceased, who died from brain damage after the appellant punched him in the face and he fell to the ground.<sup>173</sup> On the way to

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<sup>167</sup> *R. v Wills* 1983 VIC LEXIS 73, paragraph 31.

<sup>168</sup> [1977] 2 All ER 365.

<sup>169</sup> *R v Wills* 1983 VIC LEXIS 73, paragraph 34.

<sup>170</sup> *Ibid* at paragraph 35.

<sup>171</sup> (1992) 107 ALR 257.

<sup>172</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>173</sup> The appellant had been charged with murder, but was acquitted of that charge and was convicted of manslaughter instead. Both offences are dealt with in the *Criminal Law Consolidation Act 1935 (SA)* but neither is defined in the act. The elements of the offences are to be found in the common law.

get some alcohol, the appellant and his girlfriend had encountered the deceased, a middle-aged man. The deceased was drunk and made it hard for the couple to pass him on the street. The appellant claimed that the deceased pushed him and that, after Cumming (the co-accused) arrived, the deceased put his arm on the back of the appellant's neck and tried to kiss him. As he tried to walk away the appellant noticed that the deceased had his fists clenched and thought the deceased was going to hit him so the appellant punched him once in the face.

2.132 After the deceased was punched he fell to the ground and his head landed on the dirt area near a hedge. The appellant then left the scene with his girlfriend. However, Cumming rolled the deceased on to his stomach, went through his pockets and then hit the deceased's head off the concrete twice. Medical evidence at the trial suggested that the cause of death was brain damage and that the injuries were consistent with one impact. The prosecution argued that the fall which resulted from the appellant's punch was the more likely cause of death. Although the trial judge instructed the jury that the cause of death could have been the fall from the appellant's punch or Cumming's smashing the deceased's head off the ground twice, the jury acquitted Cumming of both murder<sup>174</sup> and manslaughter.

2.133 The appellant took issue with the trial judge's instruction to the jury as regards the possibility of reaching a manslaughter verdict which had been issued in the following terms:

“In this case if you have not found murder proved, but had gone on to consider manslaughter it would be manslaughter by an unlawful and dangerous act. The killing of a man in the course of committing a crime is manslaughter. The crime must be an act in serious breach of the criminal law. A serious assault – you may think the punch by Wilson or the hitting of the head on the concrete by Cumming to be serious assaults – would be an unlawful act for this purpose. Whether the particular act you are considering is a dangerous act is a matter for your judgment.”<sup>175</sup>

2.134 Following a thorough account of the historical distinction between murder and manslaughter and an extensive analysis of unlawful and

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<sup>174</sup> The murder case against both the accused at trial was based on felony murder. It was alleged that they had assaulted the deceased in the course of robbing him. In answer to the felony murder charge, the appellant Wilson denied any participation in the robbery and any intention of causing serious bodily harm to the victim. He also raised the issue of self-defence. The trial judge had directed the jury that if the killing occurred as a result of a joint enterprise between Wilson and Cumming or if the one of the accused aided or abetted the other in the killing, the jury should find both men guilty of murder.

<sup>175</sup> *Wilson v R* (1992) 107 ALR 257, 259.

dangerous act manslaughter in particular, the High Court (four judges to three) found in favour of the appellant and ordered a retrial. Significantly, the majority<sup>176</sup> held that battery manslaughter, or manslaughter by the intentional infliction of some harm was not a category of involuntary manslaughter at common law.

2.135 *Wilson v R*<sup>177</sup> was an appeal to the High Court of Australia from an order of the Court of Criminal Appeal of South Australia.<sup>178</sup> Faced with the conflict of authority between English decisions and decisions from the various regions in Australia, King CJ had decided that the Court of Criminal Appeal of South Australia should adopt the *R v Holzer* test, because the law had developed towards a closer correlation between moral culpability and legal responsibility and also because the scope of constructive crime should be confined to what was “truly unavoidable.”<sup>179</sup>

2.136 King CJ held that the decision of the Supreme Court of an Australian State in *R v Wills*<sup>180</sup> supporting *R v Holzer* was more persuasive than decisions of courts in other countries which were potentially reflective of different community attitudes and standards.<sup>181</sup> The Chief Justice concluded that although the trial judge’s summing up was somewhat flawed, there had been no miscarriage of justice.

2.137 Cox J wished to see the English authorities such as *R v Larkin*<sup>182</sup> and *R v Church*<sup>183</sup> followed in preference to *R v Holzer*. Mindful of the fact that *DPP v Newbury and Jones*<sup>184</sup> was decided when appeals from Australia still lay to the Privy Council, Cox J felt that a decision of the House of Lords was “very persuasive”. Matheson J similarly favoured the English approach.<sup>185</sup>

2.138 The High Court of Australia considered whether the act of the appellant in punching the deceased was dangerous and said that that question in turn gives rise to another:

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<sup>176</sup> Mason CJ, Toohey, Gaudron and McHugh JJ.

<sup>177</sup> (1992) 107 ALR 257.

<sup>178</sup> See *R v Wilson* (1991) 53 A Crim R 281.

<sup>179</sup> *R v Wilson* (1991) 53 A Crim R 281, 286

<sup>180</sup> 1983 VIC LEXIS 73; [1983] 2 VR 201.

<sup>181</sup> *R v Wilson* (1991) 53 A Crim R 281, 287.

<sup>182</sup> [1943] 1 All ER 217.

<sup>183</sup> [1965] 2 All ER 72.

<sup>184</sup> [1976] 2 All ER 364.

<sup>185</sup> *R v Wilson* (1991) 53 A Crim R 281, 307.



“was it enough that the appellant (that is, a reasonable person in his position) appreciated the risk of some injury to the deceased from the act or did the jury have to be satisfied that he appreciated the risk of really serious injury?”<sup>186</sup>

2.139 In discussing battery manslaughter, the High Court of Australia remarked that if this additional category of manslaughter did indeed exist, then it centred around a subjective test of intention to inflict a low degree of requisite harm. Owing to the low degree of requisite harm it had been suggested that the English test for unlawful and dangerous act manslaughter and Smith J’s identification of a third category of manslaughter were quite similar, although battery manslaughter imports a subjective intention.<sup>187</sup>

2.140 The Court concluded that Smith J’s category of manslaughter by the intentional infliction of some harm resulted in people being convicted of manslaughter for acts, which were neither intended nor likely to cause death.<sup>188</sup> The Court did not think it helpful to speak in terms of reasonable foreseeability as the concept was a confusing one. According to the Court, unlawful and dangerous act manslaughter could be similarly criticized for punishing offenders for unexpected deaths but:

“the criticism loses its force if the test in *Holzer* is applied so that, before a conviction may ensue, a reasonable person would have realised that he or she was exposing another to an appreciable risk of really serious injury.”<sup>189</sup>

2.141 As regards the qualifier “really” in the last sentence of the quotation, the court felt that it was of questionable merit because the *R v Holzer*<sup>190</sup> direction, in placing emphasis on really serious injury brought manslaughter “perilously close to murder”. The Court felt that the distinction between the two forms of homicide could become blurred in the minds of the jury and therefore held that it was more desirable for judges to direct the jury in terms of appreciable risk of serious injury when dealing with unlawful and dangerous act manslaughter.

“A direction in those terms gives adequate recognition to the seriousness of manslaughter and to respect for human life, while preserving a clear distinction from murder. The approach in

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<sup>186</sup> *Wilson v R* (1992) 107 ALR 257, 266.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> 1968 VIC LEXIS 228; [1968] VR 481.

*Holzer* takes away the idea of unexpectedness to a large extent.”<sup>191</sup>

The Court observed that a *Holzer*-style direction did not remove the unexpectedness of death from the equation entirely, but it was felt that this was acceptable as the case involved manslaughter rather than murder and its relevant intent.

2.142 The dissenting judges in *Wilson v R*,<sup>192</sup> rejected the “appreciable risk of really serious injury” test in *R v Holzer*<sup>193</sup> because they felt it may have been the result of Smith J’s attempt to achieve some approximation between his formulation of manslaughter by criminal negligence and his definition of a dangerous act.<sup>194</sup> These three judges stated that an accurate statement of the law was to be found in *R v Creamer* where the English court of Criminal Appeal stated:

“A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault, or in the present case, abortion. This can no doubt be said to be illogical, since the culpability is the same, but nevertheless, it is an illogicality which runs throughout the whole of our law, both the common law and the statute law.”<sup>195</sup>

2.143 According to the dissenting judges, once the test for manslaughter by unlawful and dangerous act is accepted as being an objective one which focuses on likelihood or risk of injury so that the jury can comfortably conclude that the act in question was dangerous, the doctrine of battery manslaughter loses its function.

2.144 However, if the test were to be set at the higher level suggested by Smith J in *R v Holzer*<sup>196</sup> then there would be a gap in the law which would need to be filled by such a doctrine such as the battery manslaughter one.

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<sup>191</sup> *Wilson v R* (1992) 107 ALR 257, 270.

<sup>192</sup> Brennan, Deane and Dawson JJ.

<sup>193</sup> 1968 VIC LEXIS 228, [1968] VR 481.

<sup>194</sup> *Wilson v R* (1992) 107 ALR 257, 275. Regarding gross negligence Smith J in *R v Holzer* [1968] VR 481 stated at 482: “the accused must be shown to have acted not only in gross breach of a duty of care but recklessly, in the sense that he realised that he was creating an appreciable risk of really serious bodily injury to another or others and that nevertheless he chose to run the risk.”

<sup>195</sup> [1966] 1 QB 72, 82.

<sup>196</sup> 1968 VIC LEXIS 228; [1968] VR 481.

The dissenting judges believed that the sanctity of human life is the highest prized principle of the criminal law. If unlawful and dangerous act manslaughter were restricted to cases where the act exposed the victim to grievous bodily harm, the law would also have to hold that, where a person deliberately and without lawful justification or excuse causes injury or harm to another which is not simply trivial and that other dies as a result, the crime of manslaughter is committed. This is because:

“the law does and should regard death in those circumstances with gravity.”<sup>197</sup>

2.145 Despite the minority judge’s emphasis on the sanctity of life, the majority of the High Court of Australia asserted that no gap was created in the law by abolishing battery manslaughter and affirming the *R v Holzer*<sup>198</sup> test as to the level of danger applying to unlawful and dangerous act manslaughter. According to the majority, deaths resulting from serious assaults, which would have fallen within battery manslaughter, would be covered by manslaughter by an unlawful and dangerous act whereas deaths resulting unexpectedly from comparatively minor assaults, which also would have fallen within battery manslaughter, would henceforth be covered by the law governing assault. The majority judges felt that a conviction for manslaughter in the situation of a minor assault is inappropriate because it does not reflect the principle that there should be a close link between moral culpability and legal responsibility.<sup>199</sup>

2.146 Yeo states that the High Court in *Wilson v R*<sup>200</sup> applied a schematic approach to the law by devising a sliding scale of moral culpability closely linked to a suitable level of criminal liability. The court visualised three kinds of case where death was caused by an intentional battery. The worst case would be where the accused intended to inflict death or really serious injury in which he or she deserved a murder conviction. Next down the scale would be where the accused intended to inflict serious injury and unexpectedly caused death whereupon he or she would be liable for unlawful and dangerous act manslaughter. The lowest part of the scale would cover situations where the accused intended minor injury and unexpectedly caused death, in which case a conviction of battery would suffice.<sup>201</sup>

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<sup>197</sup> *Wilson v R* (1992) 107 ALR 257, 277.

<sup>198</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>199</sup> *Wilson v R* (1992) 107 ALR 257, 271.

<sup>200</sup> (1992) 107 ALR 257.

<sup>201</sup> Yeo *Fault in Homicide* (The Federation Press 1997) at 204.

2.147 Despite the more unsavoury aspects of battery manslaughter Yeo is of the opinion that it may have left a positive legacy for the future development of Australian involuntary manslaughter.

“The very fact of its existence may have paved the way for restricting the type of unlawful act under unlawful act manslaughter to intentional harm-doing.”<sup>202</sup>

2.148 *R v Van Den Bemd*<sup>203</sup> is an interesting case where the deceased had an unforeseen physical weakness. Here, the respondent who raised the defence of accident at trial, had been convicted of manslaughter in the Supreme Court of Queensland for killing a man by striking him once or twice on the face during a bar-room brawl. Medical evidence was adduced to the effect that the death was caused by a subarachnoid haemorrhage to which the man may have been predisposed either because of natural infirmity or due to excessive consumption of alcohol.

2.149 The Court of Appeal ordered a retrial, holding that the test of criminal liability under section 23 of the *Queensland Criminal Code 1899* which deals with “an event which occurs by accident,”<sup>204</sup> was whether death was such an unlikely consequence of a willed act of the accused that an ordinary person could not reasonably have foreseen it and not whether death was an immediate and direct consequence of the accused’s willed act. The Court of Appeal held that the jury had to be satisfied beyond reasonable doubt that the death of the deceased in the bar was such an unlikely consequence of the accused’s punches that it could not have been foreseen by an ordinary person in the position of the accused.

2.150 Holding that the words of section 23 of the *Queensland Criminal Code* were inherently susceptible of bearing the meaning placed upon them by the Queensland Court of Appeal and that the interpretation given to the section is one which favours the individual and reflects accepted notions of responsibility and culpability for criminal behaviour, the High Court of Australia refused the Crown’s application for special leave to appeal.

2.151 The dissenting judge, Brennan J, gave a detailed account of the facts of the case and referred to the directions of the trial judge where the jury was told that the fact that the victim was intoxicated and may have been

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<sup>202</sup> Yeo *Fault in Homicide* (The Federation Press 1997) at 204.

<sup>203</sup> (1994) 119 ALR 385.

<sup>204</sup> Subject to the provision of the Code, which relates to negligent acts and omissions, a person is not to be held criminally liable for an act or omission, which occurs independently of the exercise of his will or for an event, which occurs by accident. The first limb of section 23 “independently of the exercise of his will” applies to the acts themselves whereas the second limb, “event which occurs by accident”, applies to the consequences of the relevant act.

more susceptible than usual to a subarachnoid haemorrhage was no defence. The trial judge also stated that the defence of accident did not apply because the victim had not unexpectedly hit himself off something after he fell down following the punch. He directed the jury that:

“if you punch someone and that person died and there is nothing else to suggest that anything but the punch caused the injury from which the victim died, you are deemed to have killed him. The fact that it might have been only a moderate punch does not matter. If the person dies as a result of a direct application of force without any other factor intervening, the person who applied force is deemed to have killed him.”

2.152 The trial judge then told the jury about the legal principle that the accused must take her victim as she finds him, which means that if she hits someone on the head who happens to have an abnormally thin skull, this medical condition will not affect the liability of the accused, despite the fact that a person with a normal skull would not have perished from a similar blow. The jury was also told that an offender would not escape liability if he stabbed a person suffering from haemophilia and the victim bled to death in circumstances where a person whose blood could clot normally, would survive.

2.153 Brennan J referred to *R v Martyr*,<sup>205</sup> an earlier Queensland Court of Criminal Appeal decision where the court held that the term accident did not include an existing physical condition or an inherent weakness such as an egg-shell skull or any inherent weakness in the brain.<sup>206</sup> In line with the judicial approach to the concept of “accident” in *R v Martyr*, Brennan J did not subscribe to the majority judgment of the High Court of Australia in *R v Van den Bemd*.<sup>207</sup> He was of the view that the propositions advanced by the majority in *Mamote-Kulang v R*<sup>208</sup>, by Windeyer J in *Timbu-Kolian v The Queen*<sup>209</sup> and by the Court of Criminal Appeal in *R v Martyr*<sup>210</sup> were inconsistent with the decision of the Court of Appeal in this case.

2.154 He remarked:

“It has never been thought hitherto that, under the Code, a death which is caused by the deliberate (or “willed”) infliction of a fatal

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<sup>205</sup> [1962] Qd R 398.

<sup>206</sup> *Ibid* at 407.

<sup>207</sup> (1994) 119 ALR 385.

<sup>208</sup> (1964) 111 CLR 62; [1964] ALR 104.

<sup>209</sup> (1968) 119 CLR 47.

<sup>210</sup> [1962] Qd R 398, 416-417.

blow is “accidental” merely because the death was not foreseen or intended and was not reasonably foreseeable by the accused or by a lay bystander. A deceased whose death is facilitated or accelerated by some bodily infirmity not known to the accused or to such a bystander has not been thought to have died accidentally. It has been said both in the United Kingdom and Canada that offenders “must take their victims as they find them.”<sup>211</sup>

## **H Subjectivist arguments for reform: moral luck, moral distance and the correspondence principle**

2.155 Over the years there has been much debate on the matter of “moral luck”, that is whether moral importance should be placed on bad consequences one accidentally induces through an unlawful act. Opponents of moral luck arguments (which justify the imposition of criminal liability for bad consequences) invoke the correspondence principle, which would only hold people liable in cases where they intended or at a minimum foresaw the consequences. Regarding luck, it is true that the consequences of our acts do not always turn as anticipated.

2.156 Subjectivists maintain that the only thing which we truly control is *trying* – we do not exert any control over consequences which result in the physical world by other forces and circumstances.<sup>212</sup> If A and B both try to shoot a person and A misses because the intended victim moves at a crucial moment but B succeeds in killing the person he fired at, Ashworth maintains that subjectivists would view A and B as equally culpable. It is purely a matter of chance that there is a difference between them in relation to the consequences of their respective shootings. According to Ashworth, the moral guilt of A and B ought to depend on the choices they make which are within their control - not on chance outcomes which are not.<sup>213</sup>

2.157 At the heart of the individual autonomy principle is the notion that criminal liability ought not to attach unless the accused chose to do, or had control over the doing of the harm at issue. The correspondence principle re-emphasises the values of control and choice championed by the autonomy principle. Ashworth and Campbell define the impact of the correspondence principle on *mens rea* and *actus reus* thus:

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<sup>211</sup> (1994) 119 ALR 385 (Lexis).

<sup>212</sup> Ashworth “Taking the Consequences” in *Action and Value in Criminal Law* in Shute Gardner and Horder (eds) (Clarendon Press 1996) 107-124 at 109.

<sup>213</sup> *Ibid* at 110.

“[I]f the offence is defined in terms of certain consequences and certain circumstances, the mental element ought to correspond with that by referring to those consequences or circumstances.”<sup>214</sup>

2.158 Subjectivists believed that the accused should not be held liable for the consequences of conduct beyond his control unless he intended or adverted to the possibility of causing such consequences – otherwise he would not be representatively labelled in relation to those consequences.<sup>215</sup> The principle of representative or fair labelling insists on as close a match as possible between the name or “label” of a crime, such as “murder” or “manslaughter”, and the nature and gravity of the defendant’s conduct.<sup>216</sup>

2.159 Ashworth discusses a street fight where a person punches another in the face during the course of an argument and the victim happens to fall awkwardly so that he hits his head on the ground and dies later of a brain haemorrhage. He states that the attacker would most likely be held liable for unlawful and dangerous act manslaughter as in the Victorian case of *R v Holzer*.<sup>217</sup>

2.160 Subjectivists argue that it is unfair to impose such a condemnatory label as *manslaughter* on an attacker who only intended a minor battery. Where death was unforeseen and unforeseeable, Ashworth and his fellow subjectivists are in favour of sentencing the accused only on the basis of what he intended, for example for assault, and not on the basis of the unfortunate death which occurred. They think it is wrong to blame the attacker morally or legally for causing the death due to the lack of culpability in relation to such a serious outcome.<sup>218</sup>

2.161 The Law Commission for England and Wales, which over the years has demonstrated staunch support for subjectivism, stated in its *Consultation Paper on Criminal Law: Involuntary Manslaughter*<sup>219</sup> that constructive manslaughter is unjustifiable in principle because there is no correspondence between the defendant’s culpability and the death which ensues as a matter of chance.<sup>220</sup> The Commission considered that unlawful

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<sup>214</sup> Ashworth and Campbell “Recklessness in Assault – And in General?” (1991) 107 LQR 187, at 192.

<sup>215</sup> See Horder “A Critique of the Correspondence Principle in Criminal Law” [1995] Crim LR 759, at 761.

<sup>216</sup> *Ibid.*

<sup>217</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>218</sup> Ashworth “Taking the Consequences” in *Action and Value in Criminal Law* in Shute Gardner and Horder (eds) (Clarendon Press 1996) 107-124 at 117-118.

<sup>219</sup> (1994) Consultation Paper No 135.

<sup>220</sup> Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) Consultation Paper No 135 at paragraph 2.53 at 33.

and dangerous act manslaughter should be abolished completely and not simply modified or replaced. The Commission did, however, recognise that there was a strong feeling in certain sections of the general public that, where a fatality is the unforeseen result of a wrongful act, the law ought to mark the fact that death has occurred.<sup>221</sup>

2.162 Although the Commission thought that the criminal law should not be influenced by such feelings, it suggested that, if the majority of consultees supported the “emotional argument”,<sup>222</sup> a new, separate and lesser offence of “causing death” could be enacted to deal with cases where an accused caused death while intending to inflict harm upon another. The Commission thought that a maximum penalty of three years imprisonment might be appropriate for this offence.<sup>223</sup>

2.163 In its 2006 report on *Murder, Manslaughter and Infanticide* the Law Commission for England and Wales briefly revisited the fault elements for manslaughter and were opposed to requiring that an awareness of risk of serious injury be proved in the absence of an intention to injure because such a change would simply make the law more complicated.<sup>224</sup> The Commission stated:

“Such a definition would encourage forensic disputes about whether an assault (say, a punch) causing death was actually intended to cause injury or was only a criminal act that D thought might cause some injury (but not serious injury). If the former, D would be guilty of manslaughter, but if the latter, D would only be guilty of an assault.”<sup>225</sup>

2.164 Supporting the wider formulation endorsed by the Home Office in 2000,<sup>226</sup> the Law Commission for England and Wales did not believe liability for manslaughter should turn on such fine distinctions and argued that a person’s lack of awareness that serious harm or death might occur could simply be taken into account when imposing sentence. It therefore

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<sup>221</sup> Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) Consultation Paper No 135 paragraph 5.8 at 110.

<sup>222</sup> *Ibid* paragraph 5.13 at 111.

<sup>223</sup> Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) Consultation Paper No 135 at paragraph 5.15 at 112.

<sup>224</sup> (2006) Report No 304 paragraph 3.47 at 62.

<sup>225</sup> *Ibid* paragraph 3.48 at 62.

<sup>226</sup> Home Office *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals* (2000).



proposed that within the three-tier homicide structure<sup>227</sup> manslaughter should encompass:

- (1) killing another person through gross negligence (“gross negligence manslaughter”); or
- (2) killing another person:
  - (a) through the commission of a criminal act intended by the defendant to cause injury, or
  - (b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury (“criminal act manslaughter”).<sup>228</sup>

2.165 In the example of the street fight discussed by Ashworth “manslaughter” is arguably not the appropriate label to apply because there is too great a moral distance between the perpetrator’s fault and the tragic outcome. What occurred was an accident, a grave misfortune. However, the purpose of the law as a censuring institution is to censure people for wrongs, and not for misfortunes or bad luck.

2.166 It seems that members of the public are sensitive to variations in culpability for homicide and are reluctant to see the criminal law punish people for accidents, even those caused by low levels of violence. As discussed in part B the accused in *The People (DPP) v Byrne*<sup>229</sup> was tried for the manslaughter of his sister’s boyfriend having punched him once on the face at a family wedding. The jury unanimously found Byrne not guilty of manslaughter.

2.167 As part of a survey of public opinion in England and Wales, Mitchell asked respondents to rank eight homicide scenarios in order of severity using a scale of 1 to 20 (where 20 stood for the worst possible scenario).<sup>230</sup> One of the scenarios which respondents were required to rate

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<sup>227</sup> See Law Commission for England and Wales *Murder, Manslaughter and Infanticide* (2006) Law Com No 304. The major proposed changes to homicide are as follows. (a) It would be first degree murder when the defendant intends to kill or to cause serious injury with awareness of risk. (b) It would be second degree murder when the defendant intends serious injury or when the defendant intends to cause injury or fear or risk of injury with an awareness that the act might cause death. (c) The existing partial defences would simply reduce first degree murder to second degree murder. (d) Duress would be available as a complete defence under the new scheme.

<sup>228</sup> Law Commission for England and Wales *Murder, Manslaughter and Infanticide* (2006) Law Com No 304 paragraph 2.163 at 51.

<sup>229</sup> See Irish Times 6 July 2004.

<sup>230</sup> Mitchell “Public Perceptions of Homicide and Criminal Justice” [1998] 38 Brit J Criminol 453.

involved a “thin skull scenario” where a man gently pushed a woman during the course of an argument in the supermarket queue, with the result that she unexpectedly tripped and bumped her head against a wall. Because the woman had an unusually thin skull she died from her injuries. This scenario was rated sixth<sup>231</sup> in order of gravity and was given a mean average rating of 5.9.

2.168 In explaining why they regarded the homicide to be of relatively low severity,<sup>232</sup> respondents stated that the death was accidental, that there was no fault on the part of the killer, no intent to kill and the killer could not have foreseen the consequence of his actions. Mitchell claims that although public opinion research in this area is still in its relatively early stages, people clearly want to see some sort of link between the harm for which a defendant is held criminally responsible and what the law describes as his or her *mens rea*.<sup>233</sup>

2.169 In 1998, Mitchell carried out interviews with 33 respondents from the original quantitative study whose replies were representative of the sample as a whole.<sup>234</sup> One of the aims of the qualitative survey was to establish what are seen to be the minimum requirements for criminal liability for causing the death of another and for the worst kinds of homicide.<sup>235</sup> Interviewees unanimously reiterated the opinions expressed in the original survey that there should be no prosecution for homicide in the “thin skull scenario” because the death was accidental and unforeseeable.

2.170 Interviewees were then invited to state what level of violence and culpability would be necessary to render the man guilty of manslaughter, a

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<sup>231</sup> Mitchell “Public Perceptions of Homicide and Criminal Justice” [1998] 38 Brit J Criminol 453. The other seven scenarios consisted of a killing in the course of a burglary, a mercy killing, making no attempt to save a drowning woman, a duress killing, a necessity (duress of circumstances) killing, a battered spouse killing, and killing in self-defence. Respondents gave the burglary killing a rating of 15 out of 20, which made it the most serious scenario out of the 8 homicide scenarios in Mitchell’s survey. Only 14 out of the 822 chose the burglary killing as representing their idea of the worst homicide however, which suggests that for many people there are other, worse forms of homicide. Mercy killings, on the other hand were rated 4 out of 20, as the least serious homicide scenario of the eight examples.

<sup>232</sup> *Ibid* at 467. Respondents viewed premeditated killings, or those involving children or other particularly defenceless/vulnerable victims, such as elderly or handicapped people as the most serious homicides.

<sup>233</sup> Mitchell “In Defence of a Principle of Correspondence” [1999] Crim LR 195, at 201.

<sup>234</sup> Mitchell “Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide” [2000] Crim LR 814.

<sup>235</sup> *Ibid* at 816. One of the aims of follow-up survey was to examine public attitudes to drunk-drivers who kill and whether people thinks such killers should be treated differently from other killers.

task which they found very difficult. The investigation was therefore approached in stages, starting with the original scenario where the woman was pushed gently, progressing gradually to more violent scenarios. Mitchell states that no interviewee thought that a conviction for manslaughter should arise where the accused pushed the woman with enough force to cause actual bodily harm such as bruises or cuts – even when the accused intended to cause some, but not serious harm. In such a case, interviewees favoured liability for an appropriate assault, but not for homicide.<sup>236</sup> Seven interviewees described situations in which the man’s actions were objectively more likely to cause death although he had actually intended something less serious, for example where he swung at her “with something heavy” or “cracked her across the head”.<sup>237</sup>

2.171 Mitchell recognises that it would be foolish to draw any conclusions from these seven replies but states:

“a potential implication is that if intending serious harm whilst perpetrating an objectively potentially fatal assault is the minimum requirement for manslaughter, ordinary people would want a greater level of *culpability for killing* to justify murder.”<sup>238</sup>

## **I Objectivist arguments against reform: actions, consequences and tough luck**

“[I]t is outcomes that in the long run make us what we are.”<sup>239</sup>

2.172 For objectivists, acts cannot be separated from their consequences. Everything we do has the possibility to generate unforeseen consequences, but just because we did not anticipate a particular outcome does not mean that we are not responsible for it, provided the action which caused it was a voluntary one.

2.173 Honoré states that:

“[o]utcome-allocation is crucial to our identity as persons ... If actions and outcomes were not ascribed to us on the basis of our

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<sup>236</sup> Mitchell “Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide” [2000] Crim LR 814, at 819-20.

<sup>237</sup> *Ibid* at fn 39 at 820.

<sup>238</sup> *Ibid*.

<sup>239</sup> Honoré “Responsibility and Luck” (1988) 104 LQR 530, at 545. This article deals with arguments in favour of strict liability to compensate for many torts – it does not address criminal liability.

bodily movements and their mutual accompaniments, we could have no continuing history or character.”<sup>240</sup>

2.174 Thus, those who focus on consequences argue that where a person falls, hits their head off the ground and dies as a result of punch from another person, it is appropriate that the perpetrator may be found guilty of manslaughter regardless of the lack of intention or foresight regarding death or serious injury, so as to mark the fact that a life was ended by that unlawful act.

2.175 In identifying the communicative or condemnatory aspect of the criminal law as one of the chief functions of punishment, Duff argues that a system which failed to differentiate between completed offences and those which were merely attempted would give the impression that the causing of harm was insignificant. Because this would be a deplorable message to transmit from a moral standpoint, it follows that the presence or absence of harmful consequences should be taken into account.<sup>241</sup>

2.176 The correspondence principle associated with subjectivists seeks to restrict criminal liability to harms or wrongs that are intended, or deliberately risked but according to Horder, that principle is very much an ideal rather than an accurate descriptive generalisation about crimes.<sup>242</sup> While subjectivists insist that moral guilt should depend on the choices made by an actor which are within their control and not on chance outcomes which are outside their control, objectivists believe that consequences need to be taken into account when considering moral responsibility. Consequences of conduct are treated as part of the act itself and any attempt to separate an act from its consequences is viewed with suspicion.

2.177 Adherents of the correspondence principle do not view it as fair to label a person as a murderer or manslaughterer unless one intended or foresaw the unlawful killing.<sup>243</sup> Nonetheless, Ashworth claims that the law relating to both murder and manslaughter does not meet, and never has met, this requirement. After all, people can be convicted of murder if they intended to cause grievous bodily harm. However, as Ashworth observes this species of fault breaches the principle of correspondence since the fault element does not correspond with the causing of death, and so a person faces

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<sup>240</sup> Honoré “Responsibility and Luck” (1988) 104 LQR 530, at 545. This article deals with arguments in favour of strict liability to compensate for many torts – it does not address criminal liability at 543.

<sup>241</sup> Duff *Intention, Agency and Criminal Liability* (Oxford, 1990) at 191-192.

<sup>242</sup> Horder “A Critique of the Correspondence Principle in Criminal Law” [1995] Crim LR 759, at 759.

<sup>243</sup> *Ibid* at 761.

conviction for a higher crime than intended.<sup>244</sup> Similarly, in order to ground a conviction for manslaughter all that need be proven against the accused is that he intended to inflict an injury or foresaw that some harm might be sustained as a result of his unlawful and dangerous act.

2.178 Due to the strength of the response from consultees who supported the retention of some form of constructive manslaughter, the traditionally subjectivist Law Commission for England and Wales was forced to address philosophical “moral luck” arguments in its Report<sup>245</sup> and although reluctant, proposed a modified form of unlawful act manslaughter in its final recommendations on the creation of a new offence of killing by gross carelessness. The proposed offence provided that as long as the conduct causing the injury constituted an offence, a conviction for killing by gross carelessness may apply where a defendant intentionally caused some injury or was aware of the risk of such injury and unreasonably took the risk.<sup>246</sup>

2.179 In December 2005 the Law Commission launched a consultation paper on *A New Homicide Act for England and Wales?*<sup>247</sup> Echoing its proposals on manslaughter in its 1996 Report, the Law Commission provisionally proposed that conduct causing another’s death should be manslaughter if:

“a risk that the conduct would cause death would have been obvious to a reasonable person in the defendant’s position, the defendant had the capacity to appreciate the risk and the defendant’s conduct fell far below what could reasonably be expected in the circumstances.”<sup>248</sup>

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<sup>244</sup> Ashworth *Principles of Criminal Law* (2<sup>nd</sup> ed Clarendon Press 1995) 85

<sup>245</sup> See Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraphs 4.29 – 4.42 at 36-40.

<sup>246</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.34 at 53.

<sup>247</sup> See Law Commission for England and Wales *New Homicide Act for England and Wales?* (2005) Consultation Paper No 177 where they provisionally recommended structuring unlawful homicide into four levels including (1) first degree murder for intentional killings (with a mandatory life sentence); (2) second degree murder covering killing with an intention to inflict serious harm, reckless killings and killings committed under provocation or diminished responsibility (with a discretionary life sentence); (3) manslaughter covering gross negligence manslaughter and killing through some unlawful act, intending to injure or realising that someone may be injured (with a fixed maximum sentence – the Commission did not decide on an appropriate maximum sentence) and (4) other homicide offences such as complicity in suicide and infanticide.

<sup>248</sup> Law Commission for England and Wales *New Homicide Act for England and Wales?* (2005) Consultation Paper No 177 paragraph 10.12 at 251.

In relation to constructive manslaughter the Commission suggested that it should be manslaughter to cause another person's death by a criminal act intended to cause physical harm or by a criminal act foreseen as involving a risk of physical harm.<sup>249</sup>

2.180 As discussed in Chapter 1, the medieval theory of intention rested on the belief that an accused who wrongfully directed his or her conduct at another person crossed a threshold of liability in relation to the consequences of that conduct. Malicious actions were deemed felonious irrespective of whether the accused foresaw the consequences, however grossly negligent conduct was not felonious since it did not involve wrongful directedness.<sup>250</sup>

2.181 In 1827 the benefit of clergy for manslaughter was abolished and the malice principle *simpliciter* came to satisfy the *mens rea* of unlawful act manslaughter. Thus, an accused would be liable to a conviction for manslaughter where death occurred accidentally as a result of an act calculated to cause harm. In *R v Connor*<sup>251</sup> discussed in Chapter 1, a woman threw a poker at one son and killed another child as he entered the room. Park J. stated:

“[if] a blow is aimed at an individual unlawfully – and this was undoubtedly unlawful as an improper mode of correction - and strikes another and kills him, it is manslaughter ... She did not intend to kill this particular child nor to do bodily harm – ultimate bodily harm – to the other, but she intended to correct him, and in a way that was unlawful.”<sup>252</sup>

2.182 It is arguable that an intention to harm another makes it justifiable to this day to hold a person criminally responsible for any adverse consequences which emanate from the intended wrong, regardless of whether the risk of the fatal consequences was reasonably foreseeable.<sup>253</sup>

2.183 Horder asks us to imagine the situation where he unlawfully cleans his shotgun in the garden and it accidentally goes off, giving his neighbour such an awful shock that he dies of a heart-attack. Because the harm to the neighbour was not obvious, the unlawful act would probably be insufficient to amount to manslaughter. The same conclusion might be

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<sup>249</sup> Law Commission for England and Wales *New Homicide Act for England and Wales?* (2005) Consultation Paper No 177 paragraph 10.13 at 251.

<sup>250</sup> Horder “Two Histories and Four Hidden Principles of Mens Rea” 113 (1997) LQR 95, at 101-2.

<sup>251</sup> (1835) 7 Car & P 438; 173 ER 194.

<sup>252</sup> *Ibid* at 439; 195.

<sup>253</sup> Horder “A Critique of the Correspondence Principle in Criminal Law” [1995] Crim LR 759, at 763-764.

reached where the neighbour died of shock following the author's intentional discharge of the gun in his vicinity. In the second case, the fact that he *deliberately* wrongs his neighbour arguably changes his normative position in relation to the risk of adverse consequences of that wrongdoing to the neighbour whether or not the outcome is foreseen or reasonably foreseeable

2.184 The unlawful act in the first instance is not *directed* at his neighbour and its relevance is purely evidential. In the second case however the unlawful act is "meant to wrong" the neighbour which makes its relevance not just evidential but also normative.

"Its deliberateness changes my relationship with the risk of adverse consequences stemming therefrom, for which I may now be blamed and held criminally responsible, irrespective of their reasonable foreseeability."<sup>254</sup>

2.185 Moral luck proponents maintain that a person who decides to embark on a certain course of unlawful conduct ought to be held responsible for whatever consequences ensue – for example, if a person decides to assault someone outside the pub by kicking him once in the head and that person dies as a result of the kick, the attacker having in a sense *made his own bad luck*, should be held accountable for the outcome even though the death was unforeseen.

2.186 Using his shotgun hypothetical Horder explains the moral luck argument. If the author directs his efforts towards harming his unsuspecting neighbour by deliberately firing the gun close to the neighbour, he made his own bad luck or rather, made the neighbour's bad luck his own when the neighbour dies from the shock. This is not so where the neighbour is killed when the gun goes off while being cleaned. This would simply be a case of pure bad luck. Horder argues that the more foreseeable the outcome:

"the more tainted the purity of [the defendant's] "pure" bad luck in producing it; hence the possibility of a manslaughter conviction, even in cases of "pure" bad luck, where the purity of [the defendant's] "pure" bad luck is entirely corrupted by the grossness of his negligence."<sup>255</sup>

## **J Summary**

2.187 This chapter commenced with an analysis of leading Irish case law on unlawful and dangerous act manslaughter and an examination of the relationship between culpability and sentencing. The Commission went on

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<sup>254</sup> Horder "A Critique of the Correspondence Principle in Criminal Law" [1995] Crim LR 759, at 764.

<sup>255</sup> *Ibid* at 764-765.

to discuss how judges attempted to limit the scope of constructive manslaughter from the 19<sup>th</sup> century onwards (a) by establishing stricter rules on causation and the “unlawful” nature of the act and (b) by requiring that the conduct which caused death be objectively dangerous as well as criminal.

2.188 The Commission discussed important cases on causation and “taking victims as you find them.” In *R v Smith*<sup>256</sup> it was held that the cause of death was the bayonet wound inflicted by the accused soldier, notwithstanding the improper medical treatment given to the deceased. In *R v Blaue*<sup>257</sup> the court stated that the victim died as a result of the stab wound inflicted by the appellant despite the fact that she refused a potentially life-saving blood transfusion on religious grounds. The Commission also reviewed recent English manslaughter by drug injection cases where courts have found the identification of the basic unlawful act problematic.

2.189 The Australian approach to unlawful and dangerous act manslaughter was explored. Cases dealing with unusually susceptible victims and the concept of “accident” were discussed, as was the category of manslaughter by the intentional infliction of bodily harm which was abolished in *Wilson v R*.<sup>258</sup> Under the current Australian test for unlawful and dangerous act manslaughter the criminal conduct which caused the death must have posed “an appreciable risk of really serious injury”.

2.190 The Commission addressed subjectivist arguments calling for reform of the law in this area. Such arguments centred on the correspondence principle and the notions of moral luck and moral distance. Finally, the Commission looked at objectivist arguments opposed to reform which hinged on the idea of taking the consequences of intentional wrongful acts.

2.191 In Chapter 5, the Commission sets out various options for reform of the law of manslaughter by an unlawful and dangerous act, including the possibility of codifying the law without reform. A number of moderate reform options, as well as radical proposals, are also put forward.

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<sup>256</sup> [1959] 2 All ER 193; [1959] 2 QB 35.

<sup>257</sup> [1975] 3 All ER 446.

<sup>258</sup> (1992) 107 ALR 257.



## CHAPTER 3 GROSS NEGLIGENCE MANSLAUGHTER

### A Introduction

3.01 This chapter addresses the second form of involuntary manslaughter, gross negligence manslaughter. In part B the Commission outlines the current law of gross negligence manslaughter in Ireland and addresses early 20<sup>th</sup> century developments leading up to *The People (AG) v Dunleavy*<sup>1</sup> in part C.

3.02 In part D the Commission examines the concept of “failure to perform a legal duty”. In part E it looks at duties arising due to blood relationships and in part F it investigates duties arising outside the family setting. Contractual duties and those imposed by statute are addressed in part G. Part H discusses the notion of voluntary assumption of duty, while part I focuses on public policy issues and the existence of a duty of care in the context of joint criminal ventures.

3.03 Part J examines duties owed by those possessing special skill and knowledge such as doctors. Part K looks at the Australian approach to gross negligence manslaughter. In part L the Commission discusses the difference between negligence and inadvertence and in part M analyses the relevance of the capacity of the accused in relation to a finding of fault.

3.04 In *The People (DPP) v Cullagh Murphy* J stated that manslaughter by gross negligence is:

“a rare form of prosecution and a difficult matter for both the judge and the jury.”<sup>2</sup>

As there is very little Irish case law on the area considerable reference will be made to developments in England, particularly in relation to manslaughter cases arising from medical negligence and breach of duties owed to dependant people in the household of the accused. The Commission will also embark on a detailed analysis of legal innovations in relation to manslaughter by criminal negligence in Australia.

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<sup>1</sup> [1948] IR 95.

<sup>2</sup> See Irish Times Report 31 May 2000.

## **B Gross negligence manslaughter in Ireland**

3.05 Manslaughter is the only serious crime capable of being committed by inadvertence. Gross negligence manslaughter imposes the shame of criminality and punishment upon a person who neither intended to kill, nor indeed was subjectively reckless as to causing injury.<sup>3</sup> However, courts do not hold people criminally liable for every little careless slip-up they make which tragically leads to death, rather liability for carelessness is imposed in those extreme situations where the accused can justly be said to have been morally culpable in some way. Those who engage in dangerous activities such as performing surgical operations, operating heavy machinery or driving vehicles on public highways (motor manslaughter and related driving offences will be discussed in Chapter 4) must take care. People whose duties entail caring for dependant children or elderly relatives are under a moral duty to take reasonable steps to attend to the health of those dependants.

3.06 According to Charleton, the State punishes people for negligence because negligence, contrary to the opinion of subjectivists, is *a state of mind*.

“It involves a failure to take proper precautions for a task or failing to prevent a result through not exercising proper care. That may include neglecting to pay heed while doing something, or failing to prepare adequately for an undertaking, or failing to act in all the circumstances where a duty to act is clearly imposed. In any of these cases blame attaches to the accused because he either has not applied his mind to the task or has not taken such ordinary care as any responsible person would have felt compelled to take in the circumstances. The accused is held accountable because by the application of concentration the death of the victim could have been avoided.”<sup>4</sup>

3.07 In *The People (AG) v Dunleavy*<sup>5</sup> the Court of Criminal Appeal formulated a clear test which has not given rise to interpretational problems in the handful of gross negligence manslaughter cases that have been prosecuted since. In this case the accused, a taxi driver had been driving on the wrong side of the road and killed a cyclist when he hit him with his unlit car. The jury were instructed by the trial judge who followed the English *R*

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<sup>3</sup> See Charleton *Offences Against the Person* (Round Hall 1992) at 85.

<sup>4</sup> *Ibid* at 86.

<sup>5</sup> [1948] IR 95.

*v Bateman* test,<sup>6</sup> which will be discussed later in the chapter, that they should find the accused guilty of gross negligence manslaughter if:

“the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the lives and safety of others as to amount to a crime against the State and conduct deserving punishment...”<sup>7</sup>

3.08 However, the Court of Criminal Appeal held the direction to be inadequate because it did not specify the level of negligence which had to be proved against the accused. According to Davitt J, the trial judge in *The People (AG) v Dunleavy* should have instructed the jury:

“(a) That negligence in this connection means failure to observe such a course of conduct as experience shews to be necessary if, in the circumstances, the risk of injury to others is to be avoided, i.e., failure to behave as a reasonable driver would.

(b) That the jury must be satisfied that negligence upon the part of the accused was responsible for the death in question.

(c) That there are different degrees of negligence, fraught with different legal consequences; that ordinary carelessness, while sufficient to justify a verdict for a plaintiff in an action for damages for personal injuries, or a conviction on prosecution for careless or inconsiderate driving, falls far short of what is required in a case of manslaughter; and that a higher degree of negligence which would justify a conviction on prosecution for dangerous driving is not necessarily sufficient.

(d) That manslaughter is a felony and a very serious crime, and that before convicting of manslaughter the jury must be satisfied that the fatal negligence was of a very high degree, and was such as to involve, in a high degree, the risk or likelihood of substantial personal injury to others.”<sup>8</sup>

3.09 Although *The People (AG) v Dunleavy*<sup>9</sup> was a case of motor manslaughter, the test formulated therein applies to all instances of manslaughter by gross negligence in Ireland. Gross negligence is determined by the degree of departure from the expected standard. The test set out by the Court of Criminal Appeal is objective, that is, the accused

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<sup>6</sup> (1925) 19 Cr App R 8.

<sup>7</sup> *R v Bateman* 19 Cr App R 8, 11-12.

<sup>8</sup> [1948] IR 95, 102.

<sup>9</sup> [1948] IR 95.

need not have been aware that he or she had taken an unjustifiable risk. Charleton states:

“As a matter of practical reality few persons will be convicted in circumstances where they do not know, or suspect, they are taking a serious risk. The prosecution are relieved of the burden of proving awareness. Nor need the prosecution prove that the accused was aware that his negligence created any degree of risk of substantial personal injury to others, though the test is formulated at the outer extreme of carelessness where few, if any, will be unaware of the risk they are creating.”<sup>10</sup>

3.10 Thus, in Ireland the investigation starts with the determination of whether the accused failed to behave as a reasonable driver (or doctor or construction foreman etc) in the same circumstances would. Here the concept of the standard of care is extremely relevant. Yeo observes that this concept is difficult in that it requires that the *degree* of departure from the standard of care for manslaughter be identified.<sup>11</sup> It leaves the jury with a good deal of discretion in deciding whether the accused was highly negligent and also whether his or her negligence posed a high risk of substantial personal injury to others. Determining whether the negligence of the accused is “gross” necessarily involves a value judgment on the part of the jury.

3.11 In *The People (DPP) v Cullagh*<sup>12</sup> the defendant was convicted of manslaughter where the victim died after her chair became detached from a “chairplane” ride at a funfair. The chairplane was 20 years old at the time of the accident and had lain in an open field for three years before the defendant bought it. While the defendant was unaware of the rust in the inside of the machine which caused the accident, he was aware of the decrepit state of the ride as a whole. The trial judge directed the jury that the defendant had owed a duty of care both to the deceased and to members of the general public using the chairplane. If the jury found that he had failed in his duty of care to the deceased, it was open to them to hold the defendant criminally liable for her death. The Court of Criminal Appeal refused the defendant’s application for leave to appeal and affirmed the conviction for manslaughter by gross negligence.

3.12 In *The People (DPP) v Rosebury Construction Ltd and Others*,<sup>13</sup> a construction company, was fined almost £250,000 for offences under the

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<sup>10</sup> Charleton *Offences Against the State* (Round Hall 1992) at 90.

<sup>11</sup> Yeo *Fault in Homicide* (The Federation Press 1997) at 207.

<sup>12</sup> Irish Times Report 31 May 2000.

<sup>13</sup> Irish Times Report 22 November 2001.

*Safety Health and Welfare at Work Act 1989*, which caused the deaths of two men on a building site in 1998. One of the defendants, an employee of a sub-contractor, was given an 18 month suspended sentence for endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997* and was fined £7,000. Although all defendants initially faced manslaughter charges, these charges were later dropped and the defendants pleaded guilty to the lesser charges mentioned.

3.13 Judge Groarke stated at trial that the defendants had shown “utter disregard” for the concept of health and safety on site. The two deceased were killed when the trench in which they were working collapsed. Judge Groarke noted that there was an obligation under the relevant Regulations made under the 1989 Act on the construction company to provide supports for any trench which was more than 1.25 metres deep. The defendants failed to comply with this requirement. The trench in question was between 3.1 and 3.3 metres deep and there was evidence that there was equipment on site in the form of a trench box which could have provided support for a trench. Judge Groarke considered this to be an aggravating circumstance.

3.14 He also noted that construction workers had told the sub-contractor “once if not twice” that supports should be installed but nothing was done. Judge Groarke said that these unheeded warnings suggested to him “a recklessness of an extreme nature”. If the sub-contractor had paused for a moment he would have recognised the “gross recklessness” of what he was doing. The judge did not know whether his failure to follow safety regulations was “because he was too careless, heedless or too mean”. In imposing the various sentences, Judge Groarke said that “there was casualness of an extreme nature” and he could not ignore the fact that two men had died as a result. The fines imposed by the trial judge were upheld in the Court of Criminal Appeal.

3.15 In the recent case of *The People (DPP) v Barden*<sup>14</sup> the skipper of the Pisces fishing boat was charged with five counts of manslaughter, one count of endangerment contrary to section 13 of the *Non-Fatal Offences Against the Person Act 1997* and one count of being the master and owner of a dangerously unsafe ship contrary to section 4 of the *Merchant Shipping Act 1981*. He was found not guilty of manslaughter on all five counts and not guilty of reckless endangerment but was convicted of running an unsafe vessel. Five people drowned in 2002 when the defendant’s unseaworthy boat took in excessive amounts of water and capsized.

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<sup>14</sup> Irish Times Report 24 November 2005. The Commission is extremely grateful for the assistance and insights provided by Judge Patrick McCartan, Judge of the Circuit Court, the presiding judge in this cases.

3.16 Although there were ten people on board, there were only two life-belts and one life-jacket. The defendant had not registered the boat with the Department of the Marine, nor had he obtained a fishing licence for the vessel. Prior to the disaster he had taken two parties of anglers fishing in the same boat. On the second trip a pipe came off the cooling system and pumped water into the boat, but this problem was fixed before the third and final trip. At trial counsel for the prosecution produced evidence that the Pisces had been modified and that the new plywood deck was not watertight and so was unsuitable for its use. The defendant was aware that the Pisces was a boat that took in water.<sup>15</sup> He had to pump out water every ten minutes.

3.17 There were serious problems with the hull of the boat. Some planks were soft and rotten and the caulking (a substance used to seal gaps between planks) was absent in some places. The defendant took “crude steps to lessen the problem”, inserting silicone into the holes and gaps in an attempt to block them up. An engineer with the Marine Casualty Investigation Board gave evidence at trial saying that the boat was overloaded, unstable and insufficiently equipped with life-preserving equipment. He also said that modifications had been made to the boat before the defendant purchased it, including the construction of a deck and the introduction of freeports (holes cut in the sides of the boat to allow water on deck to flow out). Tests found that if the boat was depressed on one side by three inches, the freeports would be level with the sea and if it was depressed further, the water could flow in through them. The engineer said that if a life raft had been on board, lives would have been saved.<sup>16</sup>

3.18 Significantly, the defendant was “no beginner, no learner” where the sea was concerned, but rather was a man of many years sea-faring experience. He worked for 27 years in the merchant navy and then in small-time fishing until 2002. Despite all the evidence against the defendant who owed a duty of care to the people he took out on his fishing boat, the jury found him not guilty of manslaughter and endangerment. The fact that an experienced sea-man who knew about boats in general and knew that the Pisces had structural flaws and required a pump to get rid of excess water, had nonetheless taken passengers angling without having sufficient life-jackets on-board for them, did not convince the jury that a high level of negligence as would amount to gross negligence manslaughter had been established.

3.19 The jury was also unconvinced that the act of taking an unseaworthy boat out to sea without sufficient life-jackets amounted to a

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<sup>15</sup> Irish Times Report 16 November 2005.

<sup>16</sup> Irish Times Report 17 November 2005. Counsel for the Defence argued that the legislation which was in force at the time would not have required the boat to have a life raft.

substantial risk of death or serious injury for the purposes of section 13 of the *Non-Fatal Offences Against the Person Act 1997*. Instead the defendant was found guilty of section 4 of *The Merchant Shipping Act 1981* under which Judge McCartan fined him €1000, which was the maximum fine permissible under the legislation. This Act was replaced last year by regulations in the *Maritime Safety Act 2005* and the new maximum penalty for such an offence is €250,000 and/or two years imprisonment.

3.20 The new law makes it compulsory to carry life-jackets or personal floatation devices on recreational craft less than seven metres long. Vessels over seven metres long must have a life-jacket or personal floatation device for everyone on board. Children up to the age of 16 must wear the safety equipment on all vessels regardless of length. The new legislation also stipulates that owners of pleasure craft hold valid safety certificates and licences, which are subject to inspection by the marine survey office.

3.21 Although the jury in *The People (DPP) v Barden*<sup>17</sup> saw fit to find the accused not guilty of both gross negligence manslaughter and endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997*, it is possible that a differently constituted jury might have reached a different verdict as it was arguably grossly negligent and culpably careless to take a large party fishing in a boat which was known to take water when there was insufficient life-preserving equipment on board.

3.22 *The DPP v Cormac Building Contractors & Others*<sup>18</sup> concerned the electrocution of a worker at a building site in Bray on February 19th 2003. The victim, a specialist contractor, died when a truck-mounted concrete pump made contact with 10,000 volt overhead power line. Both the main contractor and the concrete supplier subcontractor were charged with and pleaded guilty to offences under section 6 of the *Safety Health and Welfare and Work Act 1989* (failing to have a safe system of work). The main contractors were fined €150,000 and the subcontractors €100,000. The site manager for the main contractor and a director of the subcontractor's were charged with and convicted of reckless endangerment under section 13 of the *Non-Fatal Offences against the Person Act 1997*. The site manager was given a 3 year suspended sentence and the company director was given a 2 year suspended sentence.

3.23 At trial, the court was told that the sub-contractor concrete supplier company and the main contracting company, which was also the project supervisor on site had been warned about the dangers of overhead

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<sup>17</sup> Irish Times Report 24 November 24<sup>t</sup> 2005.

<sup>18</sup> Wicklow Circuit Criminal Court, July 2006. Sentences were passed on 24 November 2006.

power lines.<sup>19</sup> An off-duty ESB engineer gave evidence that in April 2002 he went to the site office and spoke to the main contractor's site manager after his attention was attracted by a crane when he was passing the site. He warned the site manager of the dangers of the overhead power lines. He informed the court that he had seen nothing on site which would have alerted anyone to the danger, such as bunting or goalposts. A former HAS inspector gave evidence that he had issued directions about overhead wires on site on two separate occasions.

3.24 The safety consultant for the main contractor gave evidence that he had discussed the dangers posed by overhead power lines with the main contractor's site manager in June 2002. In July 2002 he had observed that better signage was required on the site since up to 30 vehicles could be working there at any time. In September 2002 when he became aware of the HSA inspector's directions, the safety consultant decided to sterilise an area in the site for three days while new signs were erected.

3.25 The safety consultant for the concrete subcontractor stated that when he was on site he was shocked to see a mobile crane operating under the high voltage wires with no warning sign in place. On 7 January 2003 he spoke to "a person in charge" and materials were then moved manually rather than by crane. The next day there was a site meeting organised by the subcontractor's site manager where the issue of the overhead wires was discussed. The main contractor had no safety advisor at the meeting. A safety audit was carried out by the safety consultant for the concrete subcontractor on 7 February and "major concern" was expressed.

3.26 In imposing sentence the judge stated that a wrong decision had been made when work was continued despite the problems with the overhead wires. The balance in these matters should always "come down on the side of the safety of workers" and "in this case it did not". Regarding the fines totalling €250,000, the judge said that the "penalties had to reflect the outrage felt by right thinking people" at the crime.<sup>20</sup>

## **C Gross negligence developments in the 20<sup>th</sup> century leading up to *The People (AG) v Dunleavy***

3.27 In chapter one the Commission discussed the development of gross negligence manslaughter in the 18<sup>th</sup> century and referred to a number of early cases where judges endeavoured to describe the level of negligence necessary to give rise to criminal as opposed to civil liability. By the time the Irish Free State was founded in 1922 it had been long established that the

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<sup>19</sup> See *Health and Safety Review* December 2006 at 10-11.

<sup>20</sup> *Ibid.*



ordinary civil test for negligence was inappropriate for establishing manslaughter liability. An objective test for establishing liability for gross negligence came to be favoured over a subjective test. It was not necessary therefore to prove that the accused was aware of the serious risk of death or injury posed by his or her acts or omissions. An objective test was chosen due to the prevailing belief that criminal sanctions were deserved in cases of extreme carelessness or ineptitude since the death may well have been avoided had the defendant conducted him or herself with due diligence.

3.28 The task of explaining to the jury that the level of negligence required for gross negligence manslaughter is higher than that required to establish negligence in a civil case has frequently proved troublesome, particularly for British judges. The English Court of Criminal Appeal decision of *R v Bateman*<sup>21</sup> marked a very important development in the law of manslaughter by gross negligence. Here a doctor appealed against a conviction for manslaughter after a woman died due to an operation which he negligently performed. The appeal was allowed because the trial judge failed to adequately differentiate between the level of negligence required for a civil action for damages and the level required to establish criminal liability for manslaughter. Lord Hewart CJ stated:

“If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove ... that A owed a duty to B to take care, that that duty was not discharged, and that the default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A’s negligence amounted to a crime ... [I]n 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>22</sup>

3.29 Thus, *R v Bateman* established that liability for gross negligence manslaughter would arise where:

- (a) the accused owed a duty to the deceased to take care;
- (b) the accused failed to properly discharge this duty;
- (c) this failure caused the death of the deceased; and

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<sup>21</sup> (1925) 19 Cr App R 8.

<sup>22</sup> *Ibid* at 10-12.

(d) the accused's negligence was gross in that it displayed such a disregard for the life and safety of others as to amount to a crime deserving of punishment.

3.30 In *Andrews v DPP*<sup>23</sup> the appellant was convicted of motor manslaughter and appealed against his conviction in the House of Lords. He was driving a van at about 30 miles an hour when he overtook another car and ran into the deceased who was three or four feet away from the kerb. The deceased was carried on the bonnet for a short distance before he was thrown off and run over by the van. The appellant did not stop and immediately after the accident nearly ran into a cyclist.

3.31 The appeal was based solely on an alleged misdirection in relation to the relationship between gross negligence manslaughter and driving recklessly within the meaning of section 11 of the *Road Traffic Act*. The trial judge Du Parcq J had directed the jury that if they thought the appellant had driven recklessly and in a dangerous manner within the meaning of section 11, and it was because of this that the person was killed, it was their duty as jurors to convict the appellant of manslaughter.

3.32 Although the House of Lords felt there were passages of Du Parcq J's direction to the jury which were open to criticism, he had nonetheless emphasised on numerous occasions the recklessness and high degree of negligence which the prosecution would have to prove before the jury would be entitled to convict the accused of manslaughter. Accordingly the appeal was dismissed. Lord Atkin observed that in the law of manslaughter there was a marked difference between doing an unlawful act and doing a lawful one with a degree of carelessness which the legislature makes criminal. He adopted the problematic language of recklessness in discussing the level of negligence required for manslaughter as distinct from civil liability.

3.33 Lord Atkin stated:

“The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for the purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied “reckless” most nearly covers the case. It is difficult to visualise a case caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all-embracing, for “reckless” suggests an indifference to risk, whereas the accused may have

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<sup>23</sup> [1937] 2 All ER 552.

appreciated the risk and intended to avoid it but shown a high degree of negligence in the means adopted to avoid the risk as would justify a conviction.”<sup>24</sup>

Charleton observes that a clearer statement of the law was required following Lord Atkin’s explication of negligence in terms of recklessness.<sup>25</sup>

3.34 As mentioned in part B the Irish Court of Criminal Appeal in *The People (AG) v Dunleavy*<sup>26</sup> held that a *Bateman*-style direction was inadequate because it did not specify the level of negligence which had to be proved against the accused. According to Davitt J, the trial judge should have instructed the jury that:

“(a) negligence means a failure to observe such a course of conduct as experience shows to be necessary if the risk of injury to others is to be avoided.

(b) the accused’s negligence was responsible for the death in question.

(c) there are different degrees of negligence and that ordinary carelessness which may give rise to civil liability in an action for damages for personal injuries, or a conviction on prosecution for careless or inconsiderate driving, is not sufficient for a manslaughter conviction; and that a higher degree of negligence which would justify a conviction on prosecution for dangerous driving is not necessarily sufficient.

(d) in order to convict a person of manslaughter, a very serious felony, the jury must be satisfied that the fatal negligence was of *a very high degree*, and was such as to give rise to a high risk or likelihood of substantial personal injury to others.”<sup>27</sup>

## **D Failure to perform a legal duty**

3.35 In relation to breach of duty cases Charleton states:

“If ... failure to take heed could be the cause of a serious injury a compelling reason exists that persons with this responsibility should apply themselves to their task. Where they fail to do so, in clear derogation of their responsibilities, they commit a wrong. It is arguable that this is merely the absence of care and is thus a

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<sup>24</sup> *Andrews v DPP* [1937] 2 All ER 552, 556.

<sup>25</sup> Charleton *Offences Against the Person* (Round Hall 1992) at 88.

<sup>26</sup> [1948] IR 95.

<sup>27</sup> *Ibid* at 102.

neutral, or negative, state of mind. It is submitted that this is not so. In these circumstances the accused would have been placed in, or will himself have undertaken to be in, a situation where the exercise of attention was of considerable importance to others. To fail to use one's mind in these circumstances is, in itself, a state of mind, albeit one capable of being regarded as mere inattention. If that state of mind is morally blameworthy to a high degree it can properly be treated as criminal negligence."<sup>28</sup>

3.36 The only mental element necessary for gross negligence manslaughter is an intention to do the act which causes death or an omission to perform the acts which would prevent death from occurring where there is a special duty to act. Where a person is under a positive duty to act, an omission to so act may justify a manslaughter conviction if it results in the death of another. Duties to act can arise where:

- a special relationship exists between the parties<sup>29</sup> or;
- the accused voluntarily assumed the duty or;
- a contractual responsibility exists, or;
- a statute establishes an obligation, or;
- prior conduct gives rise to the duty.

3.37 In all of the situations listed above where a duty exists, if the person's failure to act causes death, this will be deemed to amount to a breach of duty and may constitute manslaughter if the accused's conduct falls far below an expected standard and shows a very high degree of negligence.

3.38 Ashworth states that the relationship between parents and children is the strongest case for a general duty but deciding whether a similar duty should apply to other relationships is open for debate. A duty towards one's spouse might be uncontroversial, but imposing a legal obligation in relation to one's parents may be undesirable. According to Ashworth:

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<sup>28</sup> Charleton *Offences Against the Person* (Round Hall 1992) at 86.

<sup>29</sup> The courts first imposed a duty to look out for the helpless when they extended the principle of the Poor Law. The Poor Law had exempted parish councils from the duty to care for the sick and indigent if such people had someone in a certain class of relationship able to support them. The Poor Law, though essentially a negative piece of legislation, was seized by the courts to impose a positive duty to support certain classes of relations, for example husbands were under a duty to their wives and parents to their children. Failure to perform that duty would amount to manslaughter if the dependant person died as a result of the neglect.

“It is one thing to maintain that a person has a legal duty towards a parent who lives in the same house: it is another thing to argue that a person has a legal duty towards a parent who lives alone in the next street, or the next town, or many miles away. Thus, with parents, as indeed with husband and wife (who may be living apart), there should be a proximity requirement of living in the same household before a legal duty is imposed.”<sup>30</sup>

3.39 Ashworth discusses the concepts of voluntariness and causation in relation to omissions. He asserts that just as an action is not “voluntary” if it is the consequence of an uncontrollable or unconscious movement, an omission is not “voluntary” if the person owing the duty of care to another is incapable of doing what is required.<sup>31</sup>

3.40 Ashworth proceeds to state that once it has been established that the accused has voluntarily omitted to perform a duty, the next question is whether the omission *caused* the result. According to Ashworth, there has been a good deal of uncertainty over the relationship between causation and omissions. He observes that the criterion of causation might appear submerged within the duty concept if omissions only are regarded as having a result if such result followed the non-performance of a duty.

3.41 In relation to existing English law, Ashworth says that both A and C had the capacity to rescue, A could be said to have caused the death of his child by making no effort to rescue him from drowning, whereas B would not be castigated for causing the death of a stranger by making no effort to rescue him.

“On this view, both the duty relationship and the causal relationship are absent in the case of the drowning stranger. ... the duty-concept [is] the primary criterion, both because it establishes moral (if not strictly causal) responsibility and because it delineates in time and space the number of people who may be said to have omitted [to act]...”<sup>32</sup>

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<sup>30</sup> Ashworth “The Scope of Criminal Liability for Omissions” (1989) 105 LQR 424, at 441-2.

<sup>31</sup> *Ibid* at 434.

<sup>32</sup> *Ibid* at 435. Ashworth also states at 435 that “those who regard the general “but for” standard of causation as applicable will find that it is much more demanding in omissions cases than in relation to acts, if the court must be satisfied beyond reasonable doubt that the result would not have occurred but for this defendant’s omission. Secondly, the many offences of omission which take the form of “failing to do x” make no reference to results and therefore side-step all problems of causation.”

## **E Blood relationships**

### **(a) Parents/Guardians and Children**

3.42 Section 246 of the *Children Act 2001* deals with cruelty to children. It is an offence in Ireland for any person who has the custody, charge or care of a child, to wilfully neglect a child, or allow the child to be neglected in a manner likely to cause unnecessary suffering, or injury to health. A person will be deemed to have neglected a child for the purposes of this section if they:

(a) fail to provide adequate food, clothing, heating, medical aid or accommodation for the child, or

(b) being unable to provide such basic necessities of life fail to take steps to have it provided under the enactments relating to health, social welfare or housing.<sup>33</sup>

3.43 A conviction may be brought against a parent, guardian or carer who neglected a child notwithstanding the death of the child in respect of whom the offence is committed.<sup>34</sup> On summary conviction a maximum fine of £1500 and/or a maximum prison term of 12 months could ensue. If convicted on indictment the parent or guardian could be fined up to £10,000 and/or imprisoned for up to 7 years.<sup>35</sup>

3.44 Could the duty imposed by section 246 of the *Children Act 2001* apply more widely so as to make the parent liable for more serious offences such as gross negligence manslaughter as well? Ashworth questions whether a parent who failed to get medical treatment for a sick child who later dies a result should be liable for a homicide offence such as manslaughter rather than wilful neglect.<sup>36</sup>

3.45 Very different decisions were brought by the British courts in *R v Gibbins and Proctor*<sup>37</sup> and in *R v Lowe*<sup>38</sup> both cases of homicide by

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<sup>33</sup> Section 246 (5) *Children Act 2001*.

<sup>34</sup> Section 246 (3) *Children Act 2001*.

<sup>35</sup> Section 246 (2) *Children Act 2001*.

<sup>36</sup> Ashworth "The Scope of Criminal Liability for Omissions" (1989) 105 LQR 424, at 440. Ashworth posed these questions in relation to section 1 of the *Children and Young Persons Act 1933*. Under Section 5 of the *Domestic Violence Crime and Victims Act 2004*, where a person causes or allows the death of a child or vulnerable adult to occur, the courts take into account whether the defendant "failed to take such steps as he could reasonably have been expected to take to protect the victim."

<sup>37</sup> [1918] 13 Crim App R 134.

<sup>38</sup> [1973] QB 702; [1973] 1 All ER 805.

omission in the form of neglect. In the first case Gibbins was the father of a little girl called Nelly who died of starvation having suffered considerable cruelty and neglect at the hands of both Gibbins and the second defendant, his common law wife. There were several other children living in the household, one of whom was Proctor's child and all were properly cared for except Nelly.

3.46 Following *R v Instan*<sup>39</sup> discussed below, Proctor, as Gibbins' *de facto* spouse was deemed to have taken upon herself the moral obligation of looking after all the children, including Nelly. According to Darling J, Nelly's organs were healthy and there was no reason why she should have died if she had received food. He observed that the child was kept upstairs apart from the others, and there was evidence that Proctor "hated her and cursed her, from which the jury could infer that she had a very strong interest in her death."<sup>40</sup>

3.47 There was less evidence against Gibbins. He gave Proctor all his wages so as to buy food for the household. Nonetheless the judge believed he was blameworthy. After all:

"he lived in the house and the child was his own, a little girl of seven, and he grossly neglected the child. He must have known what her condition was if he saw her, for she was little more than a skeleton."<sup>41</sup>

3.48 Had Gibbins not seen the deceased or been aware of her condition the jury might well infer that he did not care if she died and if he did see her he must have known what was going on. According to the Court of Criminal Appeal, the question was whether there was evidence that Gibbins so conducted himself as to show that he desired that grievous bodily injury should be done to the child.

3.49 The court felt that there was evidence that Gibbins did desire that grievous bodily harm should be done, and he was therefore guilty of murder.<sup>42</sup> When Nelly died of starvation the appellants hid the body so as to prevent the death from becoming known. Proctor told Gibbins to bury Nelly out of sight and he did so in the brickyard where he worked. The trial judge, Roche J had directed the jury that since there was no evidence that either of the defendants was insane they had to be judged as reasonable persons who understood the nature of what they were doing. The jury were told:

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<sup>39</sup> [1893] 1 QB 450; [1891-1894] All ER 1213.

<sup>40</sup> [1918] 13 Crim App R 134, 136.

<sup>41</sup> *Ibid* at 138-139.

<sup>42</sup> *Ibid*.

“if you think that one or other of those prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury, as the result of which she died, it is not necessary for you to find that she intended or he intended to kill the child then and there. It is enough that you find that he or she intended to set up such a state of facts by withholding food or anything as would in the ordinary course of nature lead to her death.”<sup>43</sup>

3.50 The jury came to the conclusion that Proctor, in deliberately withholding food from Nelly had done more than wickedly neglect the child<sup>44</sup> and returned a verdict of murder rather than manslaughter against her. Similarly they held that although Gibbins didn’t withhold any food himself, he knew what Proctor was doing and had done nothing to stop her. Thus, he was also found guilty of murder. The Court of Appeal upheld the murder convictions. According to Ashworth, this decision was correct in holding that a murder conviction by omission “is perfectly proper so long as the parent is shown to have had the required mental element.”<sup>45</sup> Ashworth says that it follows that the offence of wilful neglect is not the most serious offence that may be charged against a person who neglects a child.<sup>46</sup>

3.51 However, in the more recent case of *R v Lowe*<sup>47</sup> where a child died due to the neglect of the accused parent, the court distinguished between omission and commission, saying that if a person strikes a child and the child dies, he may be guilty of manslaughter, whereas if he negligently omits to do something (e.g. feed the child) and the child’s health deteriorates so that death results, a charge of manslaughter should not be *inevitable* even where the omission is deliberate. It is submitted that where the omission is truly wilful, for example where the accused deliberately omits to summon medical aid, realising that it is necessary, there is no valid ground for distinguishing between omission and commission.

**(b) Other familial relationships**

3.52 In *R v Instan*<sup>48</sup> the defendant lived with her elderly, bedridden aunt. The aunt was totally dependant on her niece for food and medicine, which the defendant however refused to supply. The aunt eventually died

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<sup>43</sup> [1918] 13 Crim App R 134, 137-8.

<sup>44</sup> *Ibid* at 140.

<sup>45</sup> Ashworth “The Scope of Criminal Liability for Omissions” (1989) 105 LQR 424, at 441.

<sup>46</sup> *Ibid*.

<sup>47</sup> [1973] QB 702; [1973] 1 All ER 805.

<sup>48</sup> [1893] 1 QB 450; [1891-1894] All ER 1213.



due to this neglect. The court held that the defendant was under a clear moral duty to care for her dependant aunt. Her refusal to provide food and medicine at least hastened the death of the deceased, and thus amounted to manslaughter.

3.53 In *R v Senior*<sup>49</sup> the defendant was a member of a religious sect that held the belief that resorting to medical assistance amounted to a lack of faith in God. His eight-month-old child developed pneumonia which could easily have been treated but as a result of his religious beliefs such treatment was not sought. The child died and the defendant was found guilty of manslaughter.

3.54 In *R v Stone and Dobinson*<sup>50</sup> Stone allowed the deceased, his sister Fanny, to move in with him and his partner Dobinson. Fanny was anorexic and became seriously ill. She eventually refused to get out of bed even to wash or go to the bathroom and died an undignified death lying in her own excrement, covered in bedsores. Although aware of Fanny's ailing condition the defendants failed to obtain medical assistance and even omitted to mention her condition to a social worker who occasionally visited Stone's son.

3.55 Defence counsel argued that the defendants were not under a duty to care for Fanny simply because she became increasingly unwell while staying at the defendant's house as a lodger. It was further argued that the defendants were not under a duty any more than a person was under a duty to rescue a stranger from drowning. The court rejected the defence's heartless suggestion that the appellants were entitled to do nothing, stating:

“Whether Fanny was a lodger or not she was a blood relative of the appellant Stone; she was occupying a room in his house; the appellant Dobinson had undertaken the duty of trying to wash her, of taking such food to her as she required. There was ample evidence that each appellant was aware of the poor condition she was in by mid-July. It was not disputed that no effort was made to summon an ambulance or the social services or the police despite the entreaties of Mrs Wilson and Mrs West. A social worker used to visit Cyril. No word was spoken to him. All these were matters which the jury were entitled to take into account when considering whether the necessary assumption of a duty to care for Fanny had been proved ... This was not a situation analogous to the drowning stranger. They did make efforts to care.”<sup>51</sup>

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<sup>49</sup> [1899] 1 QB 283.

<sup>50</sup> [1977] 2 All ER 340.

<sup>51</sup> [1977] 2 All ER 340, 345-6.

3.56 Thus, Stone owed a duty to his sister because she was a blood relation and also because she lived in his house and he was aware of her condition.<sup>52</sup> Dobinson, for her part, owed a duty to the deceased because she voluntarily undertook to wash and feed the invalid. Glanville Williams states that it is contrary to reason to say that a person who voluntarily undertook to help another is bound by that fact to a duty to continue the help. In his view the only view for holding that Dobinson, who was not related to the deceased, owed a duty to her was because Dobinson:

“was an adult member of the same household in which Fanny became ill, and as such was under the same duty (whatever it might be) as the occupier, Stone.”<sup>53</sup>

3.57 The court held that the issue of the existence of a duty was a question of fact for the jury and not a matter of law for the judge. Stone was sentenced to 12 months imprisonment, “to mark the public disapproval of such behaviour.” Dobinson received only a suspended sentence.<sup>54</sup>

3.58 There was considerable evidence that both defendants had a low level of intelligence and were rather incompetent individuals who may have been incapable of meeting objective standards of responsibility. According to Glanville Williams, the Court of Appeal’s understanding of the function of a prison sentence was highly questionable, and in relation to justice, took insufficient account of Stone’s poor intelligence and his hopelessness as regards his sister’s refusal to accept treatment. Fanny’s health problems were simply too big for her brother. Williams wrote:

“Important as it is to maintain the principle that helpless invalids must be cared for, no great public harm would follow if indulgence were shown to inadequate people, and those who do

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<sup>52</sup> Glanville Williams states that if the idea is: “that when you allow your sister (or, surely, anybody else) to come to live with you, you impliedly promise to give her necessary aid if she falls ill, that is merely a “construction of law,” and the court might as well state the reality of the rule, which is that the occupier of the house must take reasonable steps in these circumstances. The rule, as a rule, is a good one. (On that view of the law, however, it is strange that the judge should have left it to the jury to decide the question whether Stone was under a duty. If the matter was settled by law, as a conclusion from the mere fact that Fanny was incapacitated in Stone’s house, the jury could and should have been explicitly directed on the point.)” *Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1961) at 264.

<sup>53</sup> Williams *Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1961) at 265.

<sup>54</sup> *Ibid.* Glanville Williams observes that if Stone and Dobinson “were legally on a par, as being members of the household, it is difficult to justify the distinction made between them in the matter of punishment. Mrs D would seem from the facts stated to have been the more competent of the two and therefore the more responsible.” *Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1961) at 265.

not wish to force ministrations upon others; and Stone fell into both categories.”<sup>55</sup>

The incompetence of the defendants in this case will be discussed later in the section dealing with capacity and failure to use one’s abilities in the face of avoidable risks.

3.59 The issue of self-determination was not raised during the appeal, that is, the court did not address whether Fanny had wilfully chosen to forego food and medical attention. As a result, the related matter of whether the defendants should have been expected to override her wishes if she had indeed chosen to reject food and medical care was not dealt with by the court.

3.60 In *R v Wilkinson*<sup>56</sup> a man was sentenced to imprisonment for two months and his daughter for 18 months for the manslaughter of the wife and mother. The deceased had taken to bed ten years before her death due to an irrational fear of growing old. She resisted offers of medical help. According to the Court of Appeal, it was not surprising that the defendants gave up trying to persuade her. Nonetheless the Court refused leave to appeal against conviction. The sentence was altered to allow for the immediate release of the appellants who had been in prison already for five months. The stigma of a conviction for manslaughter was not removed, however. Arguably the jury should have been instructed at trial that a person has an absolute right to refuse medical assistance. Glanville Williams states that even psychiatric patients cannot be treated against their will:

“except to the extent authorised by statute or in certain extreme situations, and an adult patient who is physically ill cannot be treated against his express refusal in any circumstances. Even if a patient is *non compos* in the terminal states of an illness, it would be wrong to give him treatment that he is known to have rejected when in full possession of his faculties. It would be a contradiction to say that people cannot be compulsorily treated against their will, even to save their lives, but that they can be compulsorily treated as soon as they are in a coma and near death, even though their previous opposition is quite clear.”<sup>57</sup>

3.61 In *R v Smith*<sup>58</sup> the court examined the issue of whether there was a duty to get medical assistance for an adult person of sound mind if they did

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<sup>55</sup> Williams *Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1961) at 263-4.

<sup>56</sup> The Times 19 April 1978. The newspaper report does not state whether the right of self-determination was argued.

<sup>57</sup> Williams *Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1961) at 268.

<sup>58</sup> [1979] Crim LR 251.

not want it. The devoted husband of the deceased was charged with manslaughter for not having called a doctor for her during her illness. The deceased had made it known at an early stage in her illness that she did not want a doctor called. The jury was instructed to balance the deceased's right to self-determination against their capacity to make a rational decision. Griffith's J stated:

“If she does not appear too ill it may be reasonable to abide by her wishes. On the other hand, if she appeared desperately ill then whatever she may say it might be right to override.”<sup>59</sup>

The jury failed to agree on whether the appellant's failure to call a doctor should give rise to a manslaughter conviction.

## **F Non-familial relationships**

3.62 A blood relationship is not always necessary in order to establish a duty to act. In the Australian case *R v Taktak*<sup>60</sup> the appellant brought a prostitute to a party but left without her. The prostitute injected herself with heroin while the appellant was absent. When he returned he found her unconscious due to an overdose, so he took her away from the party but did not get medical help in a timely manner and the girl died.

3.63 It was held that although no blood or other close relationship existed between the appellant and the prostitute, he was nonetheless responsible for her at the time of her death and his conviction for manslaughter was upheld. The court was of the opinion that in removing the deceased from the party, the appellant had prevented others from assisting her or obtaining medical help. He had assumed responsibility for the deceased and his failure to seek immediate medical assistance amounted to a breach of that duty.<sup>61</sup> Nonetheless, the Court was of the view that the evidence fell short of establishing negligence of the degree required to justify a conviction for manslaughter and therefore the appellant's conviction was quashed.

3.64 A man was acquitted of causing a woman's death in an American case with similar circumstances, *The People v Beardsley*.<sup>62</sup> A woman who

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<sup>59</sup> R v Smith [1979] Crim LR 25, 253.

<sup>60</sup> [1988] 34 A Crim R 334

<sup>61</sup> *Ibid* at 358. Carruthers J stated: “The complexity of modern society is such that the duty of care cannot be confined to specific categories of legal relationships such as husband and wife, parent and child; the duty will also arise where one person has voluntarily assumed the care of another who is helpless, through whatever cause and so secluded such person to prevent others from rendering aid.”

<sup>62</sup> (1907) 113 N.W. 1128 (Michigan).

stayed with the defendant for the weekend took an overdose of tablets. The defendant was aware that she was in a serious condition but nonetheless brought her to another apartment where she subsequently died. The court held that the defendant did not owe a duty of care to the deceased.

3.65 In *R v Khan and Khan*<sup>63</sup> the deceased went to get heroin from the defendant's flat. After snorting heroin she went into a coma and the defendants abandoned her in their flat. When they returned the following day she was dead, so they dumped her body on some waste ground. Owing to an absence of *mens rea* the trial judge withdrew the charge of murder from the jury but made it clear that the jury was entitled to find the defendants guilty of manslaughter.

3.66 The defendants' appeal against conviction was allowed on the basis that manslaughter by omission arose from a breach of duty in conjunction with evidence of gross negligence. The prosecution had argued that a duty to summon assistance arose out of the events at the flat. However the Court of Appeal held that the trial judge had failed to instruct the jury as to whether the facts of the instant case were capable of giving rise to such a duty. The court also stressed that holding such defendants guilty of manslaughter would effectively add to the categories of people to whom such a duty was owed.

3.67 According to Ashworth's "same household" criterion, which covers *de facto* relationships as well as marriage and extends duties to brothers, sisters, aunts, uncles, tenants and lodgers whose physical proximity to the defendant is established there would be "no obligation on Beardsley towards his weekend paramour or on the host towards a dinner guest or the "friend" staying overnight."<sup>64</sup>

## **G Contractual duties and those imposed by Statute**

3.68 Once it became possible to convict a person of manslaughter where they owed a duty to their wife or child and failed to take steps to save that person's life, other duties were quickly added to the list. A duty was initially imposed as a result of a contract where an employer allowed an employee or apprentice to stay in his or her house. If the employee or apprentice became ill, the employer was deemed to have impliedly undertaken to provide the basic necessities of life.<sup>65</sup>

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<sup>63</sup> [1998] Crim LR 830.

<sup>64</sup> Ashworth "The Scope for Criminal Liability for Omissions" (1989) 105 LQR 424, at 443.

<sup>65</sup> See Charleton *Offences Against the Person* (Roundhall 1992) at 101.

3.69 This principle was expanded whereby a contractual duty could give rise to a manslaughter conviction if people outside the contractual relationship were likely to be injured if the contractual duty was not performed and were actually killed. In *R v Pittwood*<sup>66</sup> a railway crossing gate-keeper opened the gate to leave a cart pass, but forgot to close it again before going off to lunch. As a result a hay-cart crossed the tracks and was struck by a train. The gate-keeper was convicted of manslaughter but his counsel argued that he only owed a duty to his employers the railway company.

3.70 The court was not convinced by this argument however and said the case was “governed by” *R v Instan*.<sup>67</sup> The Court did not acknowledge however, that in *R v Instan* the defendant’s contractual duty was owed to the victim whereas in the instant case it was owed to the employer rather than to the victim. It was simply assumed that a contractual duty *per se* is a sufficient basis for criminal liability for omission, no matter to whom the duty is owed. Wright J held that:

“there was gross and culpable negligence, as the man was paid to keep the gate shut and protect the public ... A man might incur liability from a duty arising out of contract.”<sup>68</sup>

3.71 There have been other convictions for manslaughter caused by a failure to perform duties in employment. People whose jobs involve dangerous activities which may threaten the lives or safety of others if improperly performed are under a duty to perform those activities with care and attention or must give sufficient warning if they do not or cannot perform them. In *R v Haines*<sup>69</sup> the manager of a mine was convicted of manslaughter due to an explosion which was caused due to his failure to ventilate a mine.

3.72 In *R v Lowe*<sup>70</sup> an engineer left a steam engine used to raise miners from a pit in the care of a boy despite the boy’s protestations about his ignorance of the machinery. The lift carrying four men overturned due to a defect and a man was killed. Lord Campbell CJ was of the opinion that a man may render himself liable to be convicted of manslaughter or even of murder if he neglects to perform a legal duty. The engineer was convicted of manslaughter.

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<sup>66</sup> (1902) 19 TLR 37.

<sup>67</sup> [1893] 1 QB 450; [1891-1894] All ER Rep 1213.

<sup>68</sup> (1902) 19 TLR 37, 38.

<sup>69</sup> (1847) 2 Car & K 368; 175 ER 152.

<sup>70</sup> (1850) 3 Car & K 123; 175 ER 489.

3.73 According to Ashworth, a justification for holding an accused such as the engineer in *R v Lowe*<sup>71</sup> criminally responsible for gross negligence is the fact that he was present or able to be present and had an identifiable role in preventing the occurrence of harm. In effect, the contract of employment distinguishes the accused from passersby and casual callers. A further justification is that the accused had both the authority and the capacity to prevent the harm and may have been the only person in such a position.

3.74 Ashworth observes that this was probably the case in *R v Pittwood*<sup>72</sup> where the gate-keeper was better able to prevent the fatality than any passer-by, who might have been liable for trespass by entering on to railway property in order to close the crossing gates.<sup>73</sup> According to Ashworth, the essence of the duty in these contractual duty cases is closely linked to the prevention of harm. In *R v Pittwood*<sup>74</sup> this was the whole point of employing a gate-keeper in the first place.

3.75 As mentioned in part B, in *The People (DPP) v Rosebury Construction Ltd and Others*<sup>75</sup> a construction company, was fined almost £250,000 for offences under the *Safety Health and Welfare at Work Act 1989*, which led to the deaths of two men on a building site in 1998. One of the defendants, an employee of a sub-contractor was given an 18 month suspended sentence for endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997* and was fined £7,000. The initial manslaughter charges were dropped and the defendants pleaded guilty to the lesser charges.

3.76 The two deceased were killed when the trench in which they were working collapsed. The construction company was legally obliged to provide supports for any trench which was more than 1.25 metres deep but it failed to comply with this requirement. The trench in question was between 3.1 and 3.3 metres deep. The fact that there was equipment on site in the form of a trench box which could have provided support for a trench was deemed to be an aggravating circumstance.

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<sup>71</sup> (1850) 3 Car & K 123; 175 ER 489.

<sup>72</sup> (1902) 19 TLR 37.

<sup>73</sup> Ashworth "The Scope for Criminal Liability for Omissions" (1989) 105 LQR 424, at 444-5. Ashworth also argues at 445 that undertakings related to the welfare and safety of others would be a better basis for criminal liability than contracts and undertakings generally. He refers to this as a kind of "scope of risk principle" and maintains that the question "should not be focused on the existence of a binding contract, but rather on whether the defendant has assumed responsibility for the health and welfare of victims."

<sup>74</sup> (1902) 19 TLR 37.

<sup>75</sup> See Irish Times Report 22 November 2001.

3.77 Construction workers had brought the matter of the trench size to the attention of the sub-contractor but nothing was done and the judge thought that the sub-contractor's inaction amounted to extreme recklessness. In imposing the various sentences, the judge said "there was casualness of an extreme nature".

3.78 *R v Holloway*<sup>76</sup> involved a qualified electrician who had wired a domestic central heating system. Because the defendant had wrongly connected the earth wire to a positive terminal on the programmer, the family for whom the central heating system was installed received electric shocks whenever they touched radiators and other metal objects in the house. The defendant was called back to the house but he did not discover the cause of the shocks and also failed to notice that the circuit breaker was not working.

3.79 Although the defendant intended to replace parts of the system, a family member was electrocuted and killed in the kitchen before he returned. At the defendant's trial for manslaughter the judge instructed the jury that they should convict if they were satisfied (a) that the defendant had created a serious fault, (b) that he failed to discover the origin of that fault and as a result had created a serious risk of injury to the people living in the house, (c) that any reasonable, careful, competent electrician would have recognised that the risk was obvious and (d) that the defendant had acted with reckless disregard for the safety of the inhabitants of the house. The defendant was convicted.

3.80 The Court of Criminal Appeal held that the judge had wrongly directed the jury and the appeal was allowed since the jury might not have convicted if the prosecution had to establish gross negligence. Lord Taylor of Gosforth CJ stated that the case involved inattention, or failure to advert to a serious risk in respect of an obvious and important matter which the defendant's duty demanded he should address. His Lordship remarked that it was not an "indifference" case and the issues were whether the prosecution proved that the appellant electrician was grossly negligent in not detecting the cause of the shocks and/or appreciating the risk those undiagnosed shocks reflected.<sup>77</sup>

3.81 Under section 222 of the *German Criminal Code* which addresses the offence of negligent homicide, *fahrlässige Tötung*, anyone who causes death through negligence can be fined or imprisoned for up to 5 years.<sup>78</sup> In

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<sup>76</sup> See [1993] 4 All ER 935, 954.

<sup>77</sup> *R v Holloway* [1993] 4 All ER 935, 958.

<sup>78</sup> See §222 on Fahrlässige Tötung in Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1217. „Wer durch Fahrlässigkeit den Tod eines Menschen verursacht wird mit Freiheitsstrafe bis



Germany a duty of care can arise based on the nature of employment. Under section 222 employers potentially face criminally liability for negligent homicide if they knowingly fail to adhere to German health and safety legislation and a death is caused.<sup>79</sup> The owner of a business must protect people who are working or visiting the premises against operational hazards and must heed relevant health and safety regulations, for example those which relate to chemical substances.<sup>80</sup> Supervising architects are obliged to avert dangers on German construction sites, however they are not liable if the employees of the contractor disregard regulations for the prevention of industrial accidents.

## **H Voluntary assumption of duty**

3.82 Towards the end of the nineteenth century voluntary undertakings came to be recognised as a further category of duty-based relationship which could give rise to manslaughter liability in the event of an omission to provide care, for example for a child or other vulnerable person unable to take care of themselves who the accused welcomed into his or her home.

3.83 At first, such cases involved the accused having expressly or impliedly giving the undertaking to a relative or previous guardian of the new charge, but the notion of voluntary undertakings soon came to cover cases where there was no promise of care offered. The courts exploited the ambiguous meaning of the word *undertaking* which they decided could mean either a promise to do something or actually doing it. As mentioned above the second defendant in *R v Stone and Dobinson*<sup>81</sup> was found guilty of manslaughter because she had taken steps to care for Fanny, the sick and helpless sister of the first defendant and had therefore “undertaken” a duty.

## **I Public policy, duty of care and joint criminal enterprise**

3.84 In *R v Wacker*<sup>82</sup> the defendant who was in sole charge of a lorry in which 60 Chinese people were concealed in a container was convicted of conspiracy to facilitate the entry to the UK of illegal immigrants and of 58 counts of gross negligence manslaughter. The transport of the immigrants from Rotterdam was organised by a group of people who wished to make a

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zu fünf Jahren oder mit Geldstrafe bestraft.“ A translation of the section is available at the German Law Archive, <http://www.iuscomp.org/gla/>

<sup>79</sup> See Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1219.

<sup>80</sup> *Ibid* at 1224.

<sup>81</sup> [1977] 2 All ER 341.

<sup>82</sup> [2002] EWCA Crim 1944; [2003] 4 All ER 295.

profit out of the desire of Chinese nationals to leave their country and settle abroad.

3.85 There was a single, small vent at the front of the container. Those inside the container were told that the vent would be shut and that when this occurred they would have to be silent in order to avoid detection. The defendant closed the vent a few kilometres before the lorry boarded the Zeebrugge ferry to Dover shut. The vent remained closed for five hours and as a result 58 of the immigrants died from lack of air. The two survivors told how there was a lot of screaming two hours after the vent was closed because it was difficult to breathe and people were getting distressed. Despite the screaming no-one came to the aid of the immigrants.

3.86 The defendant was sentenced to 8 years imprisonment on the conspiracy charge and to 6 years imprisonment for each of the manslaughter charges. The 6 year sentences were to run concurrently but to be consecutive to the 8 year sentence. The defendant appealed against the manslaughter convictions on the basis that he owed no duty of care to the illegal immigrants because they shared the same joint illegal purpose. He also appealed against sentence

3.87 The Attorney General in turn contended that the manslaughter sentences had been unduly lenient. The Attorney General did not suggest that the total sentence of 14 years should be increased, rather it was argued that the imposition of concurrent sentences of 6 years imprisonment for the 58 manslaughter offences when compared with the 8 years imprisonment for the conspiracy charge sent out an intolerable message in that the public might think that the court viewed the breach of immigration rules as a more serious offence than causing the death of 58 people.

3.88 At trial counsel for the defendant initially claimed that he was unaware that there were illegal immigrants in the container and that he was employed to transport tomatoes from Rotterdam to Bristol. His counsel also argued that the principle of *ex turpi causa non oritur actio* (whereby the law of negligence did not recognise the relationship of those involved in a criminal enterprise as giving rise to a duty of care) was as relevant to the question of whether there was a duty of care for the purposes of gross negligence manslaughter as it was in determining whether a civil claim for negligence could succeed.

3.89 Counsel argued that no duty of care was owed by the defendant to the deceased because they shared the same joint illegal purpose which depended on secrecy. This joint enterprise (a) displaced the duty of care; (b) made it impossible for the court to define the content of the relevant duty of care; and (c) made it inappropriate for the court to define the content of a relevant duty of care. The trial judge ruled that the defendant's failure to guarantee that the hidden immigrants had enough air to breathe was

incidental to their role in the joint illegal enterprise but critical to the defendant's own role.

3.90 Moses J told the jury that in order to convict the defendant truck driver of manslaughter they had to be sure that he owed a duty of care to each and every passenger in the container and that his conduct amounted to a breach of that duty which caused the death of the 58 passengers. With regard to the risk of death posed by the defendant's conduct the jury had to be satisfied that it was so bad, so grossly negligent that it amounted to a criminal failure.<sup>83</sup> Moses J said that the driver owed a duty to each and every occupant if he knew that he was carrying 60 passengers and should reasonably have foreseen that his failure to take reasonable care to ensure that there was sufficient air for them to breathe in the container might cause them to be injured or die.<sup>84</sup>

3.91 The English Court of Appeal stated that right-minded people would be astonished if the defendant were permitted to escape liability for causing the deaths of 58 people simply due to their involvement in a criminal activity.

“The concept that one person could be responsible for the death of another in circumstances such as these without the criminal law being able to hold him to account for that death even if he had shown not the slightest regard for the welfare and life of the other is one that would be unacceptable in civilised society.”<sup>85</sup>

3.92 Thus, as a matter of public policy the court held that it would be wrong for the criminal law *not* to hold a person criminally responsible for the death of another purely because they were both involved in a joint unlawful activity at the time or because the victim may have accepted a degree of risk in order to achieve the joint unlawful enterprise.

“The criminal law has as its function the protection of citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disappplied just because the civil law is disappplied. It has its own public policy aim which may require a different approach to the involvement of the law.”<sup>86</sup>

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<sup>83</sup> *R v Wacker* [2002] EWCA Crim 1944, paragraph 19.

<sup>84</sup> *Ibid* at paragraph 21.

<sup>85</sup> *Ibid* at 30.

<sup>86</sup> *R v Wacker* [2002] EWCA Crim 1944, paragraph 33.

3.93 Lord Mackay referred to “ordinary principles of negligence” in *R v Adomako*<sup>87</sup> which will be discussed in the next section where there was no unlawful activity on the part of either the defendant anaesthetist or the victim. The Court of Appeal held that Mackay J did not intend to decide that the rules of *ex turpi causa* were part of the ordinary principles, but was simply stating that in an ordinary case of negligence, the issue of whether there was a duty of care was to be decided by the same legal criteria as governed the existence of duty of care in the civil law of negligence.

3.94 The Court of Appeal held that in voluntarily assuming the duty of care towards the Chinese, the defendant was aware that no one’s action other than his own could realistically prevent the Chinese from suffocating to death. If he failed to properly fulfil this duty, to an extent that could be characterised as criminal, he was guilty of manslaughter if death ensued.<sup>88</sup>

3.95 The Court of Appeal were of the view that the duty of care which the defendant owed to the passengers in the container arose at the moment the vent was shut in Holland and continued until air was allowed into the container. If the vent had been opened during the ferry crossing the deaths would have been averted.

3.96 The Court held that the professional smuggling of illegal immigrants into the UK was a very serious matter. The fact that so many deaths were caused because of the desire to avoid detection while committing such an offence made the culpability of the driver that much worse. Consequently the total sentence of 14 years was not deemed to be manifestly excessive.

3.97 The occurrence of manslaughter as a result of unlawful activity was considered relevant to the sentence. The court stated that consideration should first be given to the sentence which would have been appropriate had no death been caused and then the extent to which an increase was merited due to the fact of death should be addressed. It was held that the sentences of 6 years imprisonment for manslaughter would be increased to 14 years and would run concurrently with the 8 year sentence for conspiracy.

3.98 In *R v Willoughby*<sup>89</sup> the appellant was convicted of reckless arson contrary to sections 1(2) and (3) of the *Criminal Damage Act 1971* and manslaughter. He received a total sentence of 12 years imprisonment, 7 years for arson and 12 years for manslaughter, which were to run concurrently. The appellant, the owner of an old disused pub, recruited the deceased to help him set fire to the building because he was in serious debt.

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<sup>87</sup> [1994] 3 All ER 79; [1995] 1 AC 171.

<sup>88</sup> *R v Wacker* [2002] EWCA Crim 1944, paragraph 38.

<sup>89</sup> [2004] EWCA Crim 3365; [2005] 1 Cr App R 495.

In an explosion following ignition the building collapsed, killing the deceased and injuring the appellant.

3.99 The trial judge told the jury that responsibility for the death arises (1) where there is a duty of care owed by the defendant to the victim, (2) where the duty of care was breached and caused the death of the victim and (3) that it was such that it was grossly negligent and therefore a crime.<sup>90</sup> The Crown claimed that although both the deceased and the appellant were engaged in the joint illegal enterprise of committing arson, there was still a duty of care on the appellant to safeguard his health and welfare when the deceased was on or near the pub.<sup>91</sup>

3.100 Although counsel for the appellant admitted that an owner of a building can be guilty of gross negligence manslaughter where the relationship sensibly permits a duty of care to be established, he questioned whether an owner of a public house owed a duty to ensure the safety of co-actor in relation to the spreading of petrol. Counsel attempted to distinguish *R v Wacker*<sup>92</sup> from the present case on the basis that the illegal immigrants were vulnerable and utterly dependant on the driver to ensure they had adequate air, whereas here the two parties who set fire to the pub were of equal degree. Counsel claimed that while it was possible to smuggle people safely it was not possible to burn a building down safely by the use of petrol.

3.101 During the appeal, counsel for the Crown (who had not appeared at trial for the Crown) argued that it would have been simpler if the Crown had presented the case as one of unlawful act manslaughter rather than gross negligence manslaughter. He did not however concede that the case could not be one of gross negligence manslaughter and stated that the issues of whether the appellant owed a duty to the deceased, whether there was a breach of that duty causing death and whether the appellant's behaviour was so grossly negligent as to merit criminal punishment was for the jury to decide. The judge was simply to identify the factors which could have given rise to proximity in the case, without having to go into details of proximity as a legal concept.

3.102 The Crown argued further that the relationship between the appellant and the deceased was an unequal one where the appellant decided to set fire to his own premises for financial gain and engaged the deceased to assist him in that object by setting fire to the petrol. In the light of the jury's conviction on the charge of arson, the Crown contended that there could be no defence to unlawful and dangerous manslaughter.

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<sup>90</sup> *R v Willoughby* [2004] EWCA Crim 3365, paragraph 9.

<sup>91</sup> *Ibid.*

<sup>92</sup> [2002] EWCA Crim 1944; [2003] 4 All ER 295.

3.103 The Court of Appeal held that the jury's finding of guilt in relation to arson showed that they were sure that the appellant, on his own, or jointly with the deceased, had deliberately spread petrol in the pub, intending that, or reckless as to whether it be destroyed and reckless as to life. According to the court, provided the jury was also sure that his conduct had caused the death, they were bound to convict of manslaughter.<sup>93</sup> The court thought that it was unfortunate that the Crown had not presented the manslaughter case against the appellant along these lines because it would have been more straightforward.

3.104 The court accepted that there could not be any legal duty to look after the deceased's health and welfare arising solely out of the fact that the appellant owned the premises. Nonetheless, the fact that he was the owner, that the premises were to be destroyed for his benefit and that he recruited the deceased to help him to spread petrol were all factors which were capable of giving rise to a legal duty of care on the part of the appellant.<sup>94</sup>

3.105 The Court of Appeal observed that in *R v Wacker*<sup>95</sup> it was accepted that public policy concerns determine whether a duty of care exists.<sup>96</sup> The Court also observed that the expression "the jury must go on" in *R v Adomako*<sup>97</sup> meant that the existence of a duty of care, the fact that the breach caused death and the judgment of criminality are all "usually matters for the jury"<sup>98</sup> although there may be exceptional cases, such as the doctor-patient relationship where the judge can properly direct a jury that a duty exists.<sup>99</sup>

3.106 The trial judge's focus on ownership as giving rise to a duty was deemed to be a misdirection, but not a material one due to his identification of other factors such as the appellant's recruitment of the deceased to spread petrol with him so as to set fire to the pub. In dismissing the appeal, the court held that even if there were a material misdirection in relation to duty of care, the manslaughter conviction would not be unsafe owing to the jury's verdict on the arson charge.

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<sup>93</sup> *R v Willoughby* [2004] EWCA Crim 3365, paragraph 17.

<sup>94</sup> *Ibid* at paragraph 20.

<sup>95</sup> *R v Wacker* [2002] EWCA Crim 1944; [2003] 4 All ER 295.

<sup>96</sup> *R v Willoughby* [2004] EWCA Crim 3365, paragraph 20.

<sup>97</sup> [1994] 3 All ER 79; [1995] 1 AC 171.

<sup>98</sup> *R v Willoughby* [2004] EWCA Crim 3365, paragraph 22.

<sup>99</sup> *Ibid* at paragraph 23.

## **J Manslaughter and the medical profession**

3.107 When people professing special knowledge and skill such as doctors find themselves charged with manslaughter, it is not usually because death resulted due to their omission to act, rather because they discharged their duties badly, for example they botched an operation, failed to notice a disconnected tube or injected the deceased with the wrong medicine. Lord Hewart CJ addressed the duty owed by a person who holds himself out as an expert in some field in *R v Bateman*.

“If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward.”<sup>100</sup>

3.108 Whether the accused failed to properly discharge the duty owed to the deceased depends upon whether his or her behaviour fell below the standard expected of a person in their situation. According to the court in *R v Bateman*, the standard of care which applied to experts such as doctors was a question of law. It was for the jury to decide whether the standard had been reached by the accused. In discharging their duties, doctors were required to reach a *reasonable* standard of care and competence.

3.109 Lord Hewart CJ distinguished between instances of incompetence and cases of recklessness in discussing whether a different standard should be applied to an unqualified person than to a qualified medical practitioner. He was of the opinion that in instances of incompetence the standard to be applied to the unqualified person should be the same as that applied to the qualified practitioner because the unqualified accused probably held him or herself out to possess special skill and knowledge and voluntarily undertook to treat the patient.

3.110 Lord Hewart CJ said that a person could be reckless in undertaking the treatment and also reckless in continuing it.<sup>101</sup> Recklessness in this context refers to the accused’s negligence in giving medical treatment which he or she did not have the skill to provide. Thus, a man would be

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<sup>100</sup> (1925) 19 Cr App R 8, 12.

<sup>101</sup> *Ibid* at 13.

negligent if he recklessly undertook a case which he knew, or should have known, to be beyond his personal capabilities or if he:

“undertook, and continued to treat, a case involving the gravest risk to his patient, when he knew he was not competent to deal with it, or would have known if he had paid proper regard to the life and safety of his patient.”<sup>102</sup>

3.111 In New Zealand the same standard of care applies to an unqualified person as it does to a qualified one. The Court in *R v Myatt*<sup>103</sup> stated that a greater degree of care than a reasonable degree of care is not required of a person with some professional qualification. The court held that an objective test of negligence under sections 155 and 156 of the *Crimes Act* applied. Except in a case of necessity, anyone who undertakes to administer medical treatment is under a legal duty to exercise the reasonable knowledge, skill and care called for from a medical practitioner holding himself out as able to provide that kind of treatment. Similarly, a person who undertakes the driving of a power boat is under a legal duty to exercise reasonable knowledge, skill and care in driving it such as would be exercised by a reasonable boatman or boatwoman. The position is more or less the same under section 156. The standard of care is not raised by the fact that the defendant happens to have special skills or a certain certificate testifying to a certain qualification.<sup>104</sup>

3.112 Section 222 of the *German Criminal Code* provides for the offence of negligent homicide, *fahrlässige Tötung*. A person who causes death through negligence can be fined or imprisoned for up to 5 years under this section.<sup>105</sup> Medical practitioners must not infringe recognised and accepted practices or codes of conduct. Doctors will invariably be guilty of malpractice if they operate without making a full diagnosis. Doctors are responsible for the supervision of hospital aides and any order given by them which constitutes malpractice can exculpate a nurse following that order. Although a doctor who causes the death of a patient by omitting to authorise a necessary treatment or procedure fails in his duty of care to that patient, he will not be charged with causing such death unless the patient would have probably, if not certainly, lived had the treatment or procedure been ordered.

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<sup>102</sup> R v Bateman (1925) 19 Cr App R 8, 13.

<sup>103</sup> 1990 NZLR LEXIS 900; [1991] 1 NZLR 674.

<sup>104</sup> See *Myatt* [1991] 1 NZLR 674, 682.

<sup>105</sup> See §222 on Fahrlässige Tötung in Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1217. „Wer durch Fahrlässigkeit den Tod eines Menschen verursacht wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.“ A translation of the section is available at the German Law Archive, <http://www.iuscomp.org/gla/>



Doctors are expected keep abreast of changes in their relevant area of specialisation so as to maintain and develop the expertise which is necessary for their profession.

3.113 Where an operation or other treatment involves several doctors as well as aides, the standard of care of each participant is dependant on their individual areas of responsibility. Medical consultants in Germany must, as a matter of principle, be able to depend on the fault-free participation of colleagues with different expertise, for example a surgeon should be able to rely on an anaesthetist's competence in deciding whether a very weak patient or one suffering from Anorexia Nervosa is fit to undergo general anaesthetic.<sup>106</sup> The precept of trust and faith in colleagues does not apply in relation to inexperienced interns, however.

**(a) The Irish civil standard of medical negligence**

3.114 There have been no cases of gross negligence manslaughter involving the medical profession in Ireland. There have however, been many civil actions arising from the injury or death of patients or their unborn children caused by high levels of negligence on the part of doctors and other medical practitioners such as anaesthetists<sup>107</sup> and sonographers.<sup>108</sup> This section discusses the civil standard of medical negligence in Ireland, with a view to determining how this standard compares with the standard of negligence required to establish gross negligence manslaughter in England. English medical manslaughter cases such as *R v Adomako*<sup>109</sup> and *R v Misra; R v Srivastava*<sup>110</sup> will be discussed in the next section.

3.115 *Dunne v National Maternity Hospital*<sup>111</sup> is the leading Irish case on the civil standard of negligence which applies in medical negligence cases. The plaintiff was a mentally handicapped spastic quadriplegic who

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<sup>106</sup> See Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1220.

<sup>107</sup> See *O'Donovan v Cork County Council* [1967] IR 173 where the plaintiff's cause of action succeeded on the basis that her husband died during a routine appendicectomy where the anaesthetist improperly treated the ether convulsions suffered by the deceased and did not know the correct medical course of action to take in dealing with this rare medical condition.

<sup>108</sup> See *Cunningham v The Governor and Guardians of the Coombe Lying-in Hospital* High Court (Macken J) 5 September 2005 where the sonographer and her superior were found civilly liable for negligence for failing to properly diagnose the chorionicity of the twins which led to the mismanagement of the plaintiff's pregnancy and the stillbirth of her babies.

<sup>109</sup> [1994] 3 All ER 79; [1995] 1 AC 171.

<sup>110</sup> [2004] EWCA Crim 2375; [2005] 1 Cr App R 328.

<sup>111</sup> [1989] IR 91; [1989] ILRM 735.

suffered irreversible brain damage before birth. In the High Court the plaintiff alleged that the brain damage was a consequence of the defendants' negligent management of his mother's labour and his birth. Sitting with a jury, Costello J awarded £1,039,334 in damages against the defendants. The defendants appealed against the finding of liability and the assessment of damages.

3.116 The plaintiff's mother was admitted to the National Maternity Hospital and experienced strong foetal movement which lasted for 15 minutes. She asked the nurse to summon the doctor. The nurse telephoned the doctor and informed him that labour was progressing very slowly. The doctor ordered the plaintiff's mother to walk around so as to speed up labour. Two hours later the doctor was told that there had been no progress and he directed the plaintiff's mother to be placed on an oxytocin drip.

3.117 When the assistant master examined her he found that dilation had progressed somewhat but labour was still slow-moving. He punctured the membrane and found grade 2 meconium. He carried out a blood test on the plaintiff and the results were normal. The assistant master then attached a monitor to the plaintiff's scalp. The doctor was told that the plaintiff's mother was going to give birth to the first twin. 15 minutes after the plaintiff was born the second twin was born dead.

3.118 Regarding the brain damage suffered by the plaintiff while his mother was in labour, the dispute in the Supreme Court focussed on the timing and cause of the damage and to his probable foetal condition and health both prior to and after the injury. Finlay CJ stated that the Supreme Court as an appeal court could not and should not express a view as to which of two conflicting expert opinions it would prefer.<sup>112</sup> The Chief Justice mentioned *Daniels v Heskin*<sup>113</sup> and *O'Donovan v Cork County Council*<sup>114</sup> and held that the true test for establishing negligence in relation to a medical practitioner's diagnosis or treatment:

- is whether he has been proved to have been guilty of such a failure that no other equally qualified doctor or specialist of ordinary skill would be guilty of if acting with ordinary care.
- Negligence will not be established against a doctor merely because he departed from a general and approved practice, unless it is also proved that the course followed by him was one which no doctor of the same specialisation and skill would have followed had he been

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<sup>112</sup> *Dunne v National Maternity Hospital* [1989] ILRM 735, 744.

<sup>113</sup> [1954] IR 73, (1952) 86 ILTR 41.

<sup>114</sup> [1967] IR 173.

taking the ordinary care required by a person of his skill and qualifications.

- A doctor who seeks to defend his conduct by establishing that he followed a generally approved medical practice, will not escape liability if the plaintiff demonstrates that such practice has inherent defects which should be obvious to anyone giving the issue proper consideration.
- Where an honest difference of opinion exists between doctors in relation to which of two ways of treating a patient is preferable, there is no ground for leaving negligence to the jury on the basis that a doctor followed one course rather than the other.
- The function of the jury or judge is to decide whether the course of treatment followed conformed with the careful conduct of a medical practitioner of like specialisation and skill to that professed by the defendant - not to pronounce upon which of two alternative courses of treatment is in their opinion preferable.
- In a jury trial the decision as to whether a certain medical practice is or is not generally approved and accepted must be left to the jury.<sup>115</sup>

3.119 For a practice to be “general and approved” it need not be universally accepted, but a substantial number of reputable practitioners holding the relevant qualifications and skills must indeed approve and adhere to it.<sup>116</sup> The test set out by the Chief Justice was applicable to both diagnosis and treatment.

3.120 The Supreme Court approached the tragic case with the awareness that while it was very important to society to allow medical science develop without doctors working under the frequent threat of unsustainable legal claims, it was undesirable and unjustifiable to allow a permissive standard of care govern assessments of what is and is not medical negligence since patients are totally dependent on the skill and care of their doctors and nurses. The Supreme Court recognised that it was vital that courts give equal weight to both of these considerations in medical negligence cases.

3.121 Finlay CJ held that it was open to the jury to accept the view put forward by expert witnesses for the plaintiff that brain injury suffered by the

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<sup>115</sup> *Dunne v National Maternity Hospital* [1989] ILRM 735, 745-6.

<sup>116</sup> Where a negligence action is taken against hospital administrators on the basis the way in which doctors and nurses following hospital practice or procedure diagnosed or treated illness was defective, the administrators’ conduct is to be tested as though they had personally carried out the treatment or diagnosis in accordance with such practice or procedure. See *Dunne v National Maternity Hospital* [1989] ILRM 735, 746.

plaintiff occurred after the intense period of the labour despite the defendants' expert evidence to the contrary. Applying the principles of *O'Donovan v Cork County Council*<sup>117</sup> Finlay CJ said that it was clearly part of the plaintiff's case against the defendants that by identifying only one foetal heart in a known twin pregnancy they were diverging from a medical practice generally accepted and approved by reputable obstetricians and administrators of maternity hospitals. The Chief Justice held that the plaintiff had adduced evidence which, if accepted by the jury, could support such a case. He stated that he was satisfied that if the jury found that the defendants had deviated from a general and approved practice then it would have been open to a jury who accepted the opinions of the plaintiff's expert medical witnesses to hold that the course being taken by the defendants was one which no hospital and/or consultant obstetrician of ordinary skill acting with due care would have followed.<sup>118</sup>

3.122 If however, the jury found that the defendants had followed a general and approved practice, they could nonetheless find them negligent if, having accepted the opinions of the plaintiff's medical experts they were satisfied that the practice had inherent defects which ought to have been obvious to any maternity hospital, medical administrator or to any consultant obstetrician giving the matter proper consideration.<sup>119</sup>

3.123 In directing the jury, the judge had stated that the concept of negligence was a very simple one which hinged on the concept of a duty of care and a breach thereof. He stated that the doctor owed a duty to use reasonable care and skill in treating the expectant mother and in looking after her unborn twins and deciding what course and what treatment were in the best interests of the plaintiff and her babies.<sup>120</sup>

3.124 The standard which the jury was told to apply was that of the ordinary skilled obstetrician exercising the ordinary degree of professional skill. The jury was not to apply their own judgment as to what in their view the doctor should have done, because they were not obstetricians. The trial judge stressed that it was the jury's task to decide in the light of the evidence whether the doctor fell below the standard of the ordinary skilled obstetrician in the handling of the plaintiff and the test was the same in relation to the hospital.

3.125 Finlay CJ held that the trial judge's direction to the jury on medical negligence was inadequate. The trial judge failed to point out to the

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<sup>117</sup> [1967] IR 173.

<sup>118</sup> *Dunne v National Maternity Hospital* [1989] ILRM 735, 752.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid* at 753.

jury that if they were satisfied that there was a general and approved practice of monitoring two foetal hearts which the defendants failed to follow, that they should not find the defendants negligent unless they also were satisfied that no consultant obstetrician or hospital administrator would have so deviated if they were taking ordinary care.

3.126 Alternatively, if the jury concluded that the monitoring of a single foetal heart was a general and approved practice, they could not find the defendants liable for negligence unless they were convinced that the practice had inherent defects which should have been obvious to a hospital medical administrator or consultant obstetrician giving the matter due consideration. The Chief Justice believed that a retrial was appropriate because the trial judge's failure was not merely one of wording or phraseology, but marked a failure to explain the legal principles and standards applicable to medical negligence cases.<sup>121</sup>

**(b) *Manslaughter and the medical profession in the UK***

3.127 After *Andrews v DPP*<sup>122</sup> most British manslaughter cases that did not involve unlawful and dangerous acts focused on recklessness so much so that there was great confusion until recently as to whether negligence still existed as a basis for establishing manslaughter. The *R v Bateman*<sup>123</sup> test of gross negligence was most frequently applied in medical negligence cases. *R v Akrele*<sup>124</sup> involved a Nigerian doctor who caused the deaths of ten children by giving them too strong a dose of a particular medicine. The doctor was convicted of manslaughter and appealed to the Privy Council which said that the judge had been right in directing the jury along the lines of the *Bateman* test. However the Council held that the defendant, in dispensing too strong a mixture on one single occasion without a high degree of care was not grossly negligent.

3.128 Reference was made to two earlier cases of medical negligence which resulted in death. In *R v Noakes*<sup>125</sup> two bottles of medicine were sent to a chemist who accidentally mixed them up with the result that the customer took the wrong one and died. Erle CJ left the case to the jury but suggested to them that the negligence was not grave enough to justify convicting the chemist of a felony.

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<sup>121</sup> *Dunne v National Maternity Hospital* [1989] ILRM 735, 753.

<sup>122</sup> [1937] 2 All ER 552.

<sup>123</sup> (1925) 19 Cr App R 8.

<sup>124</sup> [1943] 1 All ER 367.

<sup>125</sup> (1886) 4 F & F 920; 176 ER 849.

3.129 In *R v Crick*<sup>126</sup> a person who was not a qualified medical practitioner administered a dangerous drug which caused death. Pollock CB stated:

“If the prisoner had been a medical man I should have recommended you to take the most favourable view of his conduct, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.”<sup>127</sup>

3.130 In *R v Akrele*<sup>128</sup> the Privy Council supported the emphasis placed by previous courts on the need to be cautious about alleging a professional doctor acting in the course of his or her profession had been grossly negligent for the purposes of the criminal law and held that the trial judge’s direction stressing the consequences of the doctor’s action was wrong. It was held that negligence depended on the probable, not the actual result and therefore the result of an act could not add to its criminal nature.

3.131 Owing to the strict application of the *Bateman* test and the fact that medical practitioners tended to be largely given the benefit of the doubt as to whether their negligence went beyond a question of civil compensation, there were few convictions of doctors for gross negligence manslaughter in England for most of the 20<sup>th</sup> century. In recent years, however, there has been a notable increase in convictions of doctors for gross negligence manslaughter in Britain.

3.132 The question as to the correct test of involuntary manslaughter by breach of duty in the professional context arose in three separate English Court of Appeal’s decisions in 1993.<sup>129</sup> Two of the three appeals involved gross negligence by medical practitioners.<sup>130</sup> The first appeal concerned two inexperienced, junior doctors, one of whom was supervising the other in administering a prescribed drug by lumbar puncture. The first defendant thought that the second defendant was supervising the whole procedure, including the administration of the cytotoxic drugs, whereas the second defendant understood that he was only to supervise the use of the needle to make a lumbar puncture but was not responsible for the administration of the cytotoxic drugs.

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<sup>126</sup> (1859) 1 F & F 519; 175 ER 835.

<sup>127</sup> *Ibid* at 520; 835.

<sup>128</sup> [1943] 1 All ER 367.

<sup>129</sup> *R v Prentice and another, R v Adomako, R v Holloway* [1993] 4 All ER 935.

<sup>130</sup> The third case, *R v Holloway* [1993] 4 All ER 935, 954 involved a qualified electrician who had wired a domestic central heating system.

3.133 The second defendant handed the first defendant a syringe off the trolley prepared by a senior nurse, but neither doctor checked the labels on the box of syringes being used or on the labels on the syringes themselves before the drug was administered.<sup>131</sup> Unfortunately the wrong drug was administered and the patient died. Both doctors were charged with manslaughter and the prosecution claimed they had been reckless in failing to check the labels. The jury had been directed along the lines of *R v Lawrence*<sup>132</sup> that the defendants were reckless if it was proven:

- that they had created a serious risk of causing harm to the patient;
- that the risk would have been obvious to any ordinary prudent doctor of the experience, knowledge and status of the defendants when performing the task in question; and
- that they gave no thought to the possibility of there being any such risk.

The defendants were convicted.

3.134 In the second appeal *R v Adomako*<sup>133</sup> the defendant anaesthetist had similarly been charged and convicted of manslaughter. He had been on duty during an eye operation. At some point during the operation the tube from the ventilator supplying oxygen to the patient - who was totally paralysed due to Vecuronium and was unable to breathe by himself - became disconnected from the Malindrot connector and the defendant failed to notice the disconnection for six minutes. As a result the patient suffered a heart attack and died. At his trial medical evidence was adduced that the defendant had displayed a gross dereliction of care. The judge directed the jury that the test to be applied was whether the defendant had been guilty of gross negligence.

3.135 In discussing whether the mens rea of “involuntary manslaughter involving breach of duty” was to be characterised as gross negligence or as *Lawrence/Caldwell* recklessness (as modified in *R v Reid*),<sup>134</sup> the Court of Appeal held that *Andrews v DPP*<sup>135</sup> was still good law, and applied to both

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<sup>131</sup> At trial the judge accepted that if the first defendant had been handed the syringe by either of the consultants, that “might well be a sufficient excuse” for not checking the label himself. It was submitted by defence counsel that it followed that as the first defendant was being supervised by another more senior doctor, the second defendant, that too would be a sufficient excuse. In such circumstances, the first defendant’s conduct was not properly to be described as reckless or grossly negligent.

<sup>132</sup> [1982] AC 510; [1981] 1 All ER 974.

<sup>133</sup> [1993] 4 All ER 935.

<sup>134</sup> 91 Cr App R 263; [1990] RTR 276.

<sup>135</sup> [1937] 2 All ER 552.

appeals. Lord Taylor of Gosforth CJ addressed *R v Caldwell*<sup>136</sup> and said it was a basic premise of Lord Diplock's formulation that the accused created the obvious and serious risk. The expression obvious risk meant obvious to the ordinary prudent person. Lord Taylor stated:

“Everyone knows what can happen when you strike a match, and practically everyone, where as driver or passenger, knows the risks of the road. But in expert fields where duty is undertaken, be it by a doctor or an electrician, the criteria of what the ordinary prudent individual would appreciate can hardly be applied in the same way.”<sup>137</sup>

3.136 The Court of Appeal said that the way in which the *R v Lawrence*<sup>138</sup> test of motor manslaughter was applied in *R v Seymour*<sup>139</sup> was a result of the co-existence of the common law and statutory offences of reckless driving - the offence of reckless driving in Britain was abolished by section 1 of the *Road Traffic Act 1991*, which substituted ‘causing death by dangerous driving’. Nonetheless, the court felt it was unlikely that *R v Lawrence* would be reversed following the failed attempt at reversal in *R v Reid*.<sup>140</sup> Thus, apart from motor manslaughter cases, it was held that the proper test in manslaughter by breach of duty cases was the gross negligence test established in *Andrews v DPP*<sup>141</sup> and *R v Stone and Dobinson*<sup>142</sup> whereby manslaughter by breach of duty would be proved if:

- there was a duty;
- breach of that duty caused death; and
- there was evidence of gross negligence which justified a conviction in the jury's opinion.

3.137 Proof of any of the following states of mind in the defendant would permit a jury to find gross negligence:

- indifference to an obvious risk of injury to health;
- actual foresight of the risk coupled with the determination nevertheless to run it;

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<sup>136</sup> [1982] AC 341; [1981] 1 All ER 961.

<sup>137</sup> *R v Prentice and another, R v Adomako, R v Holloway* [1993] 4 All ER 935, 943.

<sup>138</sup> [1982] AC 510; [1981] 1 All ER 974.

<sup>139</sup> [1983] 2 AC 493; [1983] 2 All ER 1058.

<sup>140</sup> 91 Cr App R 263; [1990] RTR 276.

<sup>141</sup> [1937] 2 All ER 552.

<sup>142</sup> [1977] 2 All ER 341; [1977] QB 354.



- an appreciation of the risk coupled with an intention to avoid it, but with such a high degree of negligence in the attempted avoidance that the jury considered it justified conviction;
- inattention or failure to advert to a serious risk which went beyond ‘mere inadvertence’ in respect of an obvious and important matter which the defendant’s duty demanded that he address.

3.138 The Court of Appeal also made the important decision of stating that in the future when directing juries on involuntary manslaughter by breach of duty, judges should avoid using the words ‘reckless’ and ‘recklessness’ regardless of the dicta in *R v Seymour*<sup>143</sup> and in *Kong Cheuk Kwan v R*<sup>144</sup> which held that the word reckless was preferable to the word negligence with an epithet such as “gross”, “criminal” or “culpable”.

3.139 In relation to the first appeal *R v Prentice and another*,<sup>145</sup> on the trial judge’s instructions the jury were bound to convict once they found that the defendant gave no thought to the possibility of there being any risk. Defence counsel argued that the jury could have taken into account the various mitigating circumstances in deciding whether a high level of negligence was displayed if they had been given the proper gross negligence test.

3.140 Lord Taylor of Gosforth CJ summarised the various excuses and mitigating circumstances in the case. The first appellant was ordered to give the treatment without the consultant who prescribed it giving any instructions, despite the fact that the first appellant was inexperienced, reluctant to give the treatment and totally unaware of the likely fatal consequences of giving vincristine by lumbar puncture. The first appellant did not have the data chart on the cytotoxic trolley because that trolley was not in use. The senior nurse was not present, leaving only two students at the scene. Moreover, having asked for supervision and believing that the second appellant was supervising the whole treatment, he was actually handed each of the two syringes in turn by the second appellant and administered the drugs in his presence.

3.141 The second appellant for his part, believed that he was only required to supervise the insertion of the lumbar puncture needle by an inexperienced doctor. He understood the drugs were for administration by lumbar puncture. He had no special knowledge of cytotoxic drugs.

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<sup>143</sup> (1983) 76 Cr App R 211, 216.

<sup>144</sup> (1985) 82 Cr App R 18, 26.

<sup>145</sup> [1993] 4 All ER 935.

Although the box in which the drugs came was properly labelled it was bad practice to put the two syringes into the same box.<sup>146</sup>

3.142 The Court of Appeal held that the jury were not given an opportunity to take the mitigating circumstances into account on the issue of gross negligence. Had the jury been given such an opportunity, they might well have decided that the prosecution had failed to establish such a high level of negligence as would be sufficient for a finding of manslaughter. Thus, the court allowed both appeals and quashed the convictions.

3.143 In *R v Adomako*<sup>147</sup> the Court of Appeal dismissed the anaesthetist's appeal. As stated above, the appellant failed to notice that a disconnection of the tube from the Malindrot connector had occurred until after the deceased suffered cardiac arrest. Although the appellant was aware such a disconnection could take place, he had never experienced one before. He testified at trial that whenever he fitted the ventilator tube to the connector he always taped it to make sure it did not become disconnected due to an inadvertent movement by one of the operating doctors. However, on this occasion the original anaesthetist in charge had fitted the tube into the Malindrot connector, before the appellant took over from him.

3.144 When the appellant noticed that the deceased's pulse was low he checked the tubes running from the ventilator to the body, but did not check the Malindrot connector, or the tube that ran from the connector into the patient's mouth. He failed to notice that the deceased was getting progressively blue, a sign of lack of oxygen. He did not think there was an emergency and thus did not take any other precautions until the Dynamap alarm went off. He then injected the patient with atropine, thinking that he had suffered an oculo-cardiac reflex which sometimes occurs during eye operations. Shortly afterwards he noticed that the ECG was displaying a straight line, indicating that the patient had suffered cardiac arrest. The operating doctor stopped the operation and noticed that the ventilator tube had been disconnected. By the time it was reconnected it was too late.

3.145 Expert witnesses were extremely critical of the appellant's actions as a medical professional. One witness said that the standard of care that the patient received was abysmal. Another remarked that any competent anaesthetist should have recognised complete disconnection of the tube within 15 seconds. The appellant's conduct was criticized as amounting to "a gross dereliction of care."

3.146 The appellant failed to observe that the patient was not breathing. He failed to observe any dial which would indicate that. There were two, or

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<sup>146</sup> [1993] 4 All ER 935, 949.

<sup>147</sup> *Ibid* at 949-954.

if the ventilator alarm was on, three dials which would have shown that the patient was no longer breathing. The appellant did not notice those warning signals. By failing to take precautions for six minutes, the appellant allowed the patient to get into an irreversible position where he suffered fatal brain damage.<sup>148</sup>

3.147 Defence counsel argued that it was not appropriate for the jury to be directed on the basis of gross negligence and that they should have been directed on the basis of recklessness along the lines of the Diplock formula. Nonetheless, despite the trial judge's unhelpful reliance on extracts from previous gross negligence cases which were more likely to confuse jurors than aid them, the Court of Appeal was satisfied that his directions as to gross negligence were sufficient. The court held that it was open to the jury to conclude that a guilty verdict was justified by the appellant's failure to perform his sole duty to see that his patient was breathing satisfactorily and to cope with the breathing emergency which should have been obvious to him. The jury was entitled to conclude that his failure was more than mere inadvertence and constituted the level of gross negligence necessary for manslaughter.<sup>149</sup>

3.148 The Court of Appeal dismissed the appeal but certified that a point of law of general public importance was involved in the decision to dismiss the appeal, questioning whether in directing the jury in cases of manslaughter by criminal negligence not involving driving but involving a breach of duty, it is sufficient to adopt the gross negligence test set out by the Court of Appeal in *R v Adomako*<sup>150</sup> following *R v Bateman*<sup>151</sup> and *Andrews v DPP*<sup>152</sup> without reference to the test of recklessness as defined in *R v Lawrence*<sup>153</sup> or as adapted to the circumstances of the case.<sup>154</sup>

3.149 The convicted anaesthetist took his appeal to the House of Lords<sup>155</sup> where it was held that a person was properly convicted of involuntary manslaughter by breach of duty if:

- the defendant was in breach of a duty of care to the victim who died;

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<sup>148</sup> *R v Adomako* [1993] 4 All ER 935, 952.

<sup>149</sup> *Ibid* at 954.

<sup>150</sup> *Ibid* at 949-954.

<sup>151</sup> (1925) 19 Cr App R 8.

<sup>152</sup> [1937] 2 All ER 552; [1937] AC 576.

<sup>153</sup> [1982] AC 510; [1981] 1 All ER 974.

<sup>154</sup> *R v Adomako* [1993] 4 All ER 935, 959.

<sup>155</sup> *R v Adomako* [1994] 3 All ER 79.

- that the breach of duty caused the death of the victim; and
- that the breach of duty was such as to be characterised as gross negligence and therefore a crime.

3.150 According to Lord Mackay of Clasper LC, the issue of whether the alleged breach of duty amounted to gross negligence for the purposes of manslaughter depends on the seriousness of the breach of duty committed by the defendant in all the circumstances in which he was placed when the death occurred. Lord Mackay stated that the jury must decide whether the extent to which the defendant's conduct departed from the proper standard of care required of him or her:

“involving as it must have done *a risk of death to the patient*, was such that it should be judged criminal.”<sup>156</sup>

3.151 Lord Mackay further stated that despite the circularity of the test, it was the correct test of how far conduct must depart from accepted standards in order to be judged criminal for the purposes of manslaughter. The issue is one of degree and he concluded that an attempt to specify the degree more closely would only achieve “a spurious precision.”<sup>157</sup>

3.152 In overturning *R v Seymour*<sup>158</sup> on the basis that the underlying statutory provisions on which it rested had been repealed by the *Road Traffic Act 1991*, Lord Mackay said that whilst judges could use the word “reckless” in its ordinary, everyday meaning if they thought that it was appropriate on the facts of the case, they were under no obligation to direct the jury on the legal meaning of “reckless” and indeed it would be wrong to give detailed and elaborate directions on the word in gross negligence cases. In relation to the risk of death involved, the central point was whether the jury is satisfied that the conduct of the defendant was so bad in all the circumstances as to amount to a criminal act or omission.

3.153 Furthermore Lord Mackay was not in favour of elaborate and rigid jury directions due to the breadth of circumstances to which a charge of involuntary manslaughter may apply. He did however applaud the trial judge's summing up in the instant case as a “model of clarity” where the jury had been directed that although doctors are not all expected to possess the “great skill of the great men in Harley Street” they are not allowed to practise medicine unless they have acquired a certain amount of skill. According to the trial judge, doctors must display a reasonable amount of skill in treating their patient. The jury was told to judge them on the basis

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<sup>156</sup> *R v Adomako* [1994] 3 All ER 79, 87 [emphasis added].

<sup>157</sup> *Ibid* at 87.

<sup>158</sup> [1983] 2 AC 493; [1983] 2 All ER 1058.

that they are skilled people, but not necessarily the most skilful medical practitioners in the profession – a criminal conviction would only be appropriate if the jury was convinced (a) that the doctor in question fell below the standard of skill which is the least qualification which any doctor should have and (b) that the doctor negligently caused death by doing something which no reasonably skilled doctor would have done.<sup>159</sup>

3.154 Lord Mackay stated that the trial judge’s reference to “doing something which no reasonably skilled doctor would have done” simply revealed a concern to prevent a conviction unless that condition was satisfied. It was incorrect, he said, to regard it as stating a sufficient condition for conviction.<sup>160</sup> Elsewhere in the trial judge’s summing up, emphasis was placed on the need for a high degree of negligence before a conviction for manslaughter would be justified. The anaesthetist’s appeal was accordingly dismissed.

3.155 Apart from overturning *R v Seymour*<sup>161</sup> and officially reinstating *Andrews v DPP*<sup>162</sup> as the authority on gross negligence manslaughter in Britain, the House of Lords took the bold step of requiring the risk posed by the defendant’s negligence to be one of *death only* rather than *death or serious bodily harm*.

3.156 In *R v Misra: R v Srivastava*<sup>163</sup> the deceased, a healthy 31-year-old man, underwent routine surgery on his patella tendon. The skin above the knee was cut and a metal wire was inserted, after which the wound was stitched up. The deceased’s leg was then placed in plaster. No post-operative complications were expected. The deceased spent some time in the recovery ward and then was transferred to the orthopaedic ward. The appellants were involved in the post-operative care of the deceased. Unfortunately the deceased’s wound became infected and the deceased died as a result of toxic shock syndrome four days after the operation.

3.157 During the manslaughter trial it was alleged that both doctors were grossly negligent with regard to the medical treatment provided to the deceased and that the patient died as a result of their failures. They were accused of unlawfully killing the deceased in that:

- as doctors they owed a duty of care to the deceased as their patient;

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<sup>159</sup> *R v Adomako* [1994] 3 All ER 79, 88.

<sup>160</sup> *Ibid.*

<sup>161</sup> [1983] 2 AC 493; [1983] 2 All ER 1058.

<sup>162</sup> [1937] 2 All ER 552; [1937] AC 576.

<sup>163</sup> [2004] EWCA Crim 2375; [2005] 1 Cr App R 328.

- in breach of that duty of care they failed to properly diagnose the nature of the deceased’s illness which they should have recognised was a serious infection necessitating aggressive supportive therapy and antibiotics, and omitted to take steps to ensure that he received suitable treatment;
- that breach of duty amounted to gross negligence; and
- the negligence was a substantial cause of the death of the deceased.

3.158 According to the prosecution, the appellants failed to appreciate that the deceased was seriously ill. Long before his death he had a high temperature and a high pulse rate but low blood pressure – these were “classic signs of infection”<sup>164</sup> which were persistent, severe and were obvious, or should have been, from the patient’s charts. The deceased was in need of urgent treatment and although other members of the medical team recognised this and suggested further treatment to the appellants, no appropriate treatment was provided by them.

3.159 The appellants were convicted of manslaughter by gross negligence in April 2003 and were sentenced to 18 months imprisonment, suspended for two years. After conviction, the trial judge certified that it was important that the crime of gross negligence manslaughter complied with the *European Convention of Human Rights (ECHR)* and he therefore deemed the case fit for appeal.

3.160 In evidence both of the appellants had admitted that they made mistakes in treating the deceased. Nonetheless, they genuinely had no idea how ill the deceased was at the time. They argued that they had done their best and had acted in good faith. They argued further that even if their individual mistakes were negligent, they were not of a level which would justify a finding that the negligence was gross.

3.161 The patient’s blood tests were available the day after the operation but were never obtained. The appellants did not enquire about the results and did not approach senior colleagues for assistance. According to Judge LJ, the deceased’s infection was not diagnosed when it should have been, and not correctly treated until it was far too late. The mistakes made by the appellants were elementary.<sup>165</sup>

3.162 One medical expert stated that after the patient was admitted to the orthopaedic ward his symptoms showed “severe sepsis” which should have been treated with broad spectrum antibiotics until a clear diagnosis was made. A professor of forensic toxicology expressed the view that following

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<sup>164</sup> *R v Misra: R v Srivastava* [2005] 1 Cr App R 328, 330 per Judge LJ.

<sup>165</sup> *Ibid.*

observations of the deceased at midday on the day after the operation, blood tests should have been conducted for kidney function. Moreover, the professor stated that where a patient continued to be ill and the blood tests were not received, it was up to the doctor to chase up the results.<sup>166</sup>

3.163 Several witnesses stated that final year students should recognise the severity of the deceased's illness from the repeated medical observations and poor urine output; every competent doctor should know that a person with a high temperature, a high pulse rate and low blood pressure was gravely ill. Accordingly the quality of care provided to the deceased by the appellants did not meet the standard to be expected of them.<sup>167</sup>

3.164 Regarding causation, most medical experts believed that on the balance of probabilities the deceased would have survived, if provided with proper medical attention by lunch-time or early afternoon on Sunday. The trial judge rejected a submission that the case should be withdrawn from the jury on the basis that the prosecution's case failed on causation. Counsel for the appellants criticised the judge's rejection of this submission, arguing that the deceased could have died from toxic shock syndrome in any case or from effects of the condition before negligence could be established against either appellant. However, the Court of Appeal held that the submission that there was no case to answer in relation to causation was untenable and application for leave to appeal on this ground was refused.<sup>168</sup>

3.165 The trial judge told the jury that more than a mere breach of duty or a serious mistake/error of judgment had to be proven before a doctor could be convicted of manslaughter. The jury was told to concentrate on whether the prosecution convinced them that the doctor's conduct fell so far below the standard to be expected of a reasonably competent and careful senior house officer that it was "truly exceptionally bad" and showed such an indifference to an obvious risk to the life of the deceased and such a departure from the standard to be expected as to amount to a criminal act or omission for the purposes of manslaughter.<sup>169</sup>

3.166 Counsel for the appellants argued that the jury's verdict of guilty of gross negligence manslaughter was perverse. Relying on the Law Commission for England and Wales' criticism of the circularity of the gross negligence manslaughter test,<sup>170</sup> counsel for the first appellant submitted that

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<sup>166</sup> *R v Misra; R v Srivastava* [2005] 1 Cr App R 328, 333.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid* at 334.

<sup>169</sup> *Ibid* at 335-336.

<sup>170</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 3.9 at 24.

the offence of gross negligence manslaughter lacked legal certainty, in that it required the trial judge to instruct the jury to convict the defendant if they were satisfied that his or her conduct is “criminal”. The relevant portion of the Law Commission report ends with the statement that:

“It is possible that the law in this area fails to meet the standard of certainty required by the European Convention on Human Rights (ECHR).”<sup>171</sup>

3.167 Article 7 of the *ECHR*, named “No punishment without law” was invoked by counsel for the first appellant. Article 7(1) provides that no-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. The Court of Appeal was of the view that the purpose of this article was to prevent the retrospective criminalisation and punishment of conduct which did not contravene the criminal law when it was carried out.

3.168 The Court of Appeal remarked that neither the House of Lords, nor the Court of Appeal was oblivious or indifferent to the need for the criminal law to be predictable before the *Human Rights Act 1998* was implemented. The courts had always been aware that vague criminal laws are undesirable - however sufficient certainty rather than absolute certainty is required.<sup>172</sup>

3.169 Counsel for the first appellant also invoked Article 6 of the *ECHR* which provides that a defendant is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Juries are not required to explain how their verdicts are reached. In relation to gross negligence manslaughter and the issues of circularity and uncertainty, the jury is required to decide whether the defendant’s conduct should be defined as a crime. Counsel for the first appellant submitted that this is an issue of law. He maintained that the absence of a reasoned judgment on legal matters diminishes the right to a fair trial.<sup>173</sup>

3.170 The Court of Appeal dismissed counsel’s submission on Article 6 of the *ECHR* because the jury had been satisfied that the conduct of the appellant doctors in discharging their duty to the deceased patient was *truly exceptionally bad* and showed a high level of indifference to an obvious and

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<sup>171</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 3.16 at 27.

<sup>172</sup> *R v Misra: R v Srivastava* [2005] 1 Cr App R 328, 339.

<sup>173</sup> *Ibid* at 340.



serious risk to the patient's life.<sup>174</sup> The Court of Appeal held that gross negligence, along with the other ingredients of the offence had been proved against the appellants and that it was unrealistic to suggest that the basis for the jury's decision could not readily be understood.<sup>175</sup>

3.171 Counsel for the first appellant referred to *R v G and Another*<sup>176</sup> a recent House of Lords decision, arguing that apart from the offence of causing death by dangerous driving, no serious criminal offence could be committed without *mens rea*. In that case Lord Bingham stated that conviction of serious crime should depend on proof not simply that the defendant's act or omission caused an injurious result to another but that his/her state of mind was culpable at the time.<sup>177</sup> According to counsel for the first appellant, this "salutary principle" was contravened unless some mental element such as recklessness was a necessary ingredient of gross negligence manslaughter.<sup>178</sup>

3.172 The Court of Appeal therefore had to consider whether English courts were no longer bound *R v Adomako*,<sup>179</sup> which confirmed *Andrews v DPP*,<sup>180</sup> following the implementation of the ECHR. It was submitted to the Court of Appeal that since *R v Adomako* the Director of Public Prosecutions looks for evidence of an obvious risk of death in cases such as the present one, and that if the risk were merely of serious injury alone, prosecution would not follow.<sup>181</sup> The Court of Appeal held that in gross negligence manslaughter cases the risk posed by the defendant's conduct has to be the risk of *death*. A conviction will no longer follow in England if the risk is merely of bodily injury or injury to health as the offence requires that a risk is posed to the life of an individual to whom the defendant owes a duty of care.<sup>182</sup>

3.173 In discussing whether gross negligence manslaughter should be replaced by and confined to reckless manslaughter, the Court of Appeal noted that not only had this argument been rejected in *R v Adomako*, but the

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<sup>174</sup> *R v Misra: R v Srivastava* [2005] 1 Cr App R 328, 349.

<sup>175</sup> *Ibid.*

<sup>176</sup> [2003] ENGL 50; [2003] 4 All ER 765; [2004] 1 Cr App R 237. Here the House of Lords departed from its controversial decision in *Metropolitan Commissioner v Caldwell* [1982] AC 341; [1981] 1 All ER 961.

<sup>177</sup> See *R v G and Another* [2003] ENGL 50, paragraph 32.

<sup>178</sup> *R v Misra: R v Srivastava* [2005] 1 Cr App R 328, 340.

<sup>179</sup> [1995] 1 AC 171; [1994] 3 All ER 79.

<sup>180</sup> [1937] 2 All ER 552; [1937] AC 576.

<sup>181</sup> *R v Misra: R v Srivastava* [2005] 1 Cr App R 328, 344.

<sup>182</sup> *Ibid.*

British Parliament had not introduced possible reforms on this offence discussed by the Law Commission for England and Wales. Moreover, the court in *R v G and Another*<sup>183</sup> discussed *R v Adomako* without criticising it or expressing any reservations.

3.174 The Court of Appeal held that the purpose of the references to negligence being of such a level as to amount to a crime in the gross negligence manslaughter test is to avoid the danger that the jury may equate “simple” negligence, which would not be sufficient for manslaughter, with negligence which involves a criminal offence. The question for the jury is whether the defendant’s negligence was gross negligence and consequently criminal and not whether it was gross, and additionally a crime.<sup>184</sup>

3.175 The Court of Appeal held that gross negligence manslaughter was not incompatible with the *ECHR* as the ingredients of the offence and the relevant legal principles are clear.

“The hypothetical citizen, seeking to know his position, would be advised that, assuming he owed a duty of care to the deceased which he had negligently broken, and that death resulted, he would be liable to conviction for manslaughter if, on the available evidence, the jury was satisfied that his negligence was gross. A doctor would be told that grossly negligent treatment of a patient which exposed him or her to the risk of death, and caused it, would constitute manslaughter.”<sup>185</sup>

3.176 Since 1994 Britain has a stricter test for establishing gross negligence manslaughter in place than that laid down in *The People (AG) v Dunleavy*<sup>186</sup> which stipulated that the risk posed by the defendant’s negligent act or omission be of *substantial personal injury to others*. The English test does not simply apply to doctors or other parties with special skill or knowledge, but applies to everyone accused of gross negligence manslaughter.

3.177 Horder argues that the strongest theory of subjectivism is the ‘practical reasoning’ account where the accused acts wrongfully in spite of the reasons for so acting, where those reasons objectively outweighed the reasons in favour and the accused knew this or suspected it to be the case. However a doctor caring for a patient does not act on the balance of reasons for or against doing what it is the best interests of that patient – if the doctor

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<sup>183</sup> [2003] ENGL 50; [2003] 4 All ER 765; [2004] 1 Cr App R 237.

<sup>184</sup> *R v Misra; R v Srivastava* [2005] 1 Cr App R 328, 348.

<sup>185</sup> *Ibid.*

<sup>186</sup> [1948] IR 95.

did always act of the balance of reasons he or she would be betraying their role as a doctor.<sup>187</sup>

3.178 The ‘practical reasoning’ account of subjectivism which would require the doctor to knowingly or suspectingly act on and against the balance of reasons:

“wrongly ignores the social and moral context in which relationships, built around a positive duty of care, structure an agent’s practical reasoning and hence change the way in which wrongdoing is understood.”<sup>188</sup>

3.179 Whether the liability in question is civil or criminal, departure from an expected standard is the correct measure of negligence where doctors are concerned. Where a doctor accepts a duty to act in the best interests of another, professing him or herself to possess special skill or knowledge and identifying him or herself with responsibility for the patient, Horder maintains that he or she accepts the duty against a background of well-known and accepted standards regulate his or her ethical and professional conduct in respect of his or her patients.<sup>189</sup>

## **K The Australian approach**

3.180 In *R v Gunter*<sup>190</sup> the accused administered a douche to a pregnant woman with fatal results. At trial the judge instructed the jury as follows:

“If he held himself out to be a skilled man, and, having treated those people for years, he used an instrument that he ought not to have used, and used it so carelessly as to pump air in, and not into the part that he intended to, but something higher up and much more dangerous, was he guilty of gross negligence or not. That is the question for you.

... When a man therefore undertakes and holds himself out to be able to do a particular kind of work, and in this case whether he be a doctor or not, if he holds himself out to be able to wash out a woman’s private parts, he is supposed to have sufficient skill for that purpose. If he does it so negligently as to place the instruments that he uses in the wrong spot, or to force in something that he ought not to force in, it will be a question for you whether he is guilty of gross negligence, and if you find that

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<sup>187</sup> Horder “Gross Negligence and Criminal Culpability” (1997) 47 UTLJ 495, at 515.

<sup>188</sup> *Ibid* at 516.

<sup>189</sup> *Ibid* at 517.

<sup>190</sup> (1921) 21 SR (NSW) 282.

he has been guilty of such negligence, then you will find a verdict of manslaughter against Gunter.”<sup>191</sup>

3.181 According to the Chief Justice, the trial judge made it clear to the jury that the negligence necessary to make a man criminally responsible must be gross negligence. He proceeded to observe that many authorities established that before a man can be criminally convicted, the negligence must be culpable displaying a degree of recklessness beyond anything required to make a man liable for damages in a civil action. The trial judge told the jury that it had to be such a degree of culpable negligence as to amount to a lack of care for the lives of others which every law-abiding person is expected to exhibit. Short of this one might be blameworthy for not displaying the caution reasonably to be expected from an ordinary prudent person under the circumstances, and this could lead to an action for damages. However, a person would not be charged with a criminal offence based on negligence unless he or she recklessly took risks at the expense of other people’s lives or limbs.<sup>192</sup>

3.182 According to Hulme J in *R v Lavender*, (this case will be discussed in Chapter 4) despite the fact that the Chief Justice in *R v Gunter* used the word “recklessness” when describing the conduct which would merit a manslaughter conviction, in accepting the trial judge’s expression of “gross negligence” he did not intend the former expression to mean either a conscious appreciation of the risk or indifference to it.<sup>193</sup>

3.183 There have been times when Australian courts have held that recklessness forms part of the fault element for negligent manslaughter, however these occasions have been mercifully less frequent than in English law. The Australian courts did not subscribe to the *R v Lawrence*<sup>194</sup> direction which was a confusing corner-stone of the English law of involuntary manslaughter from 1982 until 1994, whereby negligent manslaughter demanded recklessness in the sense of either awareness or neglect of an obvious risk. By not adopting the *R v Lawrence* direction, Australian courts were free to frame negligent manslaughter in purely objective terms.<sup>195</sup>

3.184 In *Callaghan v R*<sup>196</sup> the high Court was required to interpret the expression “to use reasonable care and take reasonable precautions” in two

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<sup>191</sup> *R v Gunter* (1921) 21 SR (NSW) 282, 287.

<sup>192</sup> *Ibid* at 286.

<sup>193</sup> (2004) NSWCCA 120, paragraph 203.

<sup>194</sup> [1982] AC 510; [1981] 1 All ER 974.

<sup>195</sup> *Yeo Fault in Homicide* (The Federation Press 1997) at 205. Yeo observes that the Australian courts dealt with manslaughter by criminal negligence in objective terms since the Victorian case of *R v Nydam* VIC LEXIS 131; [1977] VR 430.

<sup>196</sup> (1952) 87 CLR 115.

sections of the Western Australian *Criminal Code (1902)*. Section 266 stated:

“It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.”

Section 291A (1) provides that any person:

“who has in his charge or under his control any vehicle and fails to use reasonable care and take reasonable precautions in the use and management of such vehicle whereby death is caused to another person is guilty of a crime and liable to imprisonment with hard labour for five years.”

Section 291(A)(2) stated that this section shall not relieve a person of criminal responsibility for the unlawful killing of another person.”

3.185 The High Court held that breach of the duty of care under section 266 became one of the constituents of manslaughter by criminal negligence and that the standards set by both sections should be set by the common law where negligence amounts to manslaughter. Dixon CJ, Webb, Fullagar and Kitto JJ quoted James Fitzjames Stephen’s jury directions on the level of neglect which may make a man guilty of manslaughter. Stephen wrote:

“Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence and ought to be punished.”<sup>197</sup>

As to whether an act of negligence was culpable or not, Stephen told the gentlemen of the jury that they had a discretion which they ought to exercise as well as they could.

3.186 The court’s reliance on Stephen’s statement means that they agreed with, or accepted the accuracy of his statement of the law. Furthermore, the judges’ reference, without unfavourable comment, to the Canadian decision of *McCarthy v The King*<sup>198</sup> where it was said that a jury will seldom be instructed in relation to indifference to consequences, is

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<sup>197</sup> *R v Doherty* (1887) 16 Cox CC 306, 309.

<sup>198</sup> 1921 DLR LEXIS 1154; (1921) 59 DLR 206.

support for the view that indifference, and hence appreciation, is not an essential ingredient of manslaughter by criminal negligence.<sup>199</sup> In referring to *McCarthy v The King* the *Callaghan* court was quite conscious of the difference between gross negligence on the one hand and recklessness in the sense of recognition of the risk or indifference to consequences.

3.187 In *R v Holzer*<sup>200</sup> Smith J was of the view that the facts of the case involved manslaughter by unlawful and dangerous act as well as manslaughter by the intentional infliction of some harm and not manslaughter by criminal negligence under which, he understood the law on the latter form of manslaughter to be founded upon the House of Lords' decision in *Andrews v DPP*.<sup>201</sup> Mistaking the ratio of *Andrews*, Smith J stated that the test for manslaughter by criminal negligence was such that:

“the accused must be shown to have acted not only in gross breach of duty of care but recklessly, in the sense that he realised that he was creating an appreciable risk of really serious bodily injury to another or others and that nevertheless he chose to run the risk.”<sup>202</sup>

Thus, in focusing on the work “reckless” in *Andrews v DPP* and interpreting it as meaning conscious disregard of the risk of really serious injury to others, Smith J imported a subjective component into the law of manslaughter by criminal negligence in Victoria, whereby an accused could not be found guilty of causing a death due to his or her negligence unless he or she was aware that the intended voluntary act posed a real risk of serious injury to others.

3.188 In *Pemble v R*<sup>203</sup> the appellant had shot and killed his de facto wife while wielding a loaded gun. At trial he maintained that the gun fired accidentally when he stumbled. Defence counsel urged the jury to convict the accused of manslaughter on the basis that the killing was a consequence of an unlawful and dangerous act which was perpetrated without the intention of killing or causing serious harm.<sup>204</sup> The High Court allowed Pemble's appeal against conviction for murder.

3.189 During the trial the issue of manslaughter by criminal negligence had not been left to the jury. Barwick CJ remarked that an accidental killing

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<sup>199</sup> *R v Lavender* (2004) NSWCCA 120, paragraphs 218-219 per Hulme J.

<sup>200</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>201</sup> [1937] 2 All ER 552; [1937] AC 576.

<sup>202</sup> *R v Holzer* 1968 VIC LEXIS 228, paragraph 4.

<sup>203</sup> (1971) 124 CLR 107.

<sup>204</sup> See *Pemble v R* (1971) 124 CLR 107, 111-112.

will amount to manslaughter if it resulted from culpable or criminal negligence<sup>205</sup> but he did not consider the matter further, treating the case as a clear instance of manslaughter by unlawful and dangerous act. However, Menzies J was of the opinion that the jury should have received specific directions as regards manslaughter by unlawful and dangerous act and manslaughter by criminal negligence,<sup>206</sup> referring to comments by Smith J in *R v Longley*<sup>207</sup> and citing the articulation of criminal negligence in *R v Holzer*<sup>208</sup> with seeming approval. Indeed Menzies J preceded the reference to *R v Holzer* by stating that a verdict of manslaughter would no longer be sustained by simply establishing that the homicide occurred in the course of the commission of an unlawful act.<sup>209</sup>

3.190 Nevertheless, despite this seeming endorsement of *R v Holzer*, he later defined the difference between murder by recklessness and manslaughter by criminal negligence in terms which are incompatible with Smith J's formulation. Drawing on Blackstone's description of the negligent workman on the roof, Menzies J characterized the difference between reckless murder and negligent manslaughter in the following terms.

“The difference, as I apprehend it, is that to do an unjustifiable act causing death, knowing that it is likely to cause death or grievous bodily harm is murder, whereas to do a careless act causing death, without any conscious acceptance of the risk which its doing involves is manslaughter, if the negligence is of so high a degree as to show a disregard for life deserving punishment. An instance of the former might be to kill a person in a street by intentionally dropping a large block of stone from a high building into the crowded street below: an instance of the latter might be to kill a person in a street by carelessly letting fall a large block of stone from a high building into a crowded street below. It would not be a misuse of language to use the word ‘reckless’ both in relation to dropping and to letting fall the stone, but that word without more in relation to the first would not, of itself, bring out the essential difference between the first and the second. The use of the words ‘recklessness’ or ‘reckless indifference’ of itself would not bring home to the jury that it is only a recklessness that involves actual foresight of the probability of causing death or grievous bodily harm and indifference to that risk which does constitute the

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<sup>205</sup> See *Pemble v R* (1971) 124 CLR 107, 122.

<sup>206</sup> *Ibid* at 133.

<sup>207</sup> 1961 VIC LEXIS 602, paragraph 37.

<sup>208</sup> 1968 VIC LEXIS 228, paragraph 4.

<sup>209</sup> See *Pemble v R* (1971) 124 CLR 107, 133.

mental element that must be found to support a conviction for murder.”<sup>210</sup>

Menzies J concluded that murder differs from manslaughter not because of the degree of carelessness exhibited but because of the state of mind with which death is caused.<sup>211</sup>

3.191 *Nydam v R*,<sup>212</sup> the leading Australian case on manslaughter by negligence, was heard in the Supreme Court of Victoria in 1976. The court held that to establish manslaughter by negligence it was not necessary for the Crown to prove that the accused was aware of the likelihood of his act causing death or serious bodily harm to the victim or persons placed in a similar relationship as the victim was to the accused.

3.192 In *Nydam v R* the accused was tried for the murder of two women who died from burns sustained as a result of an explosion of petrol caused by the accused. The accused claimed at trial that he had not deliberately set fire to and killed the woman he loved, Miss Stradling, because she had spurned him and intended to return to England. He argued that he went to the hair salon where Miss Stradling was, armed with petrol, intending only to threaten suicide in order to convince her how important she was to him and to persuade her not to put an end to their relationship. According to the accused, he stumbled with the bucket of petrol, it accidentally caught fire and as a result two women, including Miss Stradling, were engulfed in the flames.

3.193 The trial judge directed the jury in terms of murder by recklessness and manslaughter by criminal negligence. Upon appeal against conviction for murder on the basis that the trial judge should not have left murder by recklessness to the jury, the Supreme Court of Victoria spent quite some time discussing the relevant test for manslaughter by negligence in that jurisdiction and declined to follow the dictum of Smith J in *R v Holzer*.<sup>213</sup>

3.194 The Supreme Court stated that the central issue at trial was whether he intended to kill Miss Stradling or was her death an accident.<sup>214</sup> If the jury were convinced that it was an accident, they might have to consider whether the accused’s negligence was of such a degree as to require a verdict of manslaughter. The court held that the trial judge’s direction regarding

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<sup>210</sup> See *Pemble v R* (1971) 124 CLR 107, 135.

<sup>211</sup> *Ibid.*

<sup>212</sup> 1976 VIC LEXIS 131; [1977] VR 430.

<sup>213</sup> 1968 VIC LEXIS 228, paragraph 4.

<sup>214</sup> 1976 VIC LEXIS 131, paragraphs 21-22.



murder by recklessness was unsatisfactory and placed the appellant at the risk of being convicted of murder by the jury upon a basis which they might not have fully understood.<sup>215</sup> In allowing the appeal and ordering a retrial the Supreme Court concluded that there was a considerable risk that the jury might have been confused by murder by recklessness and manslaughter by criminal negligence because the trial judge charged the jury in almost identical terms in relation to these two forms of homicide.

3.195 The Supreme Court was of the view that where the jury must be instructed as to murder by recklessness and manslaughter by negligence there was no distinction<sup>216</sup> capable of being satisfactorily explained between the two forms of unlawful killing on the basis of Smith J's subjective formulation of manslaughter by criminal negligence in *R v Holzer*.<sup>217</sup> Thus, the court felt duty bound to clarify the situation and hence embarked upon a careful consideration of manslaughter by criminal negligence. According to the court, in order to establish murder by recklessness the Crown must prove that when the accused did the act which caused the death he was aware that it would more than likely kill or inflict grievous bodily harm.<sup>218</sup>

3.196 In discussing manslaughter by criminal negligence the Victorian Supreme Court referred to Smith J's dictum in *R v Holzer*<sup>219</sup> where, purporting to follow *Andrews v DPP*<sup>220</sup> he stated that the accused must be shown to have acted not only in gross breach of duty of care but recklessly; he must have realised that he was creating an appreciable risk of really serious bodily injury to another or others and nevertheless chosen to run the risk.<sup>221</sup>

3.197 Although the Supreme Court of Victoria emphasized that Smith J was a most learned judge and his remarks were "entitled to the greatest respect" it nonetheless concluded that his comments in *R v Holzer* did not propound the correct test for manslaughter by criminal negligence, since they may have resulted from a misreading of Lord Atkin's judgment in

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<sup>215</sup> See *Nydam v R* 1976 VIC LEXIS 131 at paragraph 26. In holding that the trial judge failed to give the jury proper instructions regarding murder by recklessness, the Supreme Court of Victoria stated that "the judge at no time reminded the jury of the evidence that might have borne upon the formation of that state of mind and might, accordingly, have been used by them in determining what the applicant's state of mind was."

<sup>216</sup> *Nydam v R* 1976 VIC LEXIS 131, paragraph 28.

<sup>217</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>218</sup> *Nydam v R* 1976 VIC LEXIS 131, paragraph 29.

<sup>219</sup> 1968 VIC LEXIS 228; [1968] VR 481, 482.

<sup>220</sup> [1937] 2 All ER 552; [1937] AC 576.

<sup>221</sup> See *R v Holzer* 1968 VIC LEXIS 228, paragraph 4.

*Andrews v DPP*<sup>222</sup> and were in any event inconsistent with decisions of the Australian High Court such as *Pemble v R*.<sup>223</sup> Additionally the Court concluded that the weight of authority supported an objective rather than a subjective test.

3.198 Following a detailed analysis of manslaughter cases involving negligence including *Andrews v DPP*, *R v Bateman*,<sup>224</sup> and the leading Irish case on gross negligence manslaughter *The People (AG) v Dunleavy*<sup>225</sup> where the Court of Appeal favored an objective over a subjective test for liability, the Victorian Supreme Court held that in order to establish manslaughter by criminal negligence, it is adequate for the prosecution to establish that the act which caused the death:

“was done by the accused consciously or 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 harm would follow that the doing of the act merited criminal punishment.”<sup>226</sup>

3.199 Thus, the *Nydam v R* definition of manslaughter by criminal negligence which is similar to the offence of gross carelessness proposed by the Law Commission for England and Wales in 1996<sup>227</sup> set down two requirements which must be met:

- A great falling short of the standard of care of a reasonable person in the circumstances;
- A high degree of risk or likelihood of death or serious harm.

3.200 If these two requirements are met, the jury is free to conclude that the conduct deserves criminal punishment. An individual with less intelligence, knowledge or capacity for foresight and circumspection than the reasonable person will nonetheless be judged according to the knowledge

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<sup>222</sup> [1937] 2 All ER 552; [1937] AC 576.

<sup>223</sup> (1971) 124 CLR 107.

<sup>224</sup> (1925) 19 Cr App R 8.

<sup>225</sup> [1948] IR 95.

<sup>226</sup> *Nydam v R* 1976 VIC LEXIS 131 paragraphs 48-49.

<sup>227</sup> See Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237. See also Yeo *Fault in Homicide* (The Federation Press 1997) at 213 where the author observes that the Commission’s test is desirable because it omits the requirement that the conduct should merit punishment and takes into account the ability of the accused at the material time to appreciate the risk.

and capacity for foresight of the hypothetical construct and not a reasonable person with the limitations of the accused.<sup>228</sup> As will be discussed later in the chapter, Hart who generally supported the imposition of criminal liability for negligent conduct, believed that those who lacked the physical or mental capacity to meet the standards of reasonable people should be exempted.

3.201 The Victorian Law Reform Commission in its 1991 report on *Homicide*<sup>229</sup> acknowledged the strength of Hart's proposed concession, referring to *R v Instan*<sup>230</sup> and *R v Stone and Dobson*<sup>231</sup> where the very low intelligence of the defendants inhibited them from meeting the standard of care that a reasonable person would have achieved. The Victorian Law Reform Commission expressed the view that it was unjust to convict such defendants of gross negligence manslaughter and that a defence of inability to meet reasonable standards due to physical or mental infirmity should be available.<sup>232</sup>

3.202 Yeo maintains that the reference to the reasonable person's standard of care in *Nydam v R*<sup>233</sup> is to be expected because such a standard is a vital component whenever negligence is asserted both in the civil and criminal context. According to Yeo, there are problems with inviting the jury to consider the civil standard of negligence as the point of reference beyond which criminal negligence must extend, because it rests on the assumption that juries are familiar with and fully understand the civil standard.<sup>234</sup>

3.203 In *R v Taktak*<sup>235</sup> the appellant was convicted of manslaughter because he had taken an unconscious 15-year-old prostitute from a party and failed to seek medical attention for her so that she died in his care and custody. The Crown's case rested on the contention that once the appellant took charge of the deceased when she was helpless, his omission to obtain medical assistance for her was criminally negligent. The appellant submitted that he was not under a duty to obtain medical assistance. Following a review of the relevant cases and textbooks, Yeldham J concluded that there was evidence that the appellant did undertake a duty to care for the deceased

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<sup>228</sup> See Yeo *Fault in Homicide* (The Federation Press 1997) at 209.

<sup>229</sup> Report No 40.

<sup>230</sup> [1893] 1 QB 450.

<sup>231</sup> [1977] 2 All ER 341.

<sup>232</sup> Victorian Law Reform Commission *Homicide* (1991) Report No 40 paragraph 270 at 116.

<sup>233</sup> 1976 VIC LEXIS 131; [1977] VR 430.

<sup>234</sup> See Yeo *Fault in Homicide* (The Federation Press 1997) at 207.

<sup>235</sup> (1988) 34 A Crim R 334.

girl, who was helpless at the time, and in so doing he removed her from a place where others might have rendered or obtained aid for her.<sup>236</sup>

3.204 Nonetheless, Yeldham J thought the conviction was unsafe and unsatisfactory and quashed it, stating that although the deceased may well not have died, had she received medical attention in a timely manner, a finding that the appellant was criminally negligent could not be supported. Mere negligence or mere inadvertence was not enough to establish guilt. The appellant did not seek medical attention for the deceased because he thought that when she got over the dose of the drug she had she would be all right. The appellant was a heroin addict himself with no medical knowledge who made some ineffectual attempts to rouse the deceased from her unconscious state. Yeldham J stated:

“Reasonable care and common prudence demanded that he should have called medical help, notwithstanding the hour of the morning. But to hold that he was criminally negligent, and that such negligence caused or accelerated death, was in my opinion a verdict which was dangerous and unsatisfactory. There was no evidence that the appellant knew the extent of the ingestion by the deceased of any drug or that, if medical help was not obtained for her, she would be likely to die. Nor is there any evidence that he was aware that death, if likely, might have been prevented by the administration of Narcan or any other preparation. Any finding against him on these issues involved at least some guesswork.”<sup>237</sup>

In omitting to refer to *Nydam v R*<sup>238</sup> Yeldham J apparently supported Smith J’s approach to manslaughter by criminal negligence in *R v Holzer*.<sup>239</sup>

3.205 Carruthers J held that it was incumbent for the Crown to prove beyond reasonable doubt:

- That the appellant owed a duty of care in law to the deceased.
- That it was the omission of the appellant to obtain medical treatment which was the proximate cause of the victim’s death.
- That such omission by the appellant was conscious and voluntary, without any intention of causing death but in circumstances which involved such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a

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<sup>236</sup> R v Taktak (1988) 34 A Crim R 334, 354.

<sup>237</sup> *Ibid* at 355.

<sup>238</sup> 1976 VIC LEXIS 131; [1977] VR 430.

<sup>239</sup> 1968 VIC LEXIS 228; [1968] VR 481.

high risk that death would follow that the omission merited criminal punishment.

3.206 Carruthers J considered that the “wholly uncertain state of the evidence” as to how long the deceased was alive and in the sole care of the appellant meant that the jury could not have been satisfied regarding causation or indeed that there had been a sufficient falling short of the standard of care which a reasonable person would have exercised.<sup>240</sup>

3.207 In *R v Osip*,<sup>241</sup> a case very similar to Coke’s wildfowl scenario, the appellant was found guilty of manslaughter by criminal negligence for having shot a man who he mistook for a deer. He claimed that the trial judge erred in omitting to instruct the jury that the Crown had to exclude beyond reasonable doubt that when he fired the shot he had honestly and reasonably, albeit mistakenly, believed he was shooting at a deer.

3.208 Batt JA stated that contrary to the submission of the appellant, the defence of honest and reasonable mistake is subsumed in the direction as to gross negligence.

“In essence, the jury could not have been satisfied beyond reasonable doubt that, in his Honour’s words, the act or acts of the accused was or were performed by him “in circumstances which involve such a great falling short of the standard of care which a reasonable person would have exercised ...” without concluding that any belief which the applicant had that the target at which he aimed was a deer was not a reasonable belief.”<sup>242</sup>

3.209 Counsel for the defence submitted that the concept of reasonableness was not to be subsumed into the “reasonable man aspect” of the elements of the offence because reasonableness in the defence of mistake had never been the same as the reasonable man test. Batt J did not agree with such an interpretation of the law, saying that while there was still room for debate as to whether involuntary manslaughter is a crime without *mens rea* or whether the *mens rea* of gross negligence manslaughter takes the form of inadvertence or incautiousness (a view which is supported by *Nydam v R*<sup>243</sup>), the latter view was the superior one. Batt JA accepted the Crown’s submission that the “defence” of honest and reasonable mistake was simply a denial of *mens rea*. He proceeded to state that even if involuntary manslaughter has no *mens rea* the defence:

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<sup>240</sup> *R v Taktak* (1988) 34 A Crim R 334, 358.

<sup>241</sup> (2000) VR 595.

<sup>242</sup> *Ibid.*

<sup>243</sup> 1976 VIC LEXIS 131; [1977] VR 430.

“denies or puts in issue the element of gross negligence. The “defence” is, in short, not a superadded matter to be disproved.”<sup>244</sup>

3.210 In *R v Osip*<sup>245</sup> the appellant attempted to rely on *Proudman v Dayman*<sup>246</sup> and *Jiminez v R*<sup>247</sup>, (both cases will be discussed in Chapter 4) as authorities for the defence of honest and reasonable mistake, but Batt JA observed that neither was a manslaughter case.<sup>248</sup> He remarked that gross negligence or gross fault *is* an element of the offence of manslaughter by criminal negligence and it was indisputable that the defence of honest and reasonable mistake of fact:

“entails the absence of negligence and that the presence of negligence denies the reasonableness of any relevant mistake. The two cannot co-exist.”<sup>249</sup>

## **L The difference between negligence and inadvertence**

3.211 Professor J.W.C. Turner argued that a person should not be held criminally responsible unless he had in his mind the idea of causing bodily harm to someone – he found the notion of imposing criminal liability for inadvertence most unappealing since in his view the law would be resorting to strict liability so as to punish the accused for having a blank mind. Although Turner refused to recognise negligence as a form of *mens rea*, he did believe it was a state of mind:

“the state of mind of a man who pursues a course of conduct *without advertent at all* to the consequences.”<sup>250</sup>

3.212 Blameworthy as such a state of mind may be however, he refused to accept that negligence in the sense of inadvertence could amount to *mens rea* since it was impossible to claim that a man “in a fit of inadvertence, could make himself guilty” of arson, burglary or rape etc. Where a man’s mind is blind to the consequences he has no realization of their possibility and according to Turner, there are no different degrees of nothing.<sup>251</sup>

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<sup>244</sup> *R v Osip* (2000) VR 595 (Lexis).

<sup>245</sup> (2000) VR 595

<sup>246</sup> (1941) 67 CLR 536.

<sup>247</sup> (1992) 173 CLR 572; 106 ALR 162.

<sup>248</sup> *R v Osip* (2000) VR 595(Lexis).

<sup>249</sup> *Ibid.*

<sup>250</sup> Turner “The Mental Element in Crimes at Common Law” in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261 at 207.

<sup>251</sup> *Ibid* at 211.

3.213 Thus, Turner understood gross negligence to be little more than the name of a state of mind where there is no foresight of consequences. Hart said that we should require a more persuasive argument than Turner's before we abandon notions such as "very negligent," "gross negligence," and "a minor form of negligence" which are deeply rooted both in common, everyday speech as well as in the law. Unlike Turner, Hart was unconvinced that we must choose between two alternatives – between foresight of consequences and strict liability. He claimed that we can:

“perfectly well both deny that a man may be criminally responsible for ‘mere inadvertence’ and also deny that he is only responsible if ‘he had an idea in his mind to harm someone’. Thus, to take the familiar example, a workman who is mending a roof in a busy town starts to throw down into the street building materials without first bothering to take the elementary precaution of looking to see that no one is passing at the time. We are surely not forced to choose, as Dr. Turner’s argument suggests, between two alternatives: (1) Did he have the idea of harm in his mind? (2) Did he merely act in a fit of inadvertence? Why should we not say that he has been grossly negligent because he has failed, though not deliberately, to take the most elementary of the precautions that the law requires him to take in order to avoid harm to others?”<sup>252</sup>

3.214 Hart argues that the word negligence does not mean the same thing as “inadvertently” or “his mind was a blank”.<sup>253</sup> He maintains that when we remark that a person acted negligently we are not simply describing his state of mind. “He inadvertently broke a saucer” is not the same kind of statement as “He negligently broke a saucer”. According to Hart, the adverb inadvertently does little more than describe the agent’s mental state. However, when we say “He broke a saucer negligently” we are reproaching the agent for not having observed a standard of conduct which any ordinary reasonable person *could* and *would* have observed – we are saying he failed to take precautions against harm. The word negligently, both in law and everyday life, refers to an omission to do what is required: it is therefore not simply a descriptive psychological expression like ‘his mind was a blank’.<sup>254</sup> Describing someone as having acted inadvertently does not necessarily imply that his or her behaviour fell below any expected standard.

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<sup>252</sup> Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1970) at 147.

<sup>253</sup> *Ibid* at 147-148.

<sup>254</sup> *Ibid* at 148.

3.215 Although negligence is not a state of mind and inadvertence is, Hart does recognise an important link between the two concepts. Prior to acting we must obtain certain information in order to take precautions against harm by complying with a rule or standard. He states that we must examine or:

“*advert* to the situation and its possible dangers (e.g. see if the gun we are playing with is loaded) and watch our bodily movements (hand the gun carefully if it is loaded).”<sup>255</sup>

3.216 If we negligently fail to examine the situation before embarking on a course of conduct or pay improper attention while acting, we may not realise the potentially harmful consequences which our behaviour entails. In relation to these consequences our mind is in a sense a ‘blank’ but according to Hart, negligence does not consist in this blank state of mind but rather in our failure to take precautions against harm by carefully examining the situation.<sup>256</sup>

### **M Capacity and failure to take precautions against harm**

3.217 Hart argued that people should only be held legally responsible for their actions if they were capable of measuring up to the law’s expectations, had a fair opportunity to do so and can therefore be said to have chosen not to meet the expected standard.<sup>257</sup> In discussing the tendency of subjectivists to define *mens rea* in terms of intention and recklessness only, Hart states that there is much to be said in support of extending the notion of ‘*mens*’ beyond the cognitive element of knowledge or foresight to incorporate the capacities and powers of normal people to think about and control their conduct.<sup>258</sup> Hart therefore follows Stephen in including negligence in the term *mens rea* because negligence is essentially a failure to exercise such capacities.<sup>259</sup>

3.218 Arguably a person should only be found guilty of a crime such as manslaughter by gross negligence if he or she was capable of advertent to the risk or attaining the expected standard but simply did not do so. If a man knows the consequences of his conduct we can generally say “He could have helped it”. On the other hand subjectivists may be inclined to believe that a

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<sup>255</sup> Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1970) at 148.

<sup>256</sup> *Ibid.*

<sup>257</sup> See Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1970) especially Chapters 2 and 6.

<sup>258</sup> *Ibid* at 140.

<sup>259</sup> *Ibid.*



man could not have helped it, if he had no foresight of the consequences. Nonetheless Hart argues:

“there is nothing to compel us to say ‘He could not have helped it’ in *all* cases where a man omits to think about or examine the situation in which he acts and harm results which he has not foreseen. Sometimes we do say this and should say it; this is so when we have evidence, from the personal history of the agent or other sources, that his memory or other faculties were defective, or that he could not distinguish a dangerous situation from a harmless one, or where we know that repeated instructions and punishment have been of no avail. From such evidence we may conclude that he was unable to attend to, or examine the situation, or to assess its risks; often we find this is so in the case of a child or a lunatic.”<sup>260</sup>

3.219 Andrew Ashworth, a persuasive champion of ideal subjectivism claims that imposing criminal liability for negligence is justifiable because people who negligently cause harm could have behaved otherwise. In his opinion, so long as the accused people:

“have the capacity to behave otherwise, it is fair to impose liability in those situations where there are sufficient signals to alert the reasonable citizen to the need to take care”.<sup>261</sup>

3.220 According to Mitchell, Ashworth’s explication considerably widens the concept of subjectivism. Consequently objectivism is narrowed in scope. Under Ashworth’s model objectivism would be limited to cases in which the accused is measured against the hypothetical reasonable man whilst overlooking the danger that the accused may have been unable to conform to the reasonable man’s standards.<sup>262</sup>

3.221 In criticizing Horder for restricting subjectivism to cases where the proscribed result or circumstance is knowingly risked or intended, Mitchell proposes a species of subjectivism which includes instances where the accused inadvertently risks the prohibited outcome but was capable of recognising it and ought to have done so. Mitchell does not believe the notion of ‘latent’ knowledge necessarily amounts to an objective test because the inquiry does not simply look at whether the accused’s awareness and actions conformed with those of the hypothetical reasonable person.

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<sup>260</sup> Hart *Punish and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1970) at 150.

<sup>261</sup> Ashworth *Principles of Criminal Law* (2<sup>nd</sup> ed Clarendon Press 1995) at 190.

<sup>262</sup> Mitchell “In Defence of a Principle of Correspondence” [1999] Crim LR 195, at 196.

Instead, the spotlight is on what could justifiably have been expected of the particular accused.<sup>263</sup>

3.222 Under this wider understanding of subjectivism, Mitchell argues that the correspondence principle demands that the accused:

“either knowingly caused or risked the proscribed harm or failed to exercise his capacity to recognise it when he could and ought to have done so.”<sup>264</sup>

Where he failed to exercise his capacity in relation to a risk of harm, the accused may have given no thought to the risk or may have mistakenly thought or presumed there was no risk. Whether the accused’s failure to advert to the risk was due to pure absentmindedness or the influence of drink, drugs, or medication, the crux of the argument for holding him criminally responsible for his inadvertence is that he could have recognised there was an unjustifiable risk, he ought to have exercised the capacity to recognise it and should not have taken the risk.<sup>265</sup>

3.223 In opposition to having a different standard of care for experts at one end and people of poor intelligence at the other, Glanville Williams states:

“The jury or magistrates apply the negligence test, roughly speaking, by asking themselves: Was the defendant a bigger fool than I like to think I should have been in the same circumstances? That is a workable test, even though not very precise. But it would be impossible and impolitic to have an array of standards varying with position on an IQ scale ... It would be absurd to say: the older or more stupid the driver, the lower is the degree of care we expect from him.

Moreover, if the law’s reasonable man is to be invested with the defendant’s IQ, there seems to be no reason why he should not be invested with the defendant’s emotional instability, and indeed with his whole character as resulting from his genes and environment. But if the reasonable man is given all the characteristics of the defendant, the standard of judgment wholly disappears, for we can then compare the defendant’s conduct only with the (presumably identical) conduct of a fictitious construct who is like the defendant in every conceivable way.”<sup>266</sup>

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<sup>263</sup> Mitchell “In Defence of a Principle of Correspondence” [1999] Crim LR 195, at 196.

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> Williams, *Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1961) at 94.

3.224 Williams' criticism of a system of evaluating negligence which would take into account an accused's intelligence and ability for thought and circumspection is indeed scathing and taken to extreme lengths. It is submitted that Hart's argument for holding people liable for inadvertence only where they have the capacity to have attended to the risk is more persuasive. A law which would hold intellectually challenged people responsible for failure to take precautions against a particular harm that they would *never* appreciate even though the notional reasonable person would have recognised such a risk would mean imposing a harsh, purely 'objective' test capable of causing great injustice.

3.225 According to Duff, we could add a subjective element to the conception of negligence as a deviation from the standard of care to be expected of a reasonable person by requiring the deviation to be an *avoidable* one.<sup>267</sup> Under Duff's scheme people would only be judged negligent if they were physically and mentally capable of attaining the standard of care. If defendants could not have attained that standard, criminal convictions would hold them strictly and unjustly liable for what they could not avoid. However if they could have attained that standard; if they failed to take reasonable care because they failed to use their abilities for thought and attention which they could and should have used, then to convict them of negligence is to hold them properly liable for what they could and should have avoided.<sup>268</sup>

3.226 In its 1996 Report on involuntary manslaughter the Law Commission for England and Wales echoed Duff and Hart's arguments regarding the capacity of the accused. The Commission felt it would be unjust to impose liability for gross negligence manslaughter unless:

“the accused herself would have been *capable* of perceiving the risk in question, had she directed her mind to it. Since the fault of the accused lies in her failure to consider a risk, she cannot be punished for this failure if the risk in question would never have been apparent to her, no matter how hard she thought about the potential consequences of her conduct. If this criterion is not insisted upon, the accused will, in essence, be punished for being less intelligent, mature or capable than the average person.”<sup>269</sup>

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<sup>267</sup> Duff *Intention, Agency and Criminal Liability* (Basil Blackwell 1990) at 156.

<sup>268</sup> *Ibid.*

<sup>269</sup> The Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 4.20 at 34.

3.227 In *R v Stone and Dobinson*<sup>270</sup> both the defendants were of very low intelligence and educational attainment and may not have been capable of appreciating the likely consequences of their failure to summon medical attention for the anorexic victim. The issue of capacity was not argued before the Court of Appeal, however. Arguably the defendants should not have been found guilty of gross negligence manslaughter if they weren't capable of advertent to the risks inherent in their omission to act or alternatively hadn't the capacities for thought and action necessary to take effective precautions against harm.

3.228 The English criminal damage case of *Elliott v C (a minor)*<sup>271</sup> is a powerful example of the harsh results of the law's unwillingness to take the accused's capacity into account in determining liability. The accused was a 14 year-old girl of low intelligence who poured white spirit on the floor of a garden shed and set fire to it. The Magistrates felt that even if she had given the matter any thought, the risk that her actions would damage the shed would not have been obvious to her due to her age and limited understanding. However, purporting to follow the House of Lords' decision in *R v Caldwell*,<sup>272</sup> the Divisional Court held that she should be convicted because the risk would have been obvious to a reasonable person in her position. This was a most unsatisfactory, severe judgment.

3.229 Charleton states that there may be occasions where it would be unjust for the court to ignore factors such as age, mental retardation or physical hardship in the accused. Whereas it may be justifiable to make no allowance for physical or mental disabilities in the law of tort from a policy point of view in ensuring a uniform standard of conduct in society and in not disappointing the legitimate expectation to compensation of victims of objectively negligent acts, it is not justifiable in the criminal law.

“The high standard of fault used as a test for criminal negligence is clearly a reflection of a desire to find moral culpability in the accused, albeit judged objectively. A handicap in the accused may remove all wrongdoing.”<sup>273</sup>

3.230 Where a person lacking capacity (either physical or mental) causes a substantial risk of serious bodily harm or death is prosecuted for manslaughter, Charleton suggests that the elements of the test of provocation could be adopted whereby the accused would be judged objectively but the

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<sup>270</sup> [1977] QB 354; [1977] 2 All ER 341.

<sup>271</sup> [1983] 2 All ER 1005; 77 Cr App R 103.

<sup>272</sup> [1982] AC 341; [1981] 1 All ER 961.

<sup>273</sup> Charleton *Offences Against the Person* (Round Hall 1992) at 93.

standard against which he should be judged would be that of a reasonable person with the accused's characteristics such as sex, age or handicap.<sup>274</sup>

3.231 The Law Commission for England and Wales stated:

“A person cannot be said to be morally at fault in failing to advert to a risk if she lacked the capacity to do so.”<sup>275</sup>

Thus, Recommendation 4 of the Law Commission for England and Wales' Report on involuntary manslaughter recommended changing the law so that liability for gross negligence manslaughter would arise where:

- a person by his or her conduct causes the death of another;
- a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position;
- he or she is capable of appreciating that risk at the material time; and
- either
  - his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, or
  - he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, and the conduct causing (or intended to cause) the injury constitutes an offence.”<sup>276</sup>

3.232 In its 2005 Consultation Paper on *A New Homicide Act for England and Wales* the Law Commission reiterated the importance of assessing the “grossness” of the negligence in relation to the accused's individual capacity to appreciate the nature and degree of risks, which may be affected by disability or youth.<sup>277</sup> The Law Commission observed that the fact that capacity is not relevant to the issue of whether negligence is gross for the purposes of manslaughter is likely to create problems where an accused is charged with both gross negligence manslaughter and an offence of carelessness that acknowledges the relevance of capacity to appreciate risk.

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<sup>274</sup> Charleton *Offences Against the Person* (Round Hall 1992) at 93. Personal idiosyncrasies and transient factors such as drunkenness would, however, be excluded.

<sup>275</sup> The Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 4.22 at 35.

<sup>276</sup> *Ibid* Recommendation 4 at 127.

<sup>277</sup> *Ibid*.

3.233 In 2006 the Law Commission for England and Wales published a Report on *Murder, Manslaughter and Infanticide*<sup>278</sup> where it recommended the adoption of the definition of causing death by gross negligence given in the 1996 Report on involuntary manslaughter.<sup>279</sup>

3.234 Following the enactment of the *Domestic Violence Crime and Victims Act 2004* in Britain, where a person causes or allows the death of a child or vulnerable adult, the issue of whether the defendant “failed to take such steps as *he* could reasonably have been expected to take to protect the victim”<sup>280</sup> is taken into account when establishing liability.

3.235 If the defendant was charged simultaneously with gross negligence manslaughter, the jury would have to be informed that although youth or mental disability was not relevant to the issue of gross negligence, such characteristics were relevant to establishing liability where the person’s omission to act caused or allowed the death of a child or vulnerable adult. The Law Commission for England and Wales observe that this would be an embarrassing anomaly which should be removed by any reform of the law of homicide.

3.236 As is the situation in the UK, the current law on gross negligence manslaughter in Ireland does not make capacity relevant to the question of whether negligence is gross. It is submitted that this needs to change. If no other amendments are made to the Irish gross negligence manslaughter test, it is submitted that the test should at least be modified, so that people will only be deemed grossly negligent for the purposes of the offence, if they were mentally and physically capable of attaining the expected standard. The prosecution should prove that the accused was able to take the necessary protective steps to avoid the risk at the time of the fatality, but did not do so.

## **N Summary**

3.237 In this chapter the Commission discussed the law of gross negligence manslaughter in Ireland and informed the reader about developments in the 20<sup>th</sup> century which led up to *The People (AG) v Dunleavy*<sup>281</sup> where the Irish test for this form of involuntary manslaughter was established.

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<sup>278</sup> Consultation Paper No 177.

<sup>279</sup> Law Com 304 paragraph 3.60 at 64. See The Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 Recommendation 4 at 127.

<sup>280</sup> Section 5 [emphasis added].

<sup>281</sup> [1948] IR 95.

3.238 The legal concept of “duty of care” was explored in the context of blood relationships and non-familial relationships and the notion of “voluntary assumption of duty” was explained. Duties arising out of contractual obligation and those imposed by statute were also discussed. The Commission analysed *R v Wacker*<sup>282</sup> and *R v Willoughby*<sup>283</sup> where the English courts held that owing to public policy concerns a duty of care existed for the purposes of gross negligence manslaughter even though the accused and the deceased had been part of a joint criminal venture.

3.239 In discussing gross negligence manslaughter and the medical profession the Commission firstly referred to the civil standard of medical negligence laid down in *Dunne v National Maternity Hospital*<sup>284</sup> since there have been no cases where a doctor has been prosecuted for gross negligence manslaughter in Ireland. The Commission then discussed recent gross negligence manslaughter cases involving medical practitioners in England such as *R v Adomako*<sup>285</sup> and *R v Misra: R v Srivastava*,<sup>286</sup> which established that the risk posed by the alleged negligence must relate to *death* rather than “substantial personal harm” under the *Dunleavy* test.

3.240 The Commission discussed the Australian standard of negligence for manslaughter by criminal negligence before proceeding to explain the difference between negligence and inadvertence. Finally, the Commission addressed the argument that the capacity of the accused to take precautions against harm at the time of the alleged negligence should be relevant to culpability.

3.241 In Chapter 5, the Commission sets out options for reform of the law of gross negligence manslaughter including the possibility of codification without reform. Subjectivist arguments calling for the abolition of gross negligence manslaughter are investigated. The Commission suggests that moderate reform of this part of the law of involuntary manslaughter could include (a) making the capacity of the accused to avert harm relevant to culpability and/or (b) raising the risk posed by the negligence from one of “substantial personal harm” to one of *death* only or *death or serious injury*. The Commission notes that a possible radical reform of the law could involve removing deaths caused by negligence from the scope of manslaughter and creating a separate, lesser offence of negligent homicide.

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<sup>282</sup> [2002] EWCA Crim 1944; [2003] 4 All ER 295.

<sup>283</sup> [2004] EWCA Crim 3365; [2005] 1 Cr App R 495.

<sup>284</sup> [1989] ILRM 735.

<sup>285</sup> [1993] 4 All ER 935; [1994] 3 All ER 79.

<sup>286</sup> [2004] EWCA Crim 2375; [2005] 1 Cr App R 328.





## CHAPTER 4    MANSLAUGHTER AND RELATED MOTOR OFFENCES

### A            Introduction

4.01        In Chapters 2 and 3, the Commission examined the two elements that comprise involuntary manslaughter, unlawful and dangerous act manslaughter and manslaughter by gross negligence. In this Chapter, the Commission places manslaughter against the wider background of other related criminal offences which either directly include an acknowledgement that death has occurred or have been used as alternative charges in manslaughter cases. The principal focus of the Commission is on offences involving motor vehicles, because these are the most common offences related to manslaughter and death which arise in practice. The objective of this chapter is to place these offences alongside manslaughter in terms of their descending scale of culpability and blameworthiness. This is of particular importance against the background of the proposed codification of criminal law.<sup>1</sup>

4.02        In previous chapters, the Commission has already noted that a number of additional criminal charges are quite often preferred where a defendant is charged with manslaughter. By way of example, where an accused is charged with unlawful and dangerous act manslaughter, he or she can also be charged in the alternative with (in descending order) assault causing serious harm under section 4 of the *Non-Fatal Offences Against the Person Act 1997*<sup>2</sup> or with assault causing harm under section 3 of the 1997 Act.<sup>3</sup> Similarly, where a person is charged with gross negligence manslaughter, he or she may also be charged with endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997*<sup>4</sup> and, in

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<sup>1</sup>        As shown by the establishment of the Criminal Law Codification Advisory Committee under the *Criminal Justice Act 2006*. See the Introduction to this Consultation Paper, paragraph 1, above.

<sup>2</sup>        A person found guilty of this offence is liable on conviction on indictment to a fine or to imprisonment for life or to both.

<sup>3</sup>        On conviction on indictment a person faces a fine or a maximum term of 5 years imprisonment or both. On summary conviction a person can be imprisoned for up to 12 months or may be fined or both.

<sup>4</sup>        A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or

the context of workplace deaths, with breaches of the *Safety Health and Welfare at Work Act 2005*.<sup>5</sup>

4.03 Thus, as already noted, in *The People (DPP) v Rosebury Construction Ltd and Others*,<sup>6</sup> a number of the individual defendants were initially charged with manslaughter, but these charges were not proceeded with. The defendants ultimately entered pleas of guilty on a number of charges, including endangerment under the 1997 Act and offences under the *Safety Health and Welfare at Work Act 1989* (the statutory predecessor of the 2005 Act). Similarly in *The People (DPP) v Barden*<sup>7</sup> the accused skipper of a fishing boat was charged with five counts of manslaughter, one count of endangerment under the 1997 Act and one count of being the master and owner of a dangerously unsafe ship contrary to section 4 of the *Merchant Shipping Act 1981*. He was acquitted on the manslaughter and endangerment charges, but convicted on the third charge.

4.04 However, as already mentioned, the most common setting in which alternative charges to manslaughter arises is in road traffic and related motoring offences. In general, where a death is caused by a person's bad, negligent or drunk driving, the responsible motorist will be charged with dangerous driving causing death but may also be charged in the alternative with careless driving. In the remainder of this chapter, therefore, the Commission will discuss manslaughter and the related offences of dangerous driving causing death and careless driving. Although it is possible to prosecute a person who unlawfully kills another through their negligent, wanton or aggressive driving with manslaughter, most people who are responsible for road deaths are instead charged with dangerous driving causing death or careless driving. This is presumably due to the perceived unwillingness of juries to convict drivers of an offence as serious as manslaughter.

4.05 In part B, the Commission examines the legacy of *The People (AG) v Dunleavy*.<sup>8</sup> Part C outlines the Irish statutory provisions dealing with dangerous driving causing death, careless driving and driving without reasonable consideration. In part D the Commission focuses on a number of

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to both, or on conviction on indictment, to a fine or to imprisonment for a term not exceeding 7 years or to both.

<sup>5</sup> A person guilty of an offence under the 2005 Act may be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 6 months or to both, or on conviction on indictment, to a fine not exceeding €3 million or to imprisonment for a term not exceeding 7 years or to both.

<sup>6</sup> Irish Times Report 22 November 2001.

<sup>7</sup> Irish Times Report 24 November 2005.

<sup>8</sup> [1948] IR 95.

cases from Ireland and Australia which involved manslaughter or specific driving causing death offences. These cases are discussed in terms of a descending scale of culpability and blameworthiness. Part E examines the offence of careless driving causing death and addresses the recent case of *The People (DPP) v O'Dwyer*<sup>9</sup> where the Court of Criminal Appeal held that judges do not have to turn a blind eye to the fact that a death occurred when sentencing people for careless driving. Part F deals with the concept of being a “criminal” in the ordinary sense of the word and discusses latent knowledge.

## **B The legacy of *The People (AG) v Dunleavy***

4.06 In *The People (AG) v Dunleavy*<sup>10</sup> the accused, a taxi driver drove his unlit car on the wrong side of the road and killed a cyclist when he hit him. The trial judge, following the test established in *R v Bateman*<sup>11</sup> directed the jury that they should find the accused guilty of gross negligence manslaughter if the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the lives and safety of others as to amount to a crime against the State deserving punishment.

4.07 However the Court of Criminal Appeal found that the direction was inadequate because it did not clearly state the degree of negligence which had to be proved against the accused. According to Davitt J, the trial judge in *The People (AG) v Dunleavy* should have instructed the jury that in order to ground a conviction of gross negligence manslaughter the prosecution must prove four key things:

- that the accused was, by ordinary standards, negligent;
- that the negligence caused the death of the victim;
- that the negligence was of a very high degree;
- that the negligence involved a high degree of risk or likelihood of substantial personal injury to others.<sup>12</sup>

As mentioned in the previous chapter the test formulated by the Court of Criminal Appeal in *The People (AG) v Dunleavy* applies to all instances of manslaughter by gross negligence in Ireland, not simply those involving motor cars.

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<sup>9</sup> [2005] IECCA 94.

<sup>10</sup> [1948] IR 95.

<sup>11</sup> (1925) 19 Cr App R 8.

<sup>12</sup> [1948] IR 95, 102.

4.08 In *The People (AG) v O'Brien*<sup>13</sup> the accused was indicted on a manslaughter charge which arose from his fatal driving of a car. He was also charged with two counts of dangerous driving under section 51 of the *Road Traffic Act 1933*. In the trial which took place in June 1956 the prosecution was unable to prove that the accused had been charged in the District Court with dangerous driving.<sup>14</sup> The trial judge accordingly directed a verdict of not guilty on the second count of driving at a speed dangerous to the public and on the third count of driving in a manner dangerous to the public. The jury was unable to agree on a verdict in relation to manslaughter and they were discharged.

4.09 The accused was re-arraigned on the manslaughter count at a later stage whereupon counsel raised a plea in bar to the indictment on the basis that the accused was acquitted on the counts of dangerous driving. It was submitted that the acquittal on the dangerous driving charges necessarily involved an acquittal on the more serious charge of manslaughter. The President of the Circuit Court before whom the accused appeared, stated a case to the Supreme Court as to whether the jury should be directed that the accused was lawfully acquitted of manslaughter in June 1956.

4.10 Counsel for the accused maintained that following an acquittal for dangerous driving the accused could not be guilty of manslaughter which involved a much higher degree of negligence as established by *The People (AG) v Dunleavy*.<sup>15</sup> Counsel for the Attorney-General argued that a plea of *autrefois acquit* is only open if the accused has been acquitted after a trial on the merits of an offence such as manslaughter, in relation to which he is being re-arraigned. The accused was not re-arraigned on the dangerous driving charges. He was tried on a charge of manslaughter and the jury disagreed as to the verdict. According to counsel for the Attorney-General, the accused could justly be re-arraigned and re-tried on that charge.<sup>16</sup>

4.11 The Supreme Court held that it was necessary to charge the accused in the District Court with the summary offence of dangerous driving in order to include two counts thereof in the indictment. Since the prosecution could not prove that such charge had been made, the Circuit Court had no jurisdiction to try the accused on the dangerous driving counts. The Supreme Court also held that the accused was never at risk in relation to the dangerous driving counts in the indictment and therefore the plea of *autrefois acquit* did not lie.

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<sup>13</sup> [1963] IR 92.

<sup>14</sup> Section 6 of the *Criminal Justice Act 1951* had not been complied with.

<sup>15</sup> [1948] IR 95.

<sup>16</sup> *The People (AG) v O'Brien* [1963] IR 92, 94.

4.12 O’ Dalaigh J stated where an accused is acquitted of the offences of dangerous driving after a trial on the merits, he can later successfully rely upon such acquittal to raise a plea in bar to a charge of manslaughter arising out of the same set of facts.<sup>17</sup> Referring to *The People (AG) v Dunleavy*,<sup>18</sup> O Dalaigh J observed that the level of negligence necessary to amount to the offence of manslaughter where death was caused by a motor car:

“makes it quite clear that an acquittal on the charge of dangerous driving in a public place necessarily involves an acquittal of the graver charge of manslaughter.”<sup>19</sup>

Here, however counsel for the accused was seeking to argue that the directed acquittal by the trial judge due to the prosecution’s failure to prove that the accused had been properly charged with these offences in the District Court was grounds for a good plea in bar to the count of the indictment charging manslaughter.

**C Dangerous driving causing death, careless driving and driving without reasonable consideration**

4.13 Section 53(1) of the *Road Traffic Act 1961*<sup>20</sup> states that a person:

“shall not drive a vehicle in a public place at a speed or in a manner which, having regard to all the circumstances of the case (including the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be therein) is dangerous to the public. Where a person causes death or serious bodily harm in the course of driving dangerously he or she will be liable on conviction on indictment to penal servitude not exceeding 10 years or to a fine not exceeding €15,000, or both. In any other case a person convicted on indictment can be fined up to €2,500 or imprisonment not exceeding 6 months, or both.”

4.14 Whether a person has driven in a manner dangerous to the public is a question of fact for the Court to decide in every individual case. Reported decisions should be applied with caution, because even if a reported decision appears to fit the facts of a case at trial, there will inevitably have been some material variation in weather, light, or traffic. In

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<sup>17</sup> *The People (AG) v O’ Brien* [1963] IR 92, 99.

<sup>18</sup> [1948] IR 95.

<sup>19</sup> *The People (AG) v O’ Brien* [1963] IR 92, 100.

<sup>20</sup> As amended by section 51 of the *Road Traffic Act 1968*, section 49(1)(f) of the *Road Traffic Act 1994* and section 23 of the *Road Traffic Act 2002*.

*The People v Quinlan*<sup>21</sup> the judge defined dangerous driving as driving in a manner which a reasonably prudent person, having regard to all the circumstances, would recognise involved a direct, immediate and serious risk to the public.

4.15 Driving in a dangerous manner refers to the actual way the accused drove on a particular occasion. Evidence of damage to vehicles at the scene of an accident should be viewed with care, in drawing inferences as to how the accident came about.<sup>22</sup> In *Devane v Murphy*<sup>23</sup> the court held that skid marks were not, of themselves, evidence of a dangerous manner of the driving but could just as likely have been the result of an effort on the part of the driver to avert a sudden disaster.

4.16 Section 53 of the *Road Traffic Act 1961* was extended by section 51 of the 1968 Act so that the condition of the vehicle at the time of incident is one of the factors which must be taken into account in establishing whether the driving of the accused was dangerous. The accused has a defence to a charge of dangerous driving if he or she can prove that there was a mechanical defect in the vehicle such as faulty brakes of which he or she was unaware at the time of the offence, and which was not such an obvious defect that he or she should have discovered if he or she had been reasonably prudent. If some evidence of a mechanical defect is raised by the accused, the onus of disproving such a defect rests with the prosecution.<sup>24</sup> If it is established by the prosecution that the accused knew or ought to have known of a mechanical defect in his or her vehicle, the accused cannot benefit from this defence.

4.17 Section 53(4) of the *Road Traffic Act 1961* provides:

“Where, when a person is tried on indictment or summarily for an offence under this section, the jury or, in the case of a summary trial, the District Court, is of the opinion that he was not guilty of an offence under this section but was guilty of an offence under section 52 of this Act, the jury or court may find him guilty of an offence under section 52 of this Act and he may be sentenced accordingly”.

4.18 Section 52 of the *Road Traffic Act 1961*<sup>25</sup> provides that a person shall not drive a vehicle in a public place without due care and attention. A

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<sup>21</sup> (1962) ILT & SJ 123.

<sup>22</sup> See Woods *Road Traffic Offences* (Woods 1990) at 77.

<sup>23</sup> (1958) Ir Jur Rep 73.

<sup>24</sup> See *R v Spurge* [1961] 2 All ER 688, 692 per Salmon J.

<sup>25</sup> As amended by section 23 of the *Road Traffic Act 2002*.

person who commits this offence is liable on summary conviction to a maximum fine of €1,500, or at the court's discretion, imprisonment for a maximum term of 3 months or to both. A mandatory disqualification period of 6 months applies where the individual contravening section 52 was convicted two or more times under section 52 within the previous three years.

4.19 Drivers will generally be charged with careless driving rather than dangerous driving where they have been merely careless, doing their incompetent best or have been momentarily inattentive. Moreover, the charge must not automatically be one of dangerous driving when death or serious bodily harm results from carelessness. Whether a person has driven carelessly is a question of fact that the court must decide in every case and the applicable test is objective. The prosecution must establish that the accused departed from the standard of skill and care that a reasonable, competent, prudent driver of experience would have exercised in the circumstances.

4.20 In the English case of *McCrone v Riding*,<sup>26</sup> which concerned a learner driver, the Court held that an accused who fails to exercise due care is guilty regardless of whether his or her failure is due to inexperience. A conviction for careless driving can be sustained even where a driver's alleged carelessness arose due to an error of judgment. The accused need not know that that his driving was careless in order to be guilty of the offence of careless driving. In *Hampson v Powell*<sup>27</sup> the conviction for careless driving of a lorry driver who was unaware that he had hit a stationary vehicle was upheld. However his conviction for failing to report the accident was quashed because he was unaware the accident took place.

4.21 The offence of driving without reasonable consideration in Ireland is found in section 51A(2) of the *Road Traffic Act 1961* as inserted by section 49 of the *Road Traffic Act 1968*. It provides:

“A person shall not drive a vehicle in a public place without reasonable consideration for other persons using the place.”

Under section 102 of the *Road Traffic Act 1961* as amended by section 23(1)(a) of the *Road Traffic Act 2002* a general penalty applies for this offence whereby on summary conviction for a first offence the maximum penalty is €800, on a second offence it is €1,500, on a third or subsequent offence with 12 months, a fine of €1,500 and/or 3 months imprisonment; and on a third or subsequent offence not within 12 months a maximum fine of €1,500. The offence does not attract mandatory disqualification. Drivers

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<sup>26</sup> [1938] 1 All ER 157.

<sup>27</sup> [1970] 1 All ER 929.

have been prosecuted for driving without reasonable consideration for other persons where they have failed to dip headlights for oncoming traffic, or have driven through puddles at speed, soaking pedestrians.<sup>28</sup>

4.22 In *AG v Fitzgerald, Power and Thornton*<sup>29</sup> the Attorney General submitted that section 53 of the *Road Traffic Act 1961* created two offences, the offence of dangerous driving and the offence of dangerous driving causing death or serious bodily harm. The Supreme Court held that this construction of section 53 could not be reconciled with the wording of the section. According to the court, section 53 did not create two separate offences of dangerous driving and dangerous driving causing death or serious bodily harm. A single offence had been created. The dual, or rather alternative aspect of the offence related to the mode of prosecution. O' Dalaigh CJ maintained that section 53 puts the prosecution to its election; where an accused is acquitted on indictment it is not open to the Attorney General to prosecute him later summarily for dangerous driving.

4.23 O Dalaigh J also stated that if a jury acquits of an offence under section 53 it may nonetheless find the accused guilty of careless driving under section 52 and not of dangerous driving simpliciter.<sup>30</sup> In the case against Thornton<sup>31</sup> the defendant was charged with dangerous driving causing serious bodily harm and with dangerous driving simpliciter arising out of the same set of facts. He pleaded guilty to dangerous driving. The prosecution then attempted to adjourn the proceedings pending a determination of the indictable offence. The Supreme Court held that because the summary proceedings led to a conviction, the prosecution was not permitted to seek to return the accused for trial under the same section.

4.24 In *The State (McCann) v Wine*<sup>32</sup> the accused faced two summonses in the District Court, the first of which involved the summary offence of careless driving contrary to section 52 of the Act of 1961 and the second referred to the indictable offence of dangerous driving causing death contrary to section 53 of the same Act. He was also charged with driving under the influence of intoxicating liquor and of driving under the influence of a drug. The accused pleaded guilty to the careless driving offence. The Supreme Court was asked to consider whether the District Justice was right to strike out the careless driving charge and in extending the time for

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<sup>28</sup> Woods *Road Traffic Offences* (1990 Limerick) at 82.

<sup>29</sup> [1964] IR 458.

<sup>30</sup> *Ibid* at 483.

<sup>31</sup> *Ibid* at 473.

<sup>32</sup> [1981] IR 134.



delivery of a book of evidence in respect of the dangerous driving causing death charge.

4.25 The respondent claimed that under the terms of the rule 64(1) of the District Court Rules 1948 the District Judge was bound to accept the plea and dismiss the indictable offence. He relied on *The AG (Ward) v Thornton*<sup>33</sup> as authority for that proposition. In contending that the district judge had no discretion in accepting the plea or not, counsel for the respondent argued that the respondent should only be punished for the relatively trivial offence of careless driving. Counsel for the appellant argued that interpreting rule 64(1) of the District Court Rules 1948 in the manner suggested by the respondent would be incorrect. He also submitted that *The AG (Ward) v Thornton* was distinguishable from the instant case on the facts.

4.26 Under rule 64(1) of the District Court Rules 1948 the substance of the complaint must be stated to the accused and if he then admits the truth of the complaint the District Justice may convict if he does not see sufficient reason to the contrary. Griffin J in the Supreme Court stated that a plea of guilty cannot arise until and unless the substance of the complaint upon which the summary charge is based is stated to the accused.<sup>34</sup> The judge noted that in this case counsel for the respondent pleaded guilty on his client's behalf before the substance of the case had been stated. As a result the appellant's submission that the purported plea of guilty was premature and ineffective was correct.

4.27 Griffin J held that *The AG (Ward) v Thornton*<sup>35</sup> was distinguishable because the charges before the court were charges of dangerous driving and dangerous driving causing death. The prosecution in that case sought to bring both summary proceedings for dangerous driving and proceedings on indictment for dangerous driving causing death in two separate courts at the same time. The Supreme Court held that the prosecution was bound to elect and that, having failed to do so, the accused was entitled to have his plea of guilty to the summary offence accepted and to have the indictable offence struck off.

4.28 Griffin J said that even if the respondent's purported guilty plea in the District Court had not been premature he would not interpret the words "the Justice may, if he sees no sufficient reason to the contrary, convict" in

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<sup>33</sup> [1964] IR 458.

<sup>34</sup> *The State (McCann) v Wine* [1981] IR 134, 140.

<sup>35</sup> [1964] IR 458.

rule 64(1) of the Rules of 1948 in a mandatory sense by treating the word “may” as meaning “shall”.<sup>36</sup>

4.29 Under section 6 of the *Criminal Justice Act 1951* an indictment may contain a count charging the accused with the commission of a summary offence with which he has been charged in the District Court and which springs from the same set of facts relied upon to support the indictable offence.<sup>37</sup> In allowing the appeal, Griffin J stated that in a case like the present one the correct procedure is to include a count of careless driving in the indictment, or to avail of the provisions of section 53 (4) of the 1961 Act which permits a jury to find an accused person guilty of an offence under section 52 if they find that he is not guilty of the offence under section 53.

## **D Manslaughter, specific driving causing death offences and differing levels of culpability**

### **(a) *The high end of the scale***

4.30 *R v Spree and Keymark Services Ltd*<sup>38</sup> is a recent English motor manslaughter case where the culpability of the defendant was extremely high. The defendant, a director of a trucking company, pleaded guilty to the manslaughter of two men and was sentenced to 7 years imprisonment. Keymark Services Ltd also pleaded guilty to the manslaughter of the two men. The men died in a crash on the M1 in Northamptonshire in February 2002 when a lorry driver who worked for Keymark Services Ltd fell asleep at the wheel and crashed into seven vehicles while part way through an 18 hour shift.

4.31 The articulated lorry crashed through the central reservation of the M1 between junctions 15 and 16, and collided with seven other vehicles. One of the deceased had been driving a truck, while the other had been at the wheel of a van. The Keymark services employee also died in the crash. Northampton Crown Court was told that lorry drivers in the company were instructed to falsify records so that they could work longer hours.

4.32 According to the prosecutor, drivers drove as long as they could without taking daily and weekly rests. There was a constant risk that any of drivers might fall asleep at the wheel at any time. Drivers regularly falsified records of working hours so it appeared they were complying with the law. At the time of the collision, the deceased truck driver’s tachograph actually showed his truck at rest at Keymark’s depot.

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<sup>36</sup> *The State (McCann) v Wine* [1981] IR 134, 141.

<sup>37</sup> See *The People (AG) v O’ Brien* [1963] IR 92.

<sup>38</sup> Crown Court December 2004.

4.33 The judge said that the sheer scale was shocking because every driver was involved, encouraged by the incentive of a profit-sharing initiative. The director was the driving force of the fraud and involved other people in it. According to the judge, it was hard to imagine a more serious case of its type. Another female director was jailed for 16 months for conspiracy to falsify driving records, while the company's secretary was given 160 hours of community service for the same charge.

4.34 An inspection by the Vehicle Inspectorate led to Keymark's operator's licence being revoked and the directors were banned for life from holding similar management positions. Following a further police investigation, all of the company's ten full-time drivers were prosecuted. They were fined on a total of 400 different offences of breaching driving regulations and falsifying vehicle records. Three other part-time drivers received official cautions.

4.35 In *R v Cousins*<sup>39</sup> the accused pleaded guilty to one charge of aggravated dangerous driving causing death and one charge of aggravated dangerous driving occasioning grievous bodily harm following a 14 minute high-speed police chase. The accused weaved in and out of the traffic in a perilous fashion, drove through a red light at the intersection of two busy roads at 130-140 km per hour and hit the front corner of a cement truck. The accused collided with a stationary vehicle by a traffic island before mounting the island and hitting a traffic light pole. The car then hurtled off the traffic island across the traffic lane and into another pole before coming to a standstill.

4.36 The deceased and the person injured were passengers in the stolen car. The accused was also seriously injured in the crash. He had a lengthy criminal record which including several driving offences such as driving under the influence of alcohol, driving in a manner dangerous and driving while disqualified. He had served several terms of imprisonment. At the time of the offences he was a disqualified driver with a period of disqualification until 2010. He pleaded guilty but there was no evidence of remorse and the subjective features of his case did not incline the Court to show leniency.

4.37 The Chief Justice stressed the serious risk to which the accused exposed innocent members of the public by driving in such a dangerous and erratic manner. The driving offence was extremely serious and the culpability of the accused was very high. On a Crown appeal, the court imposed an 8 year sentence with a non-parole period of 6 years for the offence of aggravated dangerous driving causing death.

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<sup>39</sup> (2002) 36 MVR 262.

4.38 In *R v Stevens*<sup>40</sup> the appellant hotwired a car in order to steal it following a drinking binge. The owner of the car saw the appellant as he was driving away. He opened the driver's door and tried to stop the car. The appellant continued to drive the car, endeavouring to keep control of it, while at the same time trying to remove the owner from the car. The driving was erratic and eventually the vehicle collided with the wall of a hotel. The owner of the car was killed in the process.

4.39 The appellant who pleaded guilty to manslaughter was sentenced to 9 years and 4 months with a minimum term of 7 years. He successfully appealed against the severity of the sentence. Counsel for the appellant claimed that for the purpose of sentencing the trial judge should have indicated whether he was sentencing the appellant on the basis of unlawful and dangerous act manslaughter or manslaughter by criminal negligence. According to James J in the Supreme Court of New South Wales, it did not matter which manslaughter classification was given to the appellant's offence as his conduct readily fit both categories.

4.40 When sentencing the appellant, the trial judge had noted a variety of mitigating subjective features, including the appellant's youth, the fact that his behaviour was out of character and influenced by the amount of alcohol he had consumed. The judge observed that the appellant was from a good, stable home and was virtually illiterate but had nonetheless proved to be a diligent worker. He had good prospects of rehabilitation. The judge did not include the appellant's guilty plea or his remorse in the list of mitigating factors, but he did commence his remarks on sentencing by observing that the appellant had pleaded guilty. James J remarked that judges are not required to refer to every matter which is relevant to sentencing the offender and consequently the appellant failed to prove any error of law or of fact in sentencing on the part of the trial judge.

4.41 However, James J stated that the sentence imposed was excessive. At the appeal hearing, the Crown accepted that in the circumstances the sentence would have been in the region of 13 years in the absence of mitigating subjective features. James J stated that such a sentence would be a very high for an offence of manslaughter for criminal negligence or for an unlawful and dangerous act where the accused must be sentenced on the basis that he had no intention of killing the victim or of causing the victim serious injury.<sup>41</sup>

4.42 On the facts of the case it was held that a sentence of 13 years or more, before making any discount for favourable subjective circumstances or for a guilty plea, was extreme. Thus, the court ordered that the original

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<sup>40</sup> (1993) 18 MVR 107.

<sup>41</sup> (1993) 18 MVR 107, 111.

sentence should be quashed and a new sentence of 8 years penal servitude with a minimum term of 5½ years was imposed.

4.43 In the case of *R v Cramp*<sup>42</sup> the Supreme Court of New South Wales upheld the 55 year old appellant's conviction for manslaughter. In deciding not to reduce the appellant's sentence of 9 years and 4 months with a non-parole period of 7 years and a further term of 2 years and 4 months, the Court compared the instant case with *R v Stevens*<sup>43</sup> where the sentence was reduced. It was observed that the objective facts of that case were far less serious than those at issue here. Barr J stated that it was difficult to imagine a more serious course of conduct than that followed by the appellant. The appellant was the only adult in charge of four children for more than three hours. He drank a vast quantity of alcohol himself and supplied the teenaged deceased with alcohol which he encouraged her to drink. He knew that he was too drunk to drive and, in order to avoid the consequences to himself of drinking and driving, persuaded the deceased to drive at high speeds. Three young children as well as the deceased were endangered by this conduct. The three young boys tried to persuade the deceased to slow down before she collided with a tree and was thrown from the vehicle.

4.44 On appeal it was argued that the appellant should not have been convicted as the jury were not unanimous as to the legal basis of guilt. At trial the jury were told by the prosecution that on the evidence they could find the appellant guilty of manslaughter by unlawful and dangerous act or gross negligence or a combination of both. According to counsel for the appellant, the prosecution should not have relied on 2 bases of guilt and in any event it was incumbent on the judge to direct the jury that they had to be unanimous about a single basis of manslaughter in order to convict.

4.45 The trial judge had instructed the jury that they could bring a verdict of guilty even if their path to the verdict differed. The jury were told that if they were satisfied beyond reasonable doubt of the existence of the 4 elements set out below they should find the accused guilty of manslaughter by gross negligence and no further deliberation would be necessary.

1. The accused engaged in conduct which included one or more of the following:

- He permitted the deceased to drive his car knowing that she was affected by alcohol.
- He permitted the deceased to drive his car at high speed.

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<sup>42</sup> [1999] NSWCCA 324; (1999) 30 MVR 9.

<sup>43</sup> (1993) 18 MVR 107.

- He permitted the deceased to drive dangerously.
- He permitted the deceased to drive his car while she was not wearing a seat belt.
- He permitted the deceased to consume alcohol while she was driving his car.

2. One or more of the foregoing acts of the accused occasioned the death of the deceased.

3. The act or acts occasioning the death of the deceased was/were done with gross negligence and with reckless disregard for the safety of the deceased.

4. The act or acts occasioning the death of the deceased showed such a serious disregard for the safety of the deceased as to amount to a crime.

4.46 If the jury was not convinced as to the four elements, they were told they could consider manslaughter by unlawful and dangerous act in relation to aiding and abetting the offence of dangerous driving. A further ground for appeal concerned the trial judge's directions about the duty of care owed by a car owner to the person driving it. The judge told the jury that negligence only arises where there is a breach of a duty of care and that people driving cars owe a duty of care not to injure or kill other road-users or people in the proximity of the road because of their bad driving.<sup>44</sup>

4.47 The judge stated that if the owner of a car allows someone else to drive it, the owner owes a duty of care to the driver. The owner may breach that duty of care in a number of ways, for instance if he or she allows the person to drive it at an excessive speed (the car owner may also be in breach of a duty to other road users and pedestrians) or to not wear a seat belt. The jury was told that they had to decide whether, on the facts of the case, there had been a breach of the duty of care.

4.48 Counsel for the appellant maintained that the judge's direction as regards not wearing a seat belt in relation to the car owner's duty to withdraw permission to drive was inappropriate. It was claimed that there was no evidence that the appellant was aware that the deceased was not wearing a seat belt, nor was there any evidence which would satisfy the jury that not wearing the seat belt caused the death of the deceased. However, the Supreme Court did not think that the seat belt direction was too broad.

4.49 In fixing the relevant sentence at trial, the judge referred to the offence of aggravated dangerous driving occasioning death under section 52A(2) of the *Crimes Act* which has a maximum penalty of 14 years imprisonment and stated that this was the crime which most resembled the

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<sup>44</sup> *R v Cramp* (1999) MVR 9, 25.

crime committed by the appellant. Thus, he took 14 years imprisonment to be the relevant maximum sentence for motor manslaughter. The Supreme Court held that although the trial judge erred in comparing the offence to dangerous driving causing death, the error favoured the appellant. The offence which the trial judge was sentencing the appellant was manslaughter which had a maximum punishment of penal servitude for life and was a far more serious crime than that of aggravated dangerous driving causing death.

4.50 In *R v Jarorowski*<sup>45</sup> the accused pleaded guilty to a count of aggravated dangerous driving causing death. Shortly after noon he drove his four wheel drive out of his driveway onto a busy main road where he collided with a motorcyclist who ended up underneath the four wheel drive. The accused attempted to move his vehicle but was prevented from doing so by another motorist. The accused went into his house in a state of agitation where he made a phone call and consumed a small amount of alcohol before returning to the scene of the accident. He informed the police that he had drunk some brandy and ginger ale earlier that day. A breath test taken at the scene of the accident indicated a level of 0.240g of alcohol per 100 ml of blood. At the police station a further breath test showed a reading of 0.270g.

4.51 Two weeks before the accident the accused had been disqualified from driving for 2 years for drunk driving – his blood showed that there was not less than 0.125 g of alcohol per 100 ml of blood at the time. Thus, he was a disqualified driver at the time of the offence of aggravated dangerous driving causing death. He was a 43-year-old alcoholic who had stopped going to AA meetings and suffered from depression. After the offence he gave up drinking and appeared to be genuinely remorseful.

4.52 According to Simpson J, despite the strong subjective features which justified a degree of sympathy with the offender, she was not required to show leniency. She remarked that she could not ignore:

“the objective seriousness of the applicant’s conduct in driving a vehicle at all so soon after his disqualification and worse, after he had been drinking.”<sup>46</sup>

Accordingly, the sentence of 8 years was upheld as being within the permissible range open to the court. However, the court believed that there were special circumstances which the trial judge should have taken into account and therefore the non-parole period was reduced from 6 years to 5 years.

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<sup>45</sup> (1999) 31 MVR 107.

<sup>46</sup> See *R v Vukic* 2003 NSWCCA 0013, paragraph 54 citing from *R v Jaworowski* (1999) 31 MVR 107.

**(b) The upper middle part of the scale**

4.53 In the New South Wales case of *R v Vukic*<sup>47</sup> the appellant who had a history of alcohol and cannabis abuse pleaded guilty to aggravated dangerous driving causing death. While driving under the influence of alcohol the appellant crossed the double centre lines onto the wrong side of the road. He crashed into a car coming in the opposite direction and killed the driver. A blood sample taken from the appellant at 2 am showed a reading of 0.172g.

4.54 The appellant had a very poor driving record. He had been convicted twice of driving with a mid-range blood alcohol level. He had many traffic infringements for exceeding the speed limit, for disobeying traffic lights and not wearing a seat belt. He also had received demerit points, warning letters, and his licence was restricted.

4.55 At trial the judge remarked that in terms of the facts, it was “hard to think of a case that could be worse”. The high speed, the passing onto the wrong side of the road and the heavy intoxication were a very bad combination which made the crime “one of the worst of its type.” However he accepted that the applicant was truly sorry for what he had done and sentenced the appellant to 8 years imprisonment with a non-parole period of 5 years because the prospects of rehabilitation were good.

4.56 According to Smart JA, the trial judge erred in regarding the appellant’s dangerous driving causing death case to have been one of the worst of its type. Smart JA stated that the worst cases often involve a combination of factors, such as high speed, a blood alcohol reading of 0.2g or more and driving through red traffic control lights.<sup>48</sup>

4.57 Smart JA referred to a number of aggravated dangerous driving causing death cases which attracted head sentences of 8 years and were worse than the present case. The culpability of the accused in *R v Cousins*<sup>49</sup> was greater than *R v Vukic*<sup>50</sup> in that two offences and a high-speed police chase of 14 minutes were involved in which many people were endangered. *R v Jaworowski*<sup>51</sup> was also objectively more serious a case than *R v Vukic*.<sup>52</sup> There the accused had a much higher blood alcohol reading (0.270g), had

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<sup>47</sup> 2003 NSWCCA 0013; (2003) 28 MRV 475.

<sup>48</sup> *R v Vukic* 2003 NSWCCA 0013, paragraph 23.

<sup>49</sup> (2002) 36 MVR 262.

<sup>50</sup> 2003 NSWCCA 0013, paragraph 49.

<sup>51</sup> (1999) 31 MVR 107.

<sup>52</sup> 2003 NSWCCA 0013; (2003) 28 MRV 475.



driven while disqualified and tried to drive from his home on to a busy arterial road when it was dangerous to do so.

4.58 In *R v Woodward*<sup>53</sup> the offender drove 8-10 km along two main roads and failed to negotiate a left-hand bend where his blood alcohol reading was 0.216g. An unrestricted licence had been restored only three weeks previously. He pleaded not guilty and was not entitled to any discount of consequence for his admissions. *R v Tadman*<sup>54</sup> was also a worse case than *R v Vukic* due to the accused's lengthy period of erratic driving while strung out on heroin. The accused had failed to stop and evaded attempts by other motorists to make him stop. *R v Sen*<sup>55</sup> attracted a head sentence of 7 years for two offences of aggravated dangerous driving occasioning death. The driver's blood alcohol reading was 0.219g and he passed through a red traffic light.<sup>56</sup>

4.59 Adams J recognised that the appellant's culpability was grave, but as he was neither charged with nor convicted of manslaughter (although Adams J believed such a charge would have been justified) he could not be punished for a crime for which he had not been convicted.

4.60 Under section 24 of the *Crimes Act 1900* (NSW) manslaughter carries a maximum penalty of imprisonment for 25 years whereas the offence of aggravated dangerous driving under section 52A carries a maximum term of 14 years imprisonment. This is a significant difference. As was the case in other jurisdictions which introduced specific driving offences dealing with the negligent causing of death, the offence of dangerous driving causing death in NSW, which was enacted over 50 years ago, came into being because juries were unwilling to convict drivers of manslaughter.

4.61 In Adams J's opinion, public attitudes to deaths caused by dangerous driving had fundamentally changed in recent years and the reason for the insertion of section 52A no longer held. The judge recognised that the provision may still be appropriate in many cases but he felt it could no longer be justified on the grounds that juries would be reluctant to convict reckless drivers of manslaughter in defiance of their oaths.<sup>57</sup> Adams J stated that it was time for indictments to be drawn with this realisation in mind.

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<sup>53</sup> (2001) 33 MVR 536.

<sup>54</sup> (2001) 34 MVR 54.

<sup>55</sup> [1999] NSWCCA 199.

<sup>56</sup> See *R v Vukic* 2003 NSWCCA 0013, paragraph 69.

<sup>57</sup> *Ibid*, paragraph 10.

4.62 Nonetheless, he believed that it would be wrong to sentence and punish the appellant as if he had been convicted of gross negligence manslaughter rather than for aggravated dangerous driving, because this would subvert section 52A, which was introduced to achieve and punish convictions for manslaughter under the guise of convictions for dangerous driving causing death.<sup>58</sup> Had the appellant been convicted of manslaughter Adams J was convinced that a longer sentence than that imposed at trial would have been justified, but under the circumstances, he believed it had to be reduced.

4.63 The appellant argued that the sentence imposed was manifestly excessive. He also argued that the judge had failed to give sufficient weight to the fact of his genuine remorse, his continuing physical and psychological difficulties, his good employment record and decent character, as well as to the fact that he was going to rehab for his addictions and was a young man with a promising future.

4.64 Smart JA stated that the original 8 year sentence in *R v Vukic* was manifestly excessive and out of step with sentencing patterns for similar cases. He considered that the correct head sentence for the appellant was 7 years, which reflected the combination of the blood alcohol reading of 0.172g, the excessive speed crossing the double yellow lines, the appellant's poor traffic record and the existence of strong mitigating factors.<sup>59</sup>

4.65 The court in *R v Vukic*<sup>60</sup> emphasised the desirability of consistency in sentencing. Adams J stated that the development of a coherent system of sentences is an essential element of the rule of law and that the idiosyncratic exercise of individual discretion in sentencing undermines public confidence for the institutions of justice and has led to sentencing schemes of various kinds as a result of judicial sentencing behaviour in many American jurisdictions. According to Adams J, the attempt to achieve coherence and consistency in sentencing by trying to perceive a pattern and, where one exists, to reflect it, is a vital part of any rational and just judicial process deserving of public confidence.<sup>61</sup>

4.66 Smart J observed that sentences are not to be imposed by comparing case with case through a process of factual analysis, factual analogy and factual comparison. He thought that the focus should always be on the facts of the case before the court but did recognise that previous

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<sup>58</sup> *R v Vukic* 2003 NSWCCA 0013, paragraph 10 at paragraph 11.

<sup>59</sup> *Ibid* at paragraph 71.

<sup>60</sup> 2003 NSWCCA 0013; (2003) 28 MRV 475.

<sup>61</sup> *R v Vukic* 2003 NSWCCA 0013, paragraph 6.

decisions are useful in revealing a general pattern of sentencing for particularly bad aggravated dangerous driving causing death cases.<sup>62</sup>

4.67 In *The DPP v McCormack*<sup>63</sup> the Irish Court of Criminal Appeal imposed a 3 year suspended sentence on the accused who killed two people in a car accident a week before Christmas in 2004. The accused's car collided with another car as he tried to overtake it late at night. A mother-of-three and a father-of-two drowned when their car was forced off the road into a deep drain. The accused, a 37-year-old production manager from Co Roscommon pleaded guilty to two counts of dangerous driving causing death and to driving while intoxicated on 18 December 2004. He was initially fined €2,000 and disqualified from driving for 10 years. The DPP successfully appealed to the Court of Criminal Appeal against the leniency of the sentence on the basis that having attended his company Christmas party the accused slept for one hour, completed a 13-hour shift and then went to the pub where he had 3-4 pints of Guinness.

4.68 In *The DPP v Naughton*<sup>64</sup> the accused was sentenced to 3 years imprisonment after pleading guilty to dangerous driving causing the deaths of two teenage girls from Kilkee, Co Clare in October 2003. At the age of 15 the accused, who had been driving in fields since he was 12, purchased a 1984 Opel car from a friend for €60. On the night of the incident he went "on a campaign of dangerous driving". He was seen rallying around Kilkee and a complaint was made to Gardai that he was driving dangerously.

4.69 The accused met the two victims and the brother of one of the girls at a takeaway and pressured them into going for a drive in the back seat of his car. The boy told Gardai that the victims asked the accused to slow down but he refused. Another driver saw the accused drive "very aggressively" before he hit a sea wall at 70 to 80 mph. Both girls died at the scene. The boy successfully underwent heart surgery despite having had only a 20 % chance of surviving.

4.70 One of the garda witnesses stated that the accused initially claimed that another red car had been joyriding on the night and was responsible for putting his car off the road. The accused also said that Gardai were following him. Counsel for the accused remarked that it was completely unacceptable to have a 15-year-old drive a car and was similar to giving a 15-year-old a loaded gun.<sup>65</sup>

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<sup>62</sup> *R v Vukic* 2003 NSWCCA 0013 paragraph 67.

<sup>63</sup> See Irish Times Report 28 April 2006.

<sup>64</sup> See Irish Times Report 27 October 2006.

<sup>65</sup> *Ibid.*

4.71 The accused absconded to the UK in February 2004 and was arrested by British authorities in March 2006. He spent time in custody since. At the time of the accident the accused had been living at a home for homeless adolescents in Galway. Counsel told the court that the accused had led a feral existence since childhood with no proper parental supervision and that he had been sexually assaulted as a youth. He also said that the accused requested him to apologise to the families of the deceased on his behalf because he did not have the social skills to apologise directly himself. In deciding that 3 years was the appropriate sentence, Judge Murphy identified a number of mitigating factors including the youth of the accused, the absence of parental supervision, the guilty plea, as well as the fact that he was of low intelligence and on anti-depressants.

4.72 In *The DPP v Fitzpatrick*<sup>66</sup> the accused pleaded guilty to dangerous driving causing the death of his friend on 5 July 2004. The accused and some friends attended an air show in Galway city and afterwards went to a pub and a nightclub where the accused consumed up to 7 pints of cider and/or lager. The deceased drove the accused's car most of the way home from the club because the accused had been drinking. However, two miles from home the accused told the deceased to get into the passenger seat as he wanted to drive the rest of the way. The car diverged from the narrow country road and hit a tree moments after the switch was made.

4.73 The accused who sustained minor cuts and bruises telephoned his brother and sister at home and also called a friend who had been left out of the car minutes before the crash. He enlisted their help in moving the deceased from the passenger seat into the driver's seat before an ambulance was summoned. The DPP did not press charges against the three who helped to move the body and the State withdrew its charge of perverting the course of justice against the accused.

4.74 A garda informed the court that there were three people in the car at the time of the crash. The garda claimed that the accused was driving, the deceased was in the front passenger seat and another young man who was lying across the back seat was thrown from the car upon impact with the tree and suffered severe back injuries. According to the garda, when he arrived at the scene half an hour later he became instantly suspicious of the accused's version of events due to the unnatural position of the deceased's body in the car. When the garda visited the accused at the hospital the accused once again claimed that the deceased had been driving the car. He noticed bruising running from the accused's right shoulder down to his left hip which would have been caused by a seat belt. This confirmed his suspicions that the accused had been the driver of the vehicle.

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<sup>66</sup> See Irish Times Report 10 March 2006.

4.75 The garda smelt alcohol on the accused's breath but was unable to get a designated doctor to come to hospital to get a blood sample. Judge Groarke expressed astonishment that there was no medical assistance available to the Gardai in a place such as a Galway hospital to carry out examinations on people who are involved in serious accidents.

4.76 Judge Groarke was horrified at the way the deceased's body was treated so disrespectfully after his death. He stated that his mind was boggled at the way these people dealt with their so-called friend. The accused was sentenced to 18 months imprisonment for dangerous driving causing death.

4.77 *R v Lavender*<sup>67</sup> involved manslaughter by criminal negligence and dangerous driving charges. Having been sentenced to imprisonment for 4 years with a non-parole period of 18 months, the driver of a large front end loader who killed a boy hiding behind a tree successfully appealed his conviction for manslaughter by criminal negligence.

4.78 Four young boys had been playing in a pile of sand at the appellant's workplace. The boys should not have been on the property and were told to leave on previous occasions. On the day of the fateful accident the appellant saw them, got into the front end loader which weighed 25 tons and was much higher and longer than a car. He pursued them at approximately four km per hour through an area of thick vegetation in order to tell them to leave. His vision was impeded by the bucket at the front of the loader. When he lost sight of the boys he turned the loader around. He saw two of the boys running away from him through the scrub and so he followed them. The other two boys, one of whom was the deceased, were hiding behind trees in the scrub. While driving through the scrub, the appellant hit the victim who suffered fatal injuries.

4.79 At trial the Crown put forward a strong case of manslaughter, alleging highly negligent behaviour on the part of the appellant in disregard for the safety of others. The Prosecutor stressed that it did not matter whether or not the accused intended to inflict serious hurt or death, stating that an objective test applied.<sup>68</sup> The jury were told that in order to convict the accused of manslaughter they had to be satisfied that the victim died as a consequence of the actions of the accused; that the accused owed a duty of care to the victim and anyone else in the vicinity of the loader when it was in operation; that the accused acted with reckless disregard for the safety of the deceased and the other three boys; and that the actions of the accused created a high risk that serious injury or death would follow.<sup>69</sup>

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<sup>67</sup> 2004 NSWCCA 120; 41 MVR 492.

<sup>68</sup> *R v Lavender* 2004 NSWCCA 120, paragraph 20.

<sup>69</sup> *Ibid* at paragraph 25.

4.80 Counsel for the appellant did not object to the Crown's reference to an objective test, but argued that the appellant's negligence did not approach the degree of negligence contemplated by a manslaughter charge. The defence claimed that the deceased died as a consequence of his own "unexpected and unpredictable act" and not due to the appellant's conduct.<sup>70</sup> The appellant's main ground for appeal was that the trial judge refused to direct the jury regarding his honest and reasonable belief that it was safe to proceed. The appellant also claimed that the judge had erred in treating the offence of manslaughter as an absolute one.

4.81 The trial judge had directed the jury to compare the conduct of the accused with the conduct of a reasonable person who possessed the same personal attributes as the accused, that is the same age, possessing the same experience and knowledge as the accused in the circumstances in which he found himself, with average fortitude and strength of mind.<sup>71</sup> The judge emphasised that the Crown did not have to prove that the accused appreciated that he was being negligent or that he was being negligent to such a high degree. It was for the jury to determine whether the conduct of the accused amounted to negligence based upon what they thought a reasonable person in the accused's position would have done.<sup>72</sup>

4.82 In discussing the relevance of the driver's honest and reasonable belief as a defence to the charges with the Crown and defence counsel, the trial judge stated that the possibility of the defence generally arises in cases where there is a latent defect such as in a dangerous driving situation, where a person is driving with defective brakes not knowing anything about the defect so that the driving is objectively dangerous, but because the driver held an honest and reasonable belief that the car is in sound mechanical order, they are entitled to be acquitted.<sup>73</sup>

4.83 The appellant submitted that section 18(2)(a)<sup>74</sup> qualified the lack of care in the common law offence of manslaughter by criminal negligence

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<sup>70</sup> *R v Lavender* 2004 NSWCCA 120, paragraph 22.

<sup>71</sup> *Ibid* at paragraph 41.

<sup>72</sup> *Ibid*

<sup>73</sup> See *R v Lavender* 2004 NSWCCA 120, paragraph 38

<sup>74</sup> Although manslaughter is a common law offence, section 18 of the *Crimes Act 1900 (NSW)* provides: "1(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years." (b) Every other homicide shall be taken to be manslaughter. 2 (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section. (b) No punishment or forfeiture shall be incurred by any person who

by providing that “[n]o act or omission which was not malicious ... shall be within this section”. Section 5 of the *Crimes Act* provides:

“Every act done of malice, whether against an individual, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law and ingredient in the crime.”

4.84 The appellant claimed that the defence of honest and reasonable mistake was preserved by section 18(2)(a) and that in the absence of malice in the conduct causing death, such conduct is removed from the scope of manslaughter.<sup>75</sup>

4.85 In granting the appeal against conviction on the basis that the trial judge inadequately directed the jury as regards the meaning of “maliciously”, the Supreme Court of New South Wales held that in future trial judges should direct juries in cases of manslaughter by criminal negligence:

- in accordance with *Nydam v R*;<sup>76</sup>
- in terms of the pertinent expression(s) in the definition of maliciously in section 5 of the *Crimes Act 1900* (NSW) depending on the facts of the case - for example that the accused did the act recklessly, wantonly, with indifference to human life or suffering or with the intention of injuring someone;
- that evidence of the accused’s belief in primary factual matters is relevant;<sup>77</sup> and
- that there is no separate defence of honest and reasonable mistake.<sup>78</sup>

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kills another by misfortune only.” By section 24 of the *Crimes Act 1900* (NSW), a person convicted of manslaughter is liable to imprisonment for 25 years.

<sup>75</sup> *R v Lavender* 2004 NSWCCA 120, paragraph 134.

<sup>76</sup> 1976 VIC LEXIS 131, [1977] VR 430.

<sup>77</sup> See *R v Lavender* 2004 NSWCCA 120, paragraph 268 where Hulme J states that an accused’s beliefs as to primary factual matters such as the fact that “the speed was 20 km per hour, that the brakes were working normally, and that there was no one present” may bear on the reasonableness of his actions. A belief that it was “safe to proceed” does not fall within that description. Analysed, such a belief is really an opinion”.

<sup>78</sup> *Ibid* at paragraph 148.

**(c) The middle of the scale**

4.86 *The People (DPP) v Sheedy*<sup>79</sup> involved an appeal against the severity of the sentence imposed following a conviction for dangerous driving causing death. Upon conviction the applicant had been sentenced to four years imprisonment, with the sentence to be reviewed after two years. In March 1996 the applicant drove his recently purchased Ford Probe car towards a roundabout by the Tallaght Bypass at speed having consumed 3½ or 4 pints of beer. He passed through the roundabout without stopping and flew into the air for about 70 feet before landing on the roof of a car being driven by the deceased woman. Her husband was in the passenger seat and three children were in the back.

4.87 The applicant's car also hit another car 20 or 30 feet further on. At trial, evidence was adduced that the applicant had been driving fast for a prolonged period in a manner which made other road-users fearful. Following the applicant's arrest he was tested for alcohol consumption. His urine showed a concentration of 141 milligrams of alcohol per 100 millilitres of blood. The legal limit is 107 milligrams.

4.88 In July 1997, the applicant pleaded guilty to dangerous driving causing death contrary to section 53(2) (as amended by section 51 of the *Road Traffic Act 1968*) of the *Road Traffic Act 1961*. He also pleaded guilty to driving a car in a public place with a blood alcohol reading exceeding 107 milligrams per 100 millilitres of blood.<sup>80</sup>

4.89 Judge Matthews sentenced the applicant to 4 years imprisonment in relation to the dangerous driving causing death charge, to be reviewed on the in October 1999. The applicant was also disqualified from holding a driving licence for 12 years. In relation to section 49(7) the applicant was disqualified from holding a driving licence for a year.

4.90 In November 1997 the review date was vacated on the request of the applicant's senior counsel. A few days later Judge Kelly suspended the balance of the sentence was for 3 years and the applicant was released from custody. In February 1999 the DPP sought a judicial review that order for release and the applicant presented himself at Mountjoy prison where he was detained on the basis of the original orders. Judge Kelly's order was quashed by the High Court.

4.91 In appealing against the severity of the 4 year sentence counsel for the applicant did not deny that the case was a serious one, since the applicant's speedy driving following the consumption of 3½ or 4 pints of

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<sup>79</sup> [2000] 2 IR 184.

<sup>80</sup> Contrary to section 49(7) of the *Road Traffic Act 1961*, as inserted by section 10 of the *Road Traffic Act 1994*.



beer caused the death of an innocent motorist. However, counsel argued that the sentencing judge had intended that the applicant spend 24 months in prison as there were mitigating circumstances and such a sentence was in line with other similar cases, but that subsequent events had meant that the applicant was now subject to a 4 year sentence. In relation to the charge of dangerous driving causing death, counsel for the applicant argued that the provisions of the *Road Traffic Act 1994* which came into effect in 1995 were not mentioned in the indictment and therefore only a 5 year maximum term of imprisonment was permitted, and not a 10 year term.

4.92 Counsel for the DPP argued that the maximum penalty in force in March 1996 was 10 years imprisonment and argued that the lack of reference to the penalty statute in the indictment did not alter this fact. The fact that the maximum sentence was increased from a fine of £3,000 and/or 5 years imprisonment to a fine of £10,000 and/or 10 years imprisonment was an indication to the courts that such cases should be considered more seriously than before.<sup>81</sup>

4.93 Counsel for the DPP claimed that the judge's original sentencing order was unclear in relation to its effect and that it was only in April 1999 when the issue was appealed and came before the same judge that his intent became known. He did not call upon the courts to establish sentencing guidelines or tariffs, but he contended that it might be appropriate for the court to identify some factors that would put dangerous driving beyond momentary fault.<sup>82</sup>

4.94 In remarking that the offences in question were serious, Denham J in the Court of Criminal Appeal held that the maximum prison sentence for dangerous driving causing death at the time of the accident was 10 years, notwithstanding the absence of a reference to the *Road Traffic Act 1994* in the indictment. Without considering whether sentencing guidelines for this type of offence should be given, the Court of Criminal Appeal did not think that this case as an appropriate one in which to set out any general guidelines. Denham J stated:

“There is no doubt that information on sentencing in similar cases is useful to a court, although each case must be decided on its own circumstances. It may well be that with the introduction of information technology in the courts and the establishment of institutions connected to the judiciary, documents on issues relating to sentencing may be published in the future.”<sup>83</sup>

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<sup>81</sup> *The People (DPP) v Sheedy* [2000] 2 IR 184, 191.

<sup>82</sup> *Ibid* at 192.

<sup>83</sup> *Ibid* at 193-194.

4.95 With regard to review structures in sentences, Denham J observed that these enabled judges to individualise sentences for offenders whereby an element of punishment in the form of retribution and deterrence may be included as well as an element of rehabilitation. Denham J remarked that a judge may introduce a review date set for a determinate time into a sentence where a young offender has a behavioural problem or addiction which they wish to tackle. She noted however, that there was no evidence of addiction on the part of the applicant, nor were there any other factors which would make it correct to apply a structure of treatment before reviewing the sentence. Thus, the Court of Criminal Appeal held that this was not a proper case to sentence on the review date formula of sentencing and that the trial judge erred in principle in this respect.

4.96 It was held that the sentencing judge intended a 24 month term of imprisonment which is the equivalent to a 3 year sentence taking into account remission<sup>84</sup> and the special circumstances of the case. According to Denham J, each case must be considered on its own facts and the competing interests must be balanced so as to ensure proportionality. Denham J said that dangerous driving causing death is an offence with varying degrees of fault. Many cases only have one factor of fault, perhaps a momentary factor, whereas in some situations there are many factors, such as dangerous driving of a stolen vehicle and its use in the intended ramming of other cars.<sup>85</sup>

4.97 Denham J stated that a sentence should not always be computed in relation to the maximum applicable sentence.

“First, the court should consider the matter to see where on a range of penalties the particular case would lie. It is clear that this case does not fall into the category of a less dangerous driving case (where, for example, there may have been one fault factor). Nor can it be categorised as the most heinous. It is an offence which, in light of the circumstances, falls into the medium band of this offence. Thus, the sentence should not be calculated at the maximum penalty. That established it is then necessary for the court to consider the factors pleaded in mitigation as well as the aggravating factors.”<sup>86</sup>

4.98 The aggravating factors which were identified by the Court of Criminal Appeal included the fact that the applicant (1) killed a person (2) while driving at speed (3) under the influence of drink (4) in a dangerous

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<sup>84</sup> *The People (DPP) v Sheedy* [2000] 2 IR 184, 193-4 at 194 where Denham J remarked that the issue of remission should not normally form part of the sentencing judge’s consideration of the matter.

<sup>85</sup> *Ibid* at 195.

<sup>86</sup> *Ibid*.

manner which caused other road users to be apprehensive. Finally, the fact that the car was new to him meant that he should have driven it carefully so as to keep it under control. The court listed several mitigating factors such as the applicant's early guilty plea, his genuine remorse, the fact that he had no previous convictions, had had a good career as an architect and had done *pro bono* work and the fact that he would be affected by the calamity into the future both professionally and personally. The court noted that the extensive media coverage of the case might impede the applicant's finding future employment and the fact that he faced a lengthy driving ban would also have a negative impact. In upholding the trial judge's intent that the applicant serve 24 months in custody, the Court of Appeal reduced the sentence to one of 3 years imprisonment.

4.99 In *The DPP v Finnegan*<sup>87</sup> the accused was convicted of dangerous driving causing death in July 2006 for causing the death of his friend who clung to the back of a car for over half a mile along a rural road before he fell and suffered fatal head injuries. The accused and three friends left the Tullamore pub where they had been playing pool and the deceased jumped on the boot of the moving car in which they were travelling. The youth who was in the passenger seat told the inquest that the deceased dared the accused to go faster shortly before the accident. The car was travelling at approximately 30mph when the deceased fell off.

4.100 The accused thought the deceased was joking when he saw him lying on the ground after the fall. However, when he saw that the deceased's head was bleeding he took him to Tullamore General Hospital. The accused, a provisional-licence holder, pleaded guilty to the charge and was given an 18-month suspended sentence, fined €5,000 and disqualified from driving for 5 years.

**(d) The low end of the scale**

4.101 *R v De'Zwila*<sup>88</sup> involved an appeal against a conviction for causing death by culpable driving under section 318(2)(b) of the *Crimes Act 1958* (Vic). Section 318(2)(b) defines negligent driving as failure unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in the circumstances of the case. The appellant caused the death of a man at an intersection at dusk when she failed to give way and crashed into a utility vehicle towing a boat trailer. The prosecution had argued that the appellant was guilty of inattention in failing to notice the warning signs because she was flicking the dials on her car radio. She was not wearing shoes at the time of the collision and was semi-naked.

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<sup>87</sup> See Irish Times Report 22 September 2006.

<sup>88</sup> [2002] VSCA 158; (2002) 37 MVR 359.

4.102 The jury found the appellant guilty. She was sentenced to 3 years imprisonment on the count of culpable driving and received 1 year imprisonment on a separate count of negligently causing serious injury. The total effective sentence was 3 years imprisonment and a non-parole period of 6 months applied. The appellant lost her license and was disqualified from driving for 3 years.

4.103 At trial defence counsel addressed the jury about the penalties for the offence and also asserted that the only reason the prosecution was brought was because the police found the appellant in a state of undress at the scene of the accident. It was further contended that the evidence as to her lack of clothing and reference to the penalties should not have been allowed. On appeal counsel claimed that the trial judge failed to give adequate directions:

- that the negligence was the same as for the offence of manslaughter;
- that in order to convict, the jury were required to find such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances, and which posed such a high risk of death or grievous bodily harm, that the appellant's driving deserved criminal punishment; and
- that he erred in saying that "gross" means a "significant departure" from the applicable standard of care.

4.104 Counsel for the appellant informed the court that he had never been involved in a trial on a charge of culpable driving by gross negligence in which the jury had not sought guidance on the meaning of the word "gross". Ormiston JA agreed with the need to explain the word in the context of paragraph (b) because in his experience juries frequently asked for an explanation.<sup>89</sup> Regarding the trial judge's explanation of the word "gross" as meaning "significant departure", he stated that accepted directions which have been laid down by the highest court of the state should not ordinarily be changed unless the rationale behind such authorities no longer obtains.<sup>90</sup>

4.105 Charles JA observed that if juries frequently ask what is meant by "gross" then the claim that the word had a natural and well-understood meaning is not true, and it is necessary to give juries more assistance as to their task in such cases.<sup>91</sup> In 1997 the maximum term for the offences in

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<sup>89</sup> *R v De'Zilwa* (2002) 37 MVR 359, 360.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid* at 372.

question was increased to 20 years.<sup>92</sup> Charles JA stated that recent judges of the Victorian Court of Criminal Appeal had remarked on numerous occasions that culpable driving is a species of involuntary manslaughter and is punishable as such; the relevant test is a gross departure from the standard of reasonable care sufficient to support the crime of manslaughter.<sup>93</sup>

4.106 It was held that where a person is charged with culpable driving under section 318(2)(b) in future, judges should direct the jury that they are required to find that the driving of the accused involved (a) such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances, and (b) such a high risk that death or serious injury would follow, that the driving causing death merited criminal punishment.<sup>94</sup> The Supreme Court also held that a comparison with civil negligence would assist the jury.

4.107 According to Ormiston JA, the greatest flaw in the trial judge's charge to the jury on the section was that he completely failed to summarise the evidence and counsel's arguments and to relate the facts of the case to the actual charges. He observed that there seemed to be a disturbing trend whereby County Court judges omitted to summarise the evidence, generally due to the brevity of the trial and remarked that it should not be assumed that untrained jury members would be able to recollect in the same detail what trained and experienced lawyers can recollect at the end of a trial.<sup>95</sup> Ormiston JA also observed that the case against the appellant of causing death by culpable driving was as weak a case as one might see and could not be described as a "species of involuntary manslaughter."<sup>96</sup>

4.108 In relation to the appellant's nakedness, Charles JA stated that in determining whether the appellant was distracted from paying proper attention to her driving, the jury were entitled to take into account the applicant's state of undress because the evidence was relevant, probative and admissible.<sup>97</sup> However, Charles JA was of the view that the judge did not

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<sup>92</sup> When *R v Shields* 1980 VIC LEXIS 142; [1981] VR 717 was decided, the maximum term of imprisonment for manslaughter was 15 years, and for culpable driving the maximum was 7 years. In 1992 the penalty for culpable driving was raised to 15 years and became the same as for manslaughter.

<sup>93</sup> *R v De'Zilwa* (2002) 37 MVR 359, 372.

<sup>94</sup> *Ibid* at 373.

<sup>95</sup> *Ibid* at 360.

<sup>96</sup> *Ibid* at 362. In 2002 there was no offence of dangerous driving causing death or serious injury, with which the appellant could have been charged. In 2004 the offence of dangerous driving causing death or serious injury became section 319 of the *Crimes Act 1958* (Vic) introduced by section 6 of the *Crimes (Dangerous Driving) Act 2004*.

<sup>97</sup> *Ibid* at 368.

properly direct the jury against the misuse of the evidence of the appellant's undress and this omission may have caused the jury to convict the appellant on speculation as to sexual conduct that was no part of the prosecution's case.<sup>98</sup> The appellant's conviction was quashed and the court decided against ordering a retrial as the appellant's inattention which caused the fatality was at the lower end of gross negligence and she had already served most of the original sentence imposed.

4.109 In *The DPP v Duffy*,<sup>99</sup> an Irish case, a 26-year-old unaccompanied learner driver pleaded guilty to dangerous driving causing the deaths of two women, a mother of 8 and her aunt, while driving on the wrong side of the N5 near Castlebar, Co Mayo in July 2005. The accused was travelling to Westport for an appointment with a chiropodist when the accident occurred. He had no memory of what happened due to the injuries he sustained.

4.110 Judge Groarke said that the accused was "criminally responsible" for the deaths because he did not keep a proper lookout when overtaking. He imposed a 2 year prison sentence, which was suspended on condition that the accused enter a bond to keep the peace and be of good behaviour for 6 years. The judge also fined the father of two €600 for driving on a first provisional licence unaccompanied and disqualified him from driving for 10 years.

4.111 *Jiminez v R*<sup>100</sup> concerned an appeal against conviction for culpable driving causing death. The appellant killed his front-seat passenger when the car he was driving left the highway and collided with a tree in the early hours of the morning. According to the appellant, he had fallen asleep momentarily and lost control of the vehicle. There was no evidence of a warning as to the onset of sleep.

4.112 In allowing the appeal the High Court of Australia held that driving must be a conscious and voluntary act. In cases where the driver falls asleep at the wheel even momentarily, his actions are not conscious or voluntary during this period. Thus, he cannot be found guilty of driving the car in a manner dangerous to the public. In approving *Kroon v R*<sup>101</sup> the court emphasised that where the issue is whether a driver who fell asleep at the wheel is guilty of dangerous driving, the relevant period of driving is that which immediately precedes his falling asleep. The prosecution must

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<sup>98</sup> *R v De'Zilwa* (2002) 37 MVR 359, 368.

<sup>99</sup> See Irish Times Report 22 June 2006.

<sup>100</sup> (1992) 15 MVR 289.

<sup>101</sup> (1990) 12 MVR 483.

establish that the driver was so tired or drowsy that, in the circumstances, his driving was objectively dangerous to the public.<sup>102</sup>

4.113 There was little in the evidence that the applicant had felt drowsy prior to the collision with the tree. He had slept for four hours before setting out on the trip and a further three hours while the deceased drove the car. He had not been driving for an excessive period before the accident nor had he consumed any alcohol or drugs. He told police that he was intending to stop at the next town for breakfast, not because he needed a rest.

4.114 In *Jiminez v R* various matters were identified as being relevant in reaching a conclusion that a person's driving is objectively dangerous to the public, such as the period of driving before the accident, the lighting conditions including whether it was night or day, the heating or ventilation of the vehicle, the tiredness of the driver, the amount of sleep he or she had before setting out.<sup>103</sup> The court held that on a charge of driving in a manner dangerous to the public, a driver can exculpate him or herself by establishing they acted on the basis of an honest and reasonable belief that it was safe to drive.

**(e) *Insufficient culpability for a dangerous driving causing death conviction***

4.115 In *The DPP v Hobson*<sup>104</sup> a deaf-mute farmer from Wicklow was charged with dangerous driving causing the deaths of two teenage girls in June 2003. The girls had died shortly after leaving a sweetshop at lunchtime. They crossed the road at a junction and were hit by the accused's trailer which contained 20 bales of silage as they stood between the vehicle and the wall.

4.116 In his closing statement, counsel for the prosecution told the jury that it was unlikely that they would ever hear of "such a bad case as this." He claimed that the evidence, including the fact that there was a 16ft blind spot on the vehicle, meant that the jury could be satisfied beyond a reasonable doubt that the accused was guilty of dangerous driving. The prosecutor vigorously maintained that all the circumstances of the case, including the nature of the place and the traffic as well as the condition of the vehicle supported the indictment.

4.117 Counsel for the accused disputed the prosecutor's contention that the facts of the case supported the indictment. He argued that the trial had been unusually short because the facts of the case were not in dispute. However, the unusual aspect of the case was that none of the typical factors

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<sup>102</sup> *Jiminez v R* (1992) 15 MVR 289, 293.

<sup>103</sup> *Ibid.*

<sup>104</sup> See Irish Times Report 11 March 2006.

arising in dangerous driving cases, such as speed or alcohol played any part in the tragedy. Counsel for the accused stated that the farmer had taken care at the junction. He stopped at the white line and then stopped again and checked his mirrors before turning left on Avoca bridge. The accused had seen the two deceased pass his tractor cab a minute or two before the accident.

4.118 The jury was asked to consider whether it was unreasonable to expect that the girls would have walked past the tractor and trailer a minute later. Counsel for the accused contended that the two girls died as a result of an accident and that there was no evidence that the accused had driven in a manner far below the standard one would reasonably be expected of any driver. Judge McCartan stated that the case was “one of unbelievably tragic proportions” – one of the saddest he ever heard. The jury found the accused not guilty of both counts, having deliberated for less than 15 minutes.

### **E Careless driving and death: *The People (DPP) v O’Dwyer***

4.119 In *The People (DPP) v O’Dwyer*<sup>105</sup> the jury found the applicant not guilty of dangerous driving causing death but guilty of careless driving. The trial judge held that the offence was at the lower range of the maximum penalty for careless driving and accepted that the applicant was genuinely remorseful. Recognising that the applicant’s livelihood as a builder was dependant on his ability to drive, the judge decided against a lengthy period of disqualification and imposed a custodial sentence of one month, which he suspended.

4.120 The applicant was charged with dangerous driving causing death following an accident near Carrick-on-Suir in February 2003 in which a motorcyclist was killed. The deceased was part of a party of motorcyclists returning from a motorbike rally in Dungarvan. The accident occurred around midday in good weather conditions. One of the motorcyclists behind the deceased saw a jeep weave around the bend. The jeep careered across the road, hit a ditch and then hit the deceased’s motorcycle. The deceased died at the scene of the accident.

4.121 The garda who examined the applicant’s jeep the day after the accident said that the two rear tyres were bald and below the legal limit. The front tyres were also under the limit and the tracking was out. The garda stated in evidence that the front and rear tyres should have been replaced and the tracking on the front wheels should have been corrected. On cross-examination the garda acknowledged that the wearing on the inside of the front wheels would not have been apparent to a lay person. On the outer

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<sup>105</sup> [2005] IECCA 94.



section of the front tyres the thread level was three millimetres which is above the legal limit.

4.122 In relation to the charge of dangerous driving causing death the trial judge instructed the jury that an objective test applied to the offence and that dangerous driving was driving in a manner which a reasonable, prudent, motorist, having regard to all of the circumstances, would clearly recognise as involving a direct and serious risk of harm to the public.<sup>106</sup> The judge continued to say that the jury had to acquit the applicant if they were not satisfied beyond a reasonable doubt that it was dangerous driving, but that they could find him guilty of the lesser offence of careless driving under section 52(2) of the *Road Traffic Act 1961*, as amended which provides that a person shall not drive a vehicle in a public place without due care and attention. The trial judge directed the jury that careless driving could arise where a person had been merely careless, doing his incompetent best, or had been momentarily inattentive and that the test to be applied was objective.<sup>107</sup>

4.123 In contending that a lower sentence which did not include imprisonment should have been applied, counsel for the applicant submitted to the Court of Criminal Appeal that the trial judge erred in referring to the fatal consequences of the applicant's careless driving. The Court of Criminal Appeal was therefore required to decide whether Irish trial courts may take account of the consequence of death as an aggravating factor when imposing sentence in cases of careless driving. As there was no Irish authority on the area, the court was required to examine decisions from England and Northern Ireland even though different laws with different penalties apply there.

4.124 The first case discussed by the Court of Criminal Appeal was *R v Krawec*<sup>108</sup> where the 25-year-old defendant who was riding a motorcycle collided with an elderly male pedestrian at a busy junction. The man who was hit died six days later from his injuries. The defendant admitted driving through red traffic lights and said that he was concentrating on the car in front of him which was turning right so that he only noticed the pedestrian when it was too late.

4.125 He was charged with reckless driving and was acquitted of that offence in the Central Criminal Court. However, he was convicted of driving without due care and attention and was fined £350. His licence was also endorsed with 5 penalty points. He appealed against his sentence on the basis that he had no previous convictions. Counsel maintained that the trial judge erred in holding that the death which occurred was an aggravating

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<sup>106</sup> *The People (DPP) v O'Dwyer* [2005] IECCA 94, paragraph 8.

<sup>107</sup> *Ibid.*

<sup>108</sup> [1985] RTR 1; [1984] 6 Cr App R (S) 367.

factor. She asserted that in careless driving cases, the gravity of the consequences such as death was not relevant to the penalty.

4.126 In considering whether the trial judge was entitled to take account of the fact that a death occurred, Lord Lane LCJ stated that the unforeseen consequences of the carelessness are not relevant to penalty. The chief considerations are the quality of the driving and the degree to which the appellant fell below the standard of the reasonably competent driver on the particular occasion.<sup>109</sup>

4.127 Lord Lane LCJ said that the fact that the appellant failed to see the pedestrian until it was too late and collided with him as a result was relevant to the charge of driving without due care and attention, but the fact that the pedestrian died was not. Nonetheless, the court thought that the case was a bad one. Regardless of death it was a case where it was open to the judge to conclude and almost inevitable that he would do so, that the appellant fell far below the standard of the reasonably competent motor cyclist. As the Lord Chief Justice observed, this was not a case of momentary inattention. Even though the traffic lights were adjusted for a three-second amber phase the appellant failed to appreciate that the lights were changing from green to amber or from amber to red and did not see the deceased until it was too late.<sup>110</sup> The Court ordered a reduction of the fine imposed from £350 to £250 due to the fact that the trial judge had been influenced by the fact of death.

4.128 The second English case referred to by the Court of Criminal Appeal in *The People (DPP) v O'Dwyer*<sup>111</sup> was *R v MacCaig*.<sup>112</sup> Here the appellant, a 19-year-old student at the time of the incident, had been acquitted of reckless driving but was convicted of careless driving and was fined £150. His driving licence was endorsed for two years and it was in relation to this period of disqualification that he appealed. The accident transpired after the appellant collected two fellow students from their homes in order to drive them to college in his father's car. Their lecturer, who had arranged to collect them, did not turn up.

4.129 As the car approached a village, the appellant lost control while navigating an unmarked, left-hand bend. The car collided with a stone wall. One of his passengers died from a broken neck and the other two were injured. The appellant was also injured in the crash and did not remember what happened afterwards. The trial judge stated that this was as bad as case

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<sup>109</sup> *R v Krawec* [1985] RTR 1, 3.

<sup>110</sup> *Ibid.*

<sup>111</sup> See [2005] IECCA 94, paragraph 14.2.

<sup>112</sup> [1986] 8 Cr App R (S) 77.

of careless driving as one could imagine. However, he believed that the jury were probably correct in concluding that it did not go over the line of reckless driving.

4.130 The judge appreciated that there was no drink involved but he could not ignore the fact that a young life had been lost due to a “terrible piece of careless driving”.<sup>113</sup> He therefore held that he was bound to disqualify the accused for an appreciable time. The Court of Appeal referred to *R v Krawec*<sup>114</sup> and followed the judgment in that case, holding that it was clear that the trial judge erred in taking the death of the student into account when he considered the appropriate sentence.<sup>115</sup>

4.131 The third authority discussed by the court in *The People (DPP) v O’Dwyer*<sup>116</sup> was the Northern Irish case of *R v Megaw*<sup>117</sup> where Hutton LCJ held that the fact that death had been caused could not be taken into account when fixing the length of any period of disqualification from driving as a result of careless driving. Here a man was driving his car on the southbound carriageway of the A1 towards Newry with a female passenger in the front seat when the appellant drove his pick up truck directly in front of him from a side road whereby the car struck the side of the appellant’s truck and the woman was killed. The appellant was charged with reckless driving at the Crown Court in Armagh. At trial the Crown alleged that the appellant drove out onto to the carriageway of the A1 without stopping at the junction or looking to make sure that no traffic was approaching from the Belfast direction. The appellant claimed that he did look right, and the road was clear, and then he looked left but was unsure whether he looked right again.

4.132 The jury unanimously found the appellant not guilty of reckless driving but guilty of careless driving. He was fined £300 and disqualified from driving for 6 years. The judge approached sentencing with a view to reflecting both the jury’s acquittal on the reckless driving charge and the fact that a death was caused by the appellant’s careless road conduct. Neither of the previous authorities discussed, *R v Krawec*<sup>118</sup> and *R v MacCaig*<sup>119</sup> were brought to the judge’s attention during the trial. Hutton LCJ believed that the judge would not have imposed the period of disqualification which he

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<sup>113</sup> *R v MacCaig* [1986] 8 Cr App R (S) 77, 78-79 per Webster J.

<sup>114</sup> [1985] RTR 1; [1984] 6 Cr App R (S) 367.

<sup>115</sup> *R v MacCaig* [1986] 8 Cr App R (S) 77, 79.

<sup>116</sup> [See 2005] IECCA 94, paragraph 14.3.

<sup>117</sup> Court of Appeal (Criminal Division) 17 September 1992.

<sup>118</sup> [1985] RTR 1; [1984] 6 Cr App R (S) 367.

<sup>119</sup> [1986] 8 Cr App R (S) 77.

did, had he known about these cases. A 12-month disqualification period was held to be appropriate in the light of these earlier English decisions.

4.133 *R v Simmonds*<sup>120</sup> was also mentioned in *The People (DPP) v O'Dwyer*.<sup>121</sup> In that case the appellant, a man in his sixties with an impeccable driving record, was charged with causing death by dangerous driving, but the Crown accepted his plea of careless driving under section 3 of the *Road Traffic Act 1988*, as substituted by section 2 of the *Road Traffic Act 1991*, which provides:

“If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.”

4.134 At trial the appellant was fined £1,000, ordered to pay £150 for costs and was disqualified from driving for a year. The accident occurred when the appellant pulled into a wide entrance on the nearside of a dark, unfamiliar road in good weather conditions so as to turn his car around and drive back the way he had come. Without pausing to make sure that it was safe to proceed, he made a sweeping right-hand turn so as to cross the carriageway. He thus attempted to make his way onto the opposite carriageway but crashed into and killed an approaching motorcyclist.

4.135 He appealed against the period of disqualification which formed part of his sentence, arguing that the trial judge should not have taken into account the death of the motorcyclist when passing sentence. The appeal was dismissed and *R v Krawec*<sup>122</sup> was distinguished. According to the Court of Appeal, the statutory scheme of road traffic offences envisaged the causing of death as leading to a higher, more serious sentencing bracket and that the causing of multiple deaths was an aggravating factor. The court was of the view that it would be a legal anomaly if the sentencing judge was obliged to disregard the fact that a death occurred when dealing with road traffic offences.

4.136 The Court of Appeal in *R v Simmonds*<sup>123</sup> discussed English case law on careless driving up to that point and questioned the correctness of taking into account the consequences of traffic offences such as deaths caused by careless driving. The court also referred to the British Parliament's recent policy in road traffic legislation which reflected public attitudes to causing

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<sup>120</sup> Lexis ENG CD M305; [1999] 2 Cr App R 18.

<sup>121</sup> See [2005] IE CCA 94, paragraph 14.4.

<sup>122</sup> [1985] RTR 1; [1984] 6 Cr App R (S) 367.

<sup>123</sup> Lexis ENG CD M305; [1999] 2 Cr App R 18.

death or maiming people in driving accidents. Henry LJ who delivered the judgment of the Court of Appeal stated:

“Whether sentencing courts should take into account criminality alone or both the criminality and the consequences of an offence – and in the latter event in what proportions – is ultimately a question of choice and policy.”<sup>124</sup>

He remarked that *R v Krawec*<sup>125</sup> was valid in its context and at its time, but that in 1999 in the changed legal and political context, it was of little assistance to sentencing courts.

4.137 Thus, although culpability or criminality ought to remain the primary consideration, Henry LJ stated that the trial judge was entitled to bear in mind that he was dealing with criminal conduct that caused death. His Lordship stated:

“The relatively limited criminality of careless driving is balanced by the potentially appropriate penalties for careless driving as including disqualification. That penalty is not limited to repeat offenders.”<sup>126</sup>

Henry LJ was of the view that although the fine imposed in this case exceeded the Magistrates’ Association guidelines it was not excessive, nor was the disqualification. The appeal was accordingly dismissed.

4.138 Denham J in *The People (DPP) v O’Dwyer*<sup>127</sup> noted that *R v Simmonds* was the most recent English authority presented to the Court by counsel on the ability of judges in careless driving cases to take a fatality into account as an aggravating circumstance when sentencing. However, she discussed *R v King*,<sup>128</sup> a more recent case where the appellant was tried in October 2001 in Newcastle upon Tyne on three counts of causing death by dangerous driving. He was acquitted on all three counts, but was convicted of driving without due care and attention, having pleaded guilty at the outset to that offence. He was disqualified from driving for 3 years and was fined £2,250.

4.139 The accident, which formed the basis of the charges took place in May 2000 on a dual carriageway. All the south-bound lanes were closed for road-works and a contra flow system was in operation on the north-bound side. A 40 mph speed limit applied and temporary traffic lights had been

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<sup>124</sup> *R v Simmonds* [1999] 2 Cr App R 18, 23.

<sup>125</sup> [1985] RTR 1; [1984] 6 Cr App R (S) 367.

<sup>126</sup> *R v Simmonds* [1999] 2 Cr App R 18, 23.

<sup>127</sup> [2005] IECCA 94.

<sup>128</sup> [2001] EWCA Crim 709.

installed. Traffic moved very slowly near the traffic lights. The appellant's lorry ran into the back of the last car in the queue and three of the passengers died instantly. The car that was hit by the lorry in turn hit the car in front it, which was propelled into the lorry immediately ahead. The sole occupant of the second car was badly injured.

4.140 The tachograph in the appellant's lorry recorded an impact speed of 43mph. The accident occurred one and a quarter miles into the contra-flow system on a straight road with plenty of warning markings. The slow-moving traffic should have been apparent to the appellant for at least a minute. According to the appellant, he had not noticed the traffic until he was almost on top of it because he momentarily took his eyes off the road to study the tachograph in order to establish when he needed to stop driving. The sentencing judge remarked that the appellant was responsible for an appalling piece of careless driving and that this was one of the worst cases of careless driving he had ever encountered.

4.141 The Court of Appeal referred to Lord Lane LCJ's comments in *R v Krawec*<sup>129</sup> where he said that the main factors which a sentencing judge should consider in a careless driving case are the quality of the driving and the extent to which the driver fell below the standard of the reasonably competent driver. The Court of Appeal also noted that *R v MacCaig*<sup>130</sup> followed *R v Krawec*. Naturally *R v Simmonds*<sup>131</sup> was also discussed. Mackay J noted that in 1991 the new statutory offence of causing death by careless driving when under the influence of drink or drugs was introduced. The initial maximum sentence of imprisonment fixed for this offence was 5 years, but Parliament doubled this to 10 years within a year.

4.142 In referring to Henry LJ's remarks in *R v Simmonds* Mackay J held that the Court of Appeal's decision in that case marked a reconsideration of the approach to sentencing in this complex area. Mackay J said that the public concern had not abated in the two years since Henry LJ referred to it.

“The sentencer must still, therefore, make his primary task to assess culpability, but should not close his eyes to the fact that death has resulted, especially multiple deaths, where, as here, that was all too readily foreseeable as the consequence of the admitted lack of care in this case.”<sup>132</sup>

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<sup>129</sup> [1985] RTR 1; [1984] 6 Cr App R (S) 367.

<sup>130</sup> [1968] 8 Cr App R (S) 77.

<sup>131</sup> [1999] 2 Cr App R 18.

<sup>132</sup> *R v King* [2001] EWCA Crim 709, paragraph 16.

The court held that although the offence in question was very serious, the length of the disqualification period and the amount of the fine were excessive. The disqualification was therefore reduced to two years and the fine to £1,500.

4.143 In *The People (DPP) v O'Dwyer*<sup>133</sup> Denham J noted that the hierarchy of road offences in Ireland and England is very different, as are the available penalties. Denham J stated that the most significant difference between the Irish and English law of careless driving is that there is the possibility of imprisonment as a penalty under Irish law but not under English law.<sup>134</sup>

4.144 In English law a single summary offence of careless and inconsiderate driving is located in section 3 of the *Road Traffic Act 1988* as substituted by section 2 of the *Road Traffic Act 1991* which provides:

“If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention or without reasonable consideration for other persons using the road or place, he is guilty of an offence.”

According to the schedule of the 1988 Act, the maximum fine is £2,500. Upon conviction the court may disqualify the driver for any period and may order him or her to sit a driving test before getting his/her licence back. Imprisonment is not a penalty which applies for this offence.

4.145 However, in England the offence under section 3A(1) of the *Road Traffic Act 1988* as inserted by section 3 of the *Road Traffic Act 1991* of causing death by careless driving while under the influence of drink or drugs, which can only be prosecuted under indictment, does provide for the penalty of imprisonment.<sup>135</sup> Schedule 2 of the 1988 Act sets the maximum penalties for this offence at 10 years imprisonment and an unlimited fine.

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<sup>133</sup> See [2005] IECCA 94, paragraph 15.

<sup>134</sup> *The People (DPP) v O'Dwyer* [2005] IECCA 94, paragraph 15.4.

<sup>135</sup> It provides: “3A(1) If a person causes the death of another person by driving a mechanically propelled vehicle on the road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and (a) he is, at the time when he is driving, unfit to drive through drink or drugs, or (b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or (c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, He is guilty of an offence. (2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired. (3) Subsection (1)(b) and (c) above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle.”

Disqualification for 2 years is obligatory unless special reasons are recognised.

4.146 According to Denham J, this offence is clearly more serious than the Irish offence of careless driving and does not resemble it at all. To prove the English offence the prosecution must establish that the accused driver (1) caused death, (2) by driving without due care and attention/reasonable consideration; (3) while under the influence of drink or drugs. The Irish offence on the other hand only demands that the prosecution establish that the driver drove without due care and attention.<sup>136</sup> Denham J stated:

“The concept of careless driving covers a wide spectrum of culpability ranging, from the less serious to the more serious. It covers a mere momentary inattention, a more obvious carelessness, a more positive carelessness, bad cases of very careless driving falling below the standard of the reasonably competent driver, and cases of repeat offending. However, since even a mere momentary inattention in the driving of a mechanically propelled vehicle can give rise to a wholly unexpected death, the court has always to define the degree of carelessness and therefore culpability of the driving.”<sup>137</sup>

4.147 The Court of Appeal considered *The DPP v Sheedy*<sup>138</sup> discussed earlier where it was held that the sentence should be proportionate to the crime and the personal circumstances of the accused.<sup>139</sup> Denham J determined that the applicant’s conduct lay in the lower bracket of careless driving and accordingly that his sentence should be limited to the lower spectrum of penalties.<sup>140</sup> The chief accusation against the applicant in relation to carelessness was that the tyres on his vehicle were bald and it was reasonable to infer that the jury found him guilty on this basis. The mitigating factors of the case included his offer to plead guilty to careless driving, an absence of previous convictions, helpfulness during investigations into the offences, a positive work record and genuine remorse.

4.148 The Court of Criminal Appeal agreed with Mackay LJ’s contention in *R v King*<sup>141</sup> that the main role of the sentencing judge is to consider culpability but that the judge should not close his eyes to the fact that a death, especially multiple deaths, occurred due to the driving of the

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<sup>136</sup> *The People (DPP) v O’Dwyer* [2005] IECCA 94, paragraph 15.5.

<sup>137</sup> *Ibid*, paragraph 16.

<sup>138</sup> [2000] IR 184.

<sup>139</sup> *The People (DPP) v O’Dwyer* [2005] IECCA 94, paragraph 19.

<sup>140</sup> *Ibid*.

<sup>141</sup> [2001] EWCA Crim 709.



accused. Denham J said that the culpability of the accused relates to issues such as speed, drink or drugs, condition of the vehicle, theft of the vehicle, leaving the scene of the accident, previous convictions and as in this case bald tyres.<sup>142</sup>

4.149 Once the culpability of the driver is established the sentencing judge should not ignore the fact that a death or multiple deaths has or have resulted from that driving.

“A rigid adherence in sentencing to an approach which excludes any reference to the death in itself as an aggravating factor, despite the many and various differences in the degrees of careless driving, would not be proportionate.”<sup>143</sup>

4.150 *The People (DPP) v O’Dwyer*<sup>144</sup> established that sentencing courts may not consider death as a separate factor until a finding of the degree of carelessness in the driving has been reached. The Court of Criminal Appeal held that in the circumstances of the instant case it would have been disproportionate to regard the tragic death as an aggravating factor in itself. The trial judge was deemed to have erred in imposing a prison sentence as the offence was at the lower end of the sentencing spectrum and was further reduced by the mitigating factors. Such a level of carelessness could not proportionately attract a term of imprisonment. The appeal was therefore allowed and the appropriate sentence was said to be a fine of €1,000.

## **F The concept of being a “criminal” and latent knowledge**

4.151 In *R v Ireland*<sup>145</sup> a case from the Northern Territory of Australia it had been suggested during the appeal that people who drove cars while under the influence of alcohol and killed innocent road-users were *not criminals in the ordinary sense*. Muirhead J referred to the reluctance of criminal juries to treat injury and death on the highway as involving criminal conduct in the traditional sense. He said that this concept of crime could be explained by the fact that an intent to kill or maim is not an element of the offence and jurors are perhaps inclined to think in terms of “you today and me tomorrow”.<sup>146</sup>

4.152 Whilst this theory of crime may have been correct until fairly recent times and explained the relatively low penalties the courts imposed,

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<sup>142</sup> *The People (DPP) v O’Dwyer* [2005] IECCA 94, paragraph 20.

<sup>143</sup> *Ibid.*

<sup>144</sup> See [2005] IECCA 94, paragraph 20.

<sup>145</sup> [1987] 49 NTR 10.

<sup>146</sup> *R v Ireland* [1987] 49 NTR 10 (Lexis).

Muirhead J considered that this thinking should end. People who cause injury or death by inadvertence, momentary inattention or by a failure to observe a traffic rule, will usually be dealt with, if charged, in the courts of summary jurisdiction. However, specific driving offences for example dangerous driving causing death under section 53(1) of the *Road Traffic Act 1961* are treated as a “crime”. Muirhead J stated that such offences are dealt with in the criminal courts and the appeals are heard in courts of criminal appeal. He remarked that a criminal is a person guilty or convicted of a crime and a crime is an act committed which is injurious to the public welfare, for which there is a punishment prescribed by law.<sup>147</sup>

4.153 Muirhead J continued to state that traditional concepts of crime had their roots in the days when there were no cars, and people were put to death for burning haystacks and transported to the colonies for poaching. However, the concept of crime is different nowadays. Muirhead J stated that:

“hundreds of Australians die each year in road accidents and an unacceptable number under the wheels of vehicles driven by those whose faculties are impaired by alcohol, this despite continuing effort to educate the public of the dangerous association between alcohol and driving. The law accepts the doctrine of general deterrence ... People convicted of killing and maiming others on public roads through drunken carelessness, who cause such grief, disruption and economic loss in the community are, in my view, aptly termed criminal in the full sense of the word.”<sup>148</sup>

4.154 Road users owe positive duties of care to each other. Horder observes that the duty applies between persons deemed to be equals, rather than between a dominant and a reliant party as in the case of doctors and patients. Since the duty applies between equals, drivers do not always have to act in the best interests of other road users, in the way that doctors must act in the best interests of their patients. Nevertheless, Horder claims that:

“driving competence does not involve simply pitting the needs and goals of other road users against one’s own in deciding how to drive. Accommodating the needs and goals of other road users should shape a driver’s very conception of his or her own driving competence.”<sup>149</sup>

4.155 In relation to latent knowledge or “back of the mind” awareness, any reasonable, competent driver knows that if he or she breaks the speed

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<sup>147</sup> *R v Ireland* [1987] 49 NTR 10 (Lexis).

<sup>148</sup> *Ibid.*

<sup>149</sup> Horder “Gross Negligence and Criminal Culpability” (1997) 47 UTLJ 495, at 517.

limit and drives too fast on dangerous roads, the risk of death and injury posed is considerably higher than if the speed limit is carefully maintained. This is latent knowledge and although this knowledge may not be at the front of the speeding driver's mind, "it is knowledge nonetheless."<sup>150</sup>

4.156 In 2000 Mitchell published the results of a small qualitative survey on public opinion on various aspects of homicide and the criminal law.<sup>151</sup> One of the issues which Mitchell wanted to shed light on was people's attitudes to drunk-drivers who kill. He especially wanted to know whether the public believed these killers should be treated differently from other killers.<sup>152</sup> Interviewees were invited to respond to the following scenario:

"Having drunk 3 or 4 pints of beer, a man is a little unsteady on his feet, merry but not rolling drunk. He ignores the pub landlord's suggestion that he should leave his car at the pub and he drives home. On the way he fails to negotiate a bend and knocks down a pedestrian, killing him."<sup>153</sup>

4.157 Many respondents viewed premeditation as being a particularly aggravating feature in a homicide case. Mitchell's study revealed interesting evidence of a public understanding of premeditation which went beyond that typically comprehended by lawyers. The author writes that all respondents thought that a drink-driver who killed a pedestrian on his way home from the pub should be convicted of either murder or manslaughter. Respondents remarked that to call this crime "causing death by dangerous driving" was inadequate because that would "glorify" it a bit or "trivialise" what the driver had done.

4.158 Respondents believed that the mere imposition of a heavy punishment was seen as insufficient since the killer knew he had been drinking, he knew that drinking and driving is a dangerous and potentially fatal thing to do. In deliberately disregarding the possibility that he might harm or kill someone the drunk-driver was prepared to take that risk. This preparedness to risk causing death to another road-user was seen as premeditated in the sense that the driver demonstrated "a contemptuous disregard for human life."<sup>154</sup> Mitchell states:

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<sup>150</sup> Horder "Gross Negligence and Criminal Culpability" (1997) 47 UTLJ 495, at 510-11.

<sup>151</sup> Mitchell "Further Evidence of The Relationship Between Legal and Public Opinion on the Law of Homicide" Crim LR [2000] 814.

<sup>152</sup> *Ibid* at 817.

<sup>153</sup> *Ibid* footnote 17 at 817.

<sup>154</sup> *Ibid* at 819. See footnote 32 where Mitchell states that this form of premeditation was viewed as being less serious than where a homicide arose out of a planned intention to kill.

“This condemnation of the killer’s deliberate indifference for human life reinforces the concern expressed by some commentator’s about the narrowness of the law’s concept of a “*mens rea*” which is interpreted in solely cognitive terms such as knowledge, belief and foresight.”<sup>155</sup>

4.159 As discussed above, 1950s juries seemed reluctant to convict motorists who killed because of their dangerous driving of manslaughter, even where there was compelling evidence of culpability. The English Criminal Law Revision Committee argued that the legal focus should be on the quality of bad driving rather than the consequences since it was often a matter of chance whether serious injury or death resulted.<sup>156</sup> Nonetheless, legislatures in Ireland, the UK and Australia realised that the public viewed the occurrence of a death as a significant factor and therefore introduced specific statutory offences in the hope that juries would convict drivers who killed of an offence such as dangerous driving causing death.

4.160 In recent decades there has been a huge amount of publicity about road safety and anti drink-driving campaigns. Arguably Mitchell’s survey reveals that this publicity has had an impact on public perceptions of motorists who kill as respondents frequently pointed to the vast quantities of publicity warning about the potential dangers involved in bad driving in contending that a drunken driver who killed a pedestrian should be convicted of manslaughter at least. Mitchell states:

“People are well aware that cars and lorries are potentially “lethal weapons” and that other road-users are very much at the mercy of drivers. It is therefore reasonable to place road traffic homicides on a par with traditional murders and manslaughters. Failure adequately to reflect the gravity of such incidents – the harm and personal culpability – would merely bring the legal system into disrepute.”<sup>157</sup>

## **G Summary**

4.161 In this chapter the Commission discussed the legacy of *The People (AG) v Dunleavy*<sup>158</sup> on gross negligence manslaughter and the

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<sup>155</sup> Mitchell “Further Evidence of The Relationship Between Legal and Public Opinion on the Law of Homicide” Crim LR [2000] 814, at 819.

<sup>156</sup> *Fourteenth Report on Offences against the Person* (1980) Cmnd. 7844 London: HMSO paragraph 142 at 64.

<sup>157</sup> Mitchell “Further Evidence of The Relationship Between Legal and Public Opinion on the Law of Homicide” Crim LR [2000] 814, at 824.

<sup>158</sup> [1948] IR 95.

specific road traffic offences of dangerous driving causing death and careless driving which were introduced in its aftermath. In looking at situations where road-deaths occurred in Ireland and Australia the Commission arranged the cases in terms of a sliding scale of culpability, starting with those which were at the high end of the scale. Cases spanning the entire spectrum of culpability were then reviewed.

4.162 Regarding careless driving the Commission looked at *The People (DPP) v O'Dwyer*<sup>159</sup> where it the Court of Criminal Appeal held that once the culpable carelessness of the accused is established judges may take the fact that a death or multiple deaths were caused into account when sentencing a person for the offence of careless driving.

4.163 Finally, the Commission considered the concept of criminality and whether motorists who cause fatalities should be viewed as criminals in the ordinary sense of the word, or whether they should have some special status under the criminal law. The issue of latent knowledge regarding the inherent risks of irresponsible driving behaviour such as driving at an excessive speed or while under the influence of alcohol was discussed in this context.

4.164 In Chapter 5 the Commission sets out several potential reform proposals for motor manslaughter and the related statutory driving offences. One of the possible courses of action identified by the Commission involves the maintenance of the status quo – the offences of dangerous driving causing death and careless driving would simply continue to exist alongside the common law offence of gross negligence manslaughter. Radical reform of the law could entail the total exclusion of deaths caused by negligent driving from the scope of manslaughter or alternatively the abolition of the statutory offences so that all road-deaths would be prosecuted as manslaughter in the future.

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<sup>159</sup> [2005] IECCA 94.



## CHAPTER 5    OPTIONS FOR REFORM

### A            Introduction

5.01        In this chapter the Commission sets out the various options for reform of the law of involuntary manslaughter. In part B the Commission discusses the impact which its provisional recommendation to expand the mental element in murder to include reckless killing manifesting extreme indifference to human life<sup>1</sup> could have on the offence of manslaughter as currently constituted. Part C involves an analysis of the choices involved in approaching reform of the law in this area and notes that there are four possible options. These are the possibility of codification without reform, reform of unlawful and dangerous act manslaughter, reform of the law of gross negligence manslaughter and reform of motor manslaughter and the related statutory driving offences.

5.02        Part D posits the possibility of simply codifying the present law without introducing any reforms. In part E the Commission looks at reform of the law of unlawful and dangerous act manslaughter and puts forward a number of moderate reform proposals, such as the possibility of excluding low levels of deliberate violence from the scope of the offence, or requiring acts to be unlawful and life-threatening. The Commission also looks at more radical options for reform in this section. It discusses the structure of homicide under the *Indian Penal Code*<sup>2</sup> and the *Model Penal Code*<sup>3</sup> and suggests that radical reform of involuntary manslaughter might involve making subjective recklessness the *mens rea* for the offence.

5.03        In part F the Commission looks at reform of the law of gross negligence manslaughter. Arguments for abolishing gross negligence manslaughter are discussed. Moderate reform of this aspect of manslaughter might include making the capacity of the accused at the time of the alleged gross negligence relevant to the issue of culpability and/or raising the level of risk from “risk or likelihood of substantial personal injury” to “risk of

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<sup>1</sup>        See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) paragraph 6.01 at 89.

<sup>2</sup>        *Indian Penal Code Act No.45 of Year 1860.*

<sup>3</sup>        See American Law Institute *Model Penal Code and Commentaries* (2<sup>nd</sup> ed American Law Institute 1980).

*death*” or “risk of *death or serious injury*.” The Commission also looks at the possibility of placing deaths caused by gross negligence into a lesser category of killing, such as negligent homicide.

5.04 Reform of motor manslaughter and the related statutory driving offences is addressed in G. The Commission discusses the option of simply maintaining the legal status quo as well as the possibility of excluding road-deaths from the scope of manslaughter. The potential abolition of the statutory driving offences is also evaluated.

## **B The relevance of the Commission’s provisional recommendations on the mental element in murder**

5.05 Any reform of manslaughter must also take account of the Commission’s provisional proposals for reform of murder. In its *Consultation Paper on Homicide: The Mental Element in Murder* the Commission provisionally recommended that the fault element for murder be broadened to embrace reckless killings manifesting an extreme indifference to human life.<sup>4</sup> The Commission was influenced by section 210.2(b) of the *Model Penal Code*<sup>5</sup> which provides that homicide amounts to murder if it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.

5.06 In its *Seminar Paper on Homicide: The Mental Element in Murder*<sup>6</sup> the Commission stated that the rationale behind this recommendation was to ensure that the offence of murder should clearly include the most serious and morally culpable killings. That project cannot proceed:

“if reckless killings are automatically excluded from consideration on *a priori* grounds, irrespective of whether they are morally indistinguishable from, or even more heinous than, the general run of intentional killings.”<sup>7</sup>

5.07 Broadening the fault element for murder along the lines of the *Model Penal Code* would be advantageous for a number of reasons. First, it would cover heinous killings where the accused had no intention to kill, such as where an arsonist sets fire to an occupied house or where a terrorist plants a bomb in a public building. Such killers currently fall outside the present

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<sup>4</sup> (LRC CP 17-2001) paragraph 6.01 at 89. See also the Commission’s discussion of reckless killings manifesting an extreme indifference to the value of human life at paragraphs 4.029-4.057.

<sup>5</sup> See American Law Institute *Model Penal Code and Commentaries* (2<sup>nd</sup> ed 1980).

<sup>6</sup> LRC (SP 1-2001).

<sup>7</sup> *Ibid* at 10.



test of intention.<sup>8</sup> Second, in assessing the culpability of the risk in question, by requiring the risk to be “substantial and unjustifiable” there is no need to quantify the risk mathematically.<sup>9</sup>

5.08 The extreme indifference head of murder could potentially apply to those who discharge a firearm at a person,<sup>10</sup> or to those who kill due to drunken driving where the culpability of the defendant is sufficiently heinous. In the US case of *Slaughter v State*<sup>11</sup> the accused was convicted of extreme indifference murder where he had been drinking all day, had not eaten, had been arrested on four previous occasions for drunken driving and was exceeding the speed limit when he hit a woman with his car.<sup>12</sup>

5.09 Stabbing or slashing at a person<sup>13</sup> or striking the victim with a dangerous instrument such as a rubber mallet<sup>14</sup> might also support a finding of extreme indifference murder. Repeated and sustained physical abuse of a child which results in death could also potentially amount to murder by extreme indifference.<sup>15</sup>

5.10 The disadvantage of the *Model Penal Code* approach is that its intrinsically flexible formulation might give rise to inconsistent jury verdicts or verdicts based on irrelevant factors such as the defendant’s background, allegiance or other activities.<sup>16</sup>

5.11 In 2001 the Commission provisionally recommended that the fault element for murder be clearly defined as embracing a wide conception of intention so that culpable risk-taking which falls short of a virtual certainty would be covered by the most serious homicide offence. The Commission believed that it would be unsatisfactory for culpable killers such as terrorists and arsonists to be guilty of manslaughter but not murder if they foresaw that their conduct poses a substantial risk of death. Despite the fact that such

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<sup>8</sup> See *R v Woollin* [1998] 4 All ER 103; [1997] 1 Cr App R 97.

<sup>9</sup> See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) paragraph 4.045 at 55.

<sup>10</sup> See *King v State* [1987] (Alabama) 505 So 2d 403 discussed by the Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) paragraph 4.054 at 58.

<sup>11</sup> [1982] (Alabama) 424 So 2d 1365.

<sup>12</sup> See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) paragraph 4.052 at 57.

<sup>13</sup> See *State v Watkins* (Arizona) 614 P2d 835.

<sup>14</sup> See *Divanovich v State* [1980] (Arkansas) 607 SW2d 383.

<sup>15</sup> See *People v Poplis* [1972] (New York) 30 NY 2d 85.

<sup>16</sup> See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) paragraph 4.046 at 55.

killers may not have specifically intended to cause death, they displayed a willingness to kill in the pursuit of their goals. They accepted the risk of death, or reconciled themselves to it and in the Commission's view were as "bad" as murderers and therefore should be treated as such.<sup>17</sup>

5.12 Expanding murder to include such reckless killings manifesting extreme indifference to the value of human life means that the offence of involuntary manslaughter would shrink somewhat. Arsonists or terrorists who do not intend to kill but foresee a risk of death could currently be convicted of unlawful and dangerous act manslaughter, but would potentially be guilty of murder under the Commission's provisional recommendations. People who kill by indiscriminately discharging a firearm at another person, such as the accused in *R v Wills*<sup>18</sup> discussed in Chapter 2, could find themselves convicted of extreme murder rather than manslaughter by unlawful and dangerous act, as could those who fatally stab their victims or hit them with dangerous implements.

5.13 Similarly, under an expanded definition of murder people who drink, drive and kill, displaying a culpably indifferent attitude to the value of human life, might find themselves prosecuted for extreme indifference murder rather than manslaughter or dangerous driving causing death. Those who inflict fatal physical abuse on children could also possibly be charged with extreme indifference murder rather than gross negligence manslaughter or wilful neglect under section 246 of the *Children Act 2001*.

### **C Choosing an approach to reforming involuntary manslaughter**

5.14 The Commission's review of the current state of the law on involuntary manslaughter necessitates a discussion as to whether a single, broad offence of involuntary manslaughter should continue to exist or whether separate offences covering the same or overlapping terrain would be desirable. Separate offences would have their own distinct labels and sentencing maximums.

5.15 In contemplating law reform in this area it is important to decide whether any new offence classifications should include a degree of specificity, and, if so, what the basis for such specificity should be. According to Clarkson, law reformers should ascertain whether the new hierarchy should be based on:

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<sup>17</sup> See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) paragraph 4.070 at 61.

<sup>18</sup> 1983 VIC LEXIS 73; [1983] 2 VR 201.

“different degrees of culpability or on other criteria such as the context of the killing, the method of the killing or the identity of the victim or killer?”<sup>19</sup>

5.16 Clarkson argues that only the culpability of the defendant and certain contexts in which the killing takes place should be relevant in structuring any new manslaughter offences. The method of the killing would include for example killing with a dangerous weapon, torture or poison. The context of the killing would cover deaths caused while driving, through a business operation, during the commission of an unlawful act, contract killings or during an act of terrorism. Other possible criteria for structuring manslaughter offences could relate to the identity of the victim, for instance killing a child or a police officer, or the identity of the killer, for example a murderer already confined in prison.

5.17 Taking account of criteria such as the method of killing or the identity of the victim, which are arguably not of sufficient moral significance, when structuring offences could raise the spectre of over-specificity.<sup>20</sup> A recent Irish Court of Criminal Appeal decision addressed the issue of sentencing defendants convicted of manslaughter by knife-attack. In *The People (DPP) v Kelly*<sup>21</sup> the Court held that the trial judge was wrong in principle to state that in manslaughter cases where a knife is used there should be a minimum sentence of 20 years, before taking into account the accused’s personal circumstances. The Court stated that the judge seemed to put manslaughter by killing with a knife in a different position from any other form of manslaughter. The Court of Criminal Appeal held that the elements of the offence cannot and should not be divided to impose a minimum in relation to a particular category.

5.18 In relation to specificity, the issue of sentencing is relevant since the degree of specificity in offences is affected by the sentencing system in place. The US, Australia, the UK and Ireland have attempted to curb judicial sentencing discretion in their respective jurisdictions by introducing greater specificity into offence classifications so that more restricted bands of punishment are applicable. In Ireland murder and capital murder carry a mandatory life sentence. Since the *Criminal Justice Act 1999*, certain drugs offences carry a mandatory sentence (subject to exceptional circumstances) and the *Criminal Justice Act 2006* includes similar mandatory sentences for firearms offences.

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<sup>19</sup> Clarkson “Context and Culpability in Involuntary Manslaughter: Principle or Instinct?” in *Rethinking English Homicide Law* Ashworth and Mitchell (eds) (Oxford University Press 2000) 133-165 at 141.

<sup>20</sup> *Ibid* at 146.

<sup>21</sup> Court of Criminal Appeal 5 July 2004. See also *The People(DPP) v Dillon* Court of Criminal Appeal 17 December 2003.

5.19 Wasik notes that offences should be structured in a manner which gives guidance to key players in the criminal justice system as to how to view the offender and the offence in relation to other similarly situated offenders and related offences. He observes that efforts towards reform and codification of the criminal law sometimes place:

“too great an emphasis upon the “form” of criminal offences, whilst neglecting “functional” matters, such as the breadth with which offences are defined, the interrelation between those offences, and the degree of discretion which is accorded in their practical application to prosecutors and to sentencers.”<sup>22</sup>

Wasik states that we need to consider not simply the internal coherence of the law but also the message which is being sent to prosecutors and to sentencers.

5.20 In its *Seminar Paper on Homicide: The Mental Element in Murder*<sup>23</sup> the Commission addressed arguments in favour of abolishing the murder/manslaughter distinction. Proponents of abolition argue that a “baseline” offence of homicide would be preferable due to over-inclusiveness and the moral diversity of killings currently designated as murder. They contend that the variety of intentional killing, which includes contract killings, mercy killings, revenge killings, child killings and domestic killings, is too wide and that certain intentional killings, for example mercy killings, ought not to be branded as murder.

5.21 While the Commission recognised the phenomenon of over-inclusiveness, it was firmly of the opinion that the abolition of the murder/manslaughter distinction would “entail unnecessary violence to the essential architecture of the criminal law”<sup>24</sup> and undermine the principle that criminal liability will only attach where the relevant *mens rea* is proven.

5.22 Those who support the abolition of the offence of manslaughter as it currently stands claim that abolition would not undermine the existing architecture of the criminal law but would in fact bolster the principle that *mens rea* must be proven before a person can be found guilty of a crime. They argue that manslaughter is essentially a “large omnibus” entity, a “baseline” offence for all homicides which, for one reason or another, do not amount to murder.

5.23 Law reform proponents suggest that, much like the law of murder, the law of manslaughter suffers from over-inclusiveness. The fact that the

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<sup>22</sup> Wasik “Form and Function in the Law of Involuntary Manslaughter” [1994] CLR 883, at 884.

<sup>23</sup> LRC (SP 1-2001).

<sup>24</sup> *Ibid* at 4.

offence contains such a massive span of culpability means that from a labelling point of view “deep moral intuitions about the essential differences between related, but distinct, patterns of wrongdoing”<sup>25</sup> are ignored.

5.24 Practitioners may contend that the law of manslaughter functions perfectly well in practice and that there are more than enough categories of killing as it is. More grades of homicide would only lead to greater confusion among juries and court time would be wasted in legal debates regarding the borders of each offence. Practitioners may argue there is no need to reform the law since the trial judge takes different levels of culpability into account at the sentencing stage. Nonetheless labelling is a moral issue, not a mere matter of administrative classification.<sup>26</sup> The law of manslaughter should not remain unchanged simply because practitioners are familiar, comfortable with, or perhaps complacent about its failings for example its breadth, lack of definition, disregard for the need for positive *mens rea*, and the inequity of the unlawful act doctrine.

5.25 In the remainder of this chapter the Commission sets out four possible options for reform including the possibility of codification without reform, reform of unlawful and dangerous act manslaughter, reform of the law of gross negligence manslaughter and reform of motor manslaughter and the related statutory driving offences.

#### **D Codification of the law without reform**

5.26 If the Commission provisionally recommends that the law should be codified without any reform then a conviction for manslaughter by an unlawful and dangerous act would continue to be arrived at under the following circumstances:

- The act would be a criminal offence, carrying with it the risk of bodily harm to another (generally the offence will involve an assault);
- Dangerousness would continue to be judged objectively;
- The fact that an accused did not foresee, or that a reasonable person in that position would not have foreseen, death as a likely outcome of the unlawful conduct would continue to be irrelevant to a finding of guilt. Liability would remain *constructive* in that an accused’s intention to inflict some trivial injury to another person would make

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<sup>25</sup> Law Reform Commission *Seminar Paper on Homicide: The Mental Element in Murder* LRC (SP 1-2001) at 6.

<sup>26</sup> *Ibid.*

it justifiable for the law to hold him accountable for the unexpected result (death) of his behaviour.

5.27 Regarding gross negligence manslaughter, codification without reform would mean that a person could be convicted of this offence if the prosecution could successfully prove:

- that the accused was, by ordinary standards, negligent;
- that the negligence caused the death of the victim;
- that the negligence was of a very high degree;
- that the negligence involved a high degree of risk or likelihood of substantial personal injury to others.

The Commission sees some merit in this approach and invites submissions on codification in that sense, without reform.

5.28 *The Commission invites submissions on the possibility of codifying the current law of involuntary manslaughter without any reform.*

## **E Reforming unlawful and dangerous act manslaughter**

5.29 The Commission now turns to examining whether the law of unlawful and dangerous act manslaughter should be reformed and if so what form reform should take.

### **(1) Moderate reform**

#### **(a) Exclude low levels of deliberate violence from the scope of the offence**

5.30 The most problematic aspect of unlawful and dangerous act manslaughter is that a person who causes death by deliberately indulging in a low level of violence - for example by punching the victim once in the face so that he falls down, hits his head off the pavement and dies<sup>27</sup> can be found guilty of this serious offence by virtue of the old concept of malice in the sense of *wrongful directedness*. Despite the fact that neither the accused nor the similarly circumstanced reasonable person would have foreseen death or serious injury as an outcome of the assault, a manslaughter conviction is possible because the act of deliberately harming another person renders the wrongdoer responsible for whatever consequences ensue, regardless of whether they were unforeseen or unforeseeable.

5.31 In July 2004 a man was tried at the Dublin Circuit Criminal Court for the manslaughter of his sister's boyfriend at a family wedding in

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<sup>27</sup> *R v Holzer* 1968 VIC LEXIS; [1968] VR 481.

September 2000.<sup>28</sup> The accused hit the deceased once in the face after an argument in the car park of the hotel on the night of the wedding. The deceased fell to the ground. There was blood on his lip and on the back of his head. Over the next few days the deceased began to feel unwell and eventually was taken to hospital where he later died. The State Pathologist gave evidence that the deceased died from respiratory distress caused by head injuries he received from a “mild punch” and the subsequent fall to the ground. The jury unanimously found the accused not guilty of manslaughter.

5.32 People who punch others and accidentally kill them due to an unforeseen physical weakness, such as a thin skull or enlarged spleen should be convicted of some offence for their damaging, antisocial conduct. However, in the Commission’s view, where deliberate wrongdoing is concerned such acts are at the bottom of the scale of culpability. The label of manslaughter is arguably too severe for these accidental killings, since the accused would have been charged with a minor assault at most had a person not been unexpectedly killed.

5.33 Perhaps it would be sufficient in cases where a person dies as a result of a low level of violence to charge the perpetrator with assault rather than manslaughter and to take the fact that a death was caused into account when imposing a sentence.<sup>29</sup> The label of assault would possibly be more appropriate than that of manslaughter considering the low level of culpability involved. The fact that a life was lost as a result of the wrongdoer’s unlawful conduct obviously gives the offence of assault a more serious dimension and a more severe sentence will therefore be justified than in the case of a minor assault where no fatality results.

5.34 *The Commission invites submissions on the possibility of placing low levels of violence which unforeseeably cause death outside the scope of unlawful and dangerous act manslaughter. Such acts could be prosecuted*

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<sup>28</sup> *The People (DPP) v Byrne* Irish Times Report 6 July 2004.

<sup>29</sup> See Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.34. The proposed new offence of killing by gross carelessness would be committed if: (1) a person by his or her conduct causes the death of another; (2) a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position; (3) he or she is capable of appreciating that risk at the material time; and (4) *either* (a) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, *or* (b) he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, *and* the conduct causing (or intended to cause) the injury constitutes an offence.” The Law Commission intended thin skull scenarios to fall outside the scope of the proposed offence.

as assault and the judge would take the fact of death into account when imposing sentence.

**(b) Restrict unlawful acts to assaults**

5.35 If the Commission decides that some form of constructive manslaughter should remain in place, it is arguable that the only unlawful acts which courts should recognise for the purposes of the offence are those which involve *violent assaults*, the danger of which would be obvious to a reasonable person in the accused's position. This would mean that unlawful acts directed at property which unforeseeably cause death would be excluded from the scope of the offence.

5.36 Clarkson argues that it is appropriate to hold a person responsible for making their own bad luck where they attack someone else.

“A defendant who attacks another and risks injury cannot complain when criminal liability is imposed in relation to injuries – even death – resulting from the attack ... it is only those who attack their victims in the sense of *assaulting* them *intending or foreseeing some injury* who alter their normative position relevantly to bring themselves within the family of violence. From this it follows that not every unlawful act should suffice for constructive manslaughter as it does under the present law (as long as it is dangerous).”<sup>30</sup>

5.37 In *DPP v Newbury and Jones*<sup>31</sup> the defendants pushed a piece of paving stone off a bridge on to the front part of an approaching train and killed a guard but did not foresee that their act would harm anyone. They were convicted of manslaughter by unlawful and dangerous act but under Clarkson's scheme they would not be held liable as no “attack” occurred.<sup>32</sup>

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<sup>30</sup> Clarkson “Context and Culpability in Involuntary Manslaughter: Principle or Instinct?” in *Rethinking English Homicide Law*, Ashworth and Mitchell (eds) (Oxford University Press 2000) 133-165 at 159.

<sup>31</sup> [1976] 2 All ER 365.

<sup>32</sup> See Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1139. The authors observe that throwing stones from bridges onto vehicles during times of busy traffic is conduct which endangers an unknown quantity of people and the stone-thrower could be deemed a murder for killing a human being by “means dangerous to the public” (mit gemeingefährlichen Mitteln).



5.38 Similarly, in *R v Cato*<sup>33</sup> and other cases where death results from drug injections, the accused would escape liability for unlawful and dangerous act manslaughter. Clarkson states that the offenders in these cases have indeed engaged in actions of a certain moral quality and there might well be a risk of adverse consequences flowing from their wrongdoing. Nonetheless, they have not chosen to embark on a violent course of action. They have not attacked their victims and have therefore departed too far from the family of violence. In Clarkson's view the connection between their fault and the death is too tenuous.<sup>34</sup>

5.39 Subjectivists would ideally like to see the total abolition of constructive manslaughter because there is not enough moral proximity between the harm intended or foreseen and the harm which actually occurs. However, if some form of constructive manslaughter should be retained in order to mark the fact of death, then perhaps liability for unlawful and dangerous act manslaughter should be restricted to deliberate assaults. This offence might be named "causing death by assault" or "killing by attack" better capture the essence of the wrongdoing in the offence label.

5.40 *The Commission invites submissions on the possibility of reducing the scope of unlawful and dangerous act manslaughter by restricting unlawful acts for the purposes of the offence to assaults whereby all other unlawful acts such as criminal damage would be excluded. Submissions are also welcome on the possibility of naming the offence "causing death by assault" to capture the essence of the wrongdoing in the name of the offence.*

**(c) Require acts to be unlawful and life-threatening**

5.41 One cannot deny knowledge or awareness of the "taken-for-granted features of the everyday world".<sup>35</sup> Horder states that many subjectivists assume that when one is talking about advertence one means the knowledge or understanding that is at the forefront of the defendant's mind at the time of acting. Horder wonders why the law should not consider defendants to know or to realise something when that knowledge or realisation is at the back of their minds, and could easily have been called

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<sup>33</sup> [1976] 1 All ER 260. See also *R v Dias* [2001] EWCA Crim 2896, [2002] Crim LR 490, *R v Khan and Khan* [1998] Crim LR 830, *R v Kennedy* [1999] Crim LR 65, *R v Rogers* [2003] EWCA Crim 945, [2003] 1 WLR 1374, *R v Kennedy* [2005] EWCA Crim 685. These are all manslaughter by drug injection cases where the accused prepared or helped administer heroin to the deceased.

<sup>34</sup> Clarkson "Context and Culpability in Involuntary Manslaughter: Principle or Instinct?" in *Rethinking English Homicide Law*, Ashworth and Mitchell (eds) (Oxford University Press 2000) 133-165 at 160.

<sup>35</sup> McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 295.

on, even though they did not in fact bring the knowledge or realisation to the forefront of their minds.<sup>36</sup>

5.42 Although ideal subjectivists would restrict the *mens rea* for murder to intention or “front of the mind” awareness as regards the risk of death or serious injury, arguably implied malice means that intention actually includes “back of the mind” awareness. “Back of the mind” awareness means that our actions are often rationalised by knowledge of things (such as the likelihood that serious injury could result in death) that we may not think about at the moment of action.

5.43 McAuley and McCutcheon maintain that:

“you know that bashing someone on the head with a rock is likely to cause serious injury, and that knowledge would rationalise your action in the event that you did bash someone in the way described notwithstanding that, perhaps because you were in such a rage, you did not consciously advert to it when perpetrating the assault. On this analysis the critical question is whether an action has been rationalised or driven by knowledge or intention such that it can be regarded as applying or giving effect to whichever of these mental states is at issue, albeit that the relevant knowledge or intention may have been tacit or, in the traditional language of the law, “implied” or implicit at the relevant time.”<sup>37</sup>

5.44 Defendants who knowingly inflict serious personal violence which is generally understood to be life-threatening are held responsible if the victim dies, even though they failed to advert to the consequences at the time of the assault. They are treated as murderers because they are as bad or as culpable as such. The force of that intuition stems from the principle of common knowledge which is an epistemological assumption that ordinary people understand the everyday world and how it works. Part of common knowledge which ordinary people share is an appreciation of the vulnerability of human life in the face of serious violence.<sup>38</sup> Recognition of the principle of common knowledge should mean that the felony-murder rule, where it still exists, together with the concept of grievous bodily harm would be confined to violence where the danger to life is virtually certain.

5.45 An alternative course of reform to that suggested above in relation to confining unlawful acts to violent assaults for the purpose of constructive manslaughter would be to require the acts to be unlawful and *potentially*

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<sup>36</sup> Horder “Gross Negligence and Criminal Culpability” (Fall 1997) 47 UTLJ 495, at 510.

<sup>37</sup> McAuley and McCutcheon *Criminal Liability* (Sweet and Maxwell 2000) at 295.

<sup>38</sup> *Ibid* at 304.

(likely as opposed to virtually certain) life-threatening. This would mean that a defendant, who, in a moment of anger during a row kicked the deceased several times in the head, could not “disavow knowledge of the everyday world”.<sup>39</sup>

5.46 Everyone knows that kicking a person in the head can have fatal consequences. Giving a person a number of kicks to the head would put that person’s life at serious risk – this is a taken-for-granted fact of the everyday world. Even if the defendant didn’t realise the impact of what he or she was doing at the time of the kicking, common knowledge dictates that the act involved physical violence of a level that was *likely* to endanger life. If the violence were virtually certain to endanger life then the charge in the event of death should be murder rather than manslaughter.

5.47 By reforming the law of unlawful and dangerous act to require that the act be unlawful and likely to endanger life, people such as the defendant in *R v Holzer*<sup>40</sup> and the man in Mitchell’s “thin skull scenario” discussed in Chapter 2,<sup>41</sup> would escape liability. Under the principle of common knowledge, the acts of punching someone once in the face or pushing them in the supermarket queue, while clearly antisocial and deserving of some punishment, are not *likely* to endanger or threaten life. In fact, knowledge of the everyday world would lead reasonable people to protest that such acts are highly *unlikely* to end in death - that a fatality was totally unforeseeable in such circumstances - and such cases would be therefore treated as the accidents they are and no longer amount to constructive manslaughter.

5.48 *The Commission invites submissions on the possibility of restricting unlawful and dangerous act manslaughter to acts which are unlawful and likely to endanger life, so that minor levels of violence which cause death would fall outside the offence.*

**(d) Create a new offence similar to “Bodily Injury resulting in Death” under the German Criminal Code**

5.49 In Germany, deaths which are an unforeseeable consequence of an act of violence might fall under section 227 of the Criminal Code which deals with *Körperverletzung mit Todesfolge* -“Bodily Injury resulting in Death”.<sup>42</sup> This offence is less serious than *Totschlag* which is the German

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<sup>39</sup> McAuley and McCutcheon *Criminal Law* (Sweet and Maxwell 2000) at 311.

<sup>40</sup> 1968 VIC LEXIS 228; [1968] VR 481.

<sup>41</sup> See Mitchell “Public Perceptions of Homicide and Criminal Justice” [1998] *Brit J Criminol* 453, at 457.

<sup>42</sup> This offence is quite similar to Preterintentional Homicide under Article 584 of the *Italian Penal Code* (Codice Penale) whereby a person who causes the death of another by committing one of the crimes designated in Articles 581 (assault) and 582

version of manslaughter.<sup>43</sup> Section 227 provides that if a person causes the death of another through the infliction of bodily injury (under sections 223 to 226 of the Code), then he or she will face a minimum of 3 years imprisonment. In less serious cases the perpetrator faces 1-10 years imprisonment.<sup>44</sup> Death must be the consequence of a physical injury. The offence is capable of being satisfied by neglect. The basic crime must inherently pose a danger to life which is directly reflected in the fact of death.

5.50 Section 223 of the *German Criminal Code* deals with the offence of causing bodily injury which includes physical maltreatment and damage to health. Tröndle and Fisher maintain that giving a head-butt, setting a dog on a person, driving a car at someone, or having unprotected sex with an uninformed partner when infected with HIV, would suffice for causing dangerous bodily injury “by means of a treatment dangerous to life”. However, giving a hefty punch to the face which results in a broken nose would not give rise to liability under the offence of occasioning dangerous bodily injury under section 224.<sup>45</sup> Section 225 of the Code concentrates on the maltreatment of wards. Section 226 deals with serious injuries, for example where the accused causes the victim to lose his sight, hearing or procreative capacity or where the victim is permanently disfigured or disabled.

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(personal injury) faces between 10 and 18 years imprisonment. Article 585 deals with aggravating circumstances which merit an increased penalty, such as where a firearm or explosive is used to inflict personal injury.

<sup>43</sup> Section 212 of the German Criminal Code provides that: “(1) Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years. (2) In especially serious cases imprisonment for life shall be imposed.” In Germany, manslaughter can be committed by neglect. See Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1148. „I Wer einen Menschen tötet, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe nicht unter fünf Jahren bestraft. II In besonders schweren Fällen ist auf lebenslange Freiheitsstrafe zu erkennen.“ A translation of the section is available at the German Law Archive, <http://www.iuscomp.org/gla/>

<sup>44</sup> See Section 227 Körperverletzung mit Todesfolge in Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1257. „I Verursacht der Täter durch Körperverletzung (§223 bis 226) den Tod der verletzten Person, so ist die Strafe Freiheitsstrafe nicht unter drei Jahren. II In minder schweren Fällen ist auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren zu erkennen.“ A translation of the section is available at the German Law Archive, <http://www.iuscomp.org/gla/>

<sup>45</sup> See Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1249.

5.51 Section 227 of the *German Criminal Code* applies when an accused intentionally gives the deceased a blow with a pistol and in the process kills the person hit when a bullet is accidentally discharged. Tröndle and Fisher state that section 227 comes into play where an accused aims a hefty punch at a person's face causing them to fatally hit their head off a parked car.<sup>46</sup> Liability under section 227 could arise where an accused injures a person who later dies of a heart attack partly brought on by the injuries sustained or where the accused breaks into a house at night and ties up the elderly resident and the victim later dies as a consequence of the shock, fear and agitation.

5.52 If death is caused through the infliction of more serious forms of bodily injury under sections 223-226, for example, if the accused kills the victim by forcing them to consume a hazardous substance such as crushed glass or if they embark on an assault with a dangerous weapon under section 224, the accused could be subject to a minimum term of 3 years imprisonment under section 227 of the *German Criminal Code*. Those who cause death following the infliction of lower levels of bodily injury under sections 223-226 are punishable with incarceration from one year up to 10 years.

5.53 In cases where the accused inflicts a lower level of bodily injury, for example where he or she punches the victim in the face and they fall and hit their head off the ground and die, or where an elderly, dependent relative is maliciously neglected and dies due to an untreated illness, the Commission could potentially introduce an offence along the lines of "Bodily Injury resulting in Death" under section 227. The advantage of having a broad homicide offence such as this, lower down the homicide ladder than manslaughter, is that it would not be restricted to deliberate assaults or other violent conduct, but could also apply to cases of fatal neglect. Rather than merely prosecuting someone for assault or for neglect where the fatal consequences are ignored in the label, such an offence would be a specific homicide offence and the fact of death would therefore be recognised and marked.

5.54 *The Commission invites submissions on the possibility of introducing an offence such as "Bodily Injury resulting in Death" under section 227 of the German Criminal Code which would cover cases where death arose due to deliberate assaults and also where it was caused by neglect. This offence would be lower down the homicide ladder than manslaughter in terms of culpability.*

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<sup>46</sup> See Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1258.

(2) ***Radical reform: The Indian Penal Code the Model Penal Code and recklessness***

5.55 Yeo has argued that Indian law<sup>47</sup> is superior to English and Australian law in arranging the fault elements for involuntary manslaughter so as to complement the offences lying on both sides of it, which are murder and culpable killings falling short of manslaughter.<sup>48</sup> The *Indian Penal Code 1860* adopted a schematic approach, prescribing gradually descending degrees of fault for involuntary manslaughter each of which was carefully formulated to guarantee that it is one rung in degree of moral culpability below the corresponding fault element for murder identified by the Code.<sup>49</sup>

5.56 Under the *Indian Penal Code* the fault elements for murder and culpable homicide not amounting to murder (the Indian equivalent of manslaughter) include the subjective mental states of intention and recklessness. Although Irish law requires subjective fault in relation to murder, it adopts objective criteria for involuntary manslaughter, for example through the dangerous act requirement of unlawful act manslaughter and the test for negligent manslaughter.

5.57 Charleton, McDermott and Bolger state that manslaughter by unlawful and dangerous act and by gross negligence are the only examples in our criminal law where the accused can be found guilty of a serious criminal offence without the prosecution proving that the he or she was aware that the impugned conduct might bring about the external element of a crime.<sup>50</sup>

5.58 When dealing with an offence as serious as manslaughter, objective based faults are objectionable. Yeo states that these forms of objectively based fault for involuntary manslaughter may well be the remnants of a less humane society and that the demise thereof is long overdue under the present laws.<sup>51</sup>

5.59 Section 300 of the *Indian Penal Code* deals with culpable homicide amounting to murder. Culpable homicide is murder if the accused does an act causing death with the intention of causing death. For example, if the accused shoots the deceased with the intention of killing him and death results then this is murder under the *Indian Penal Code*. Second, culpable homicide is murder if the offender intends to cause such bodily injury as the

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<sup>47</sup> *Indian Penal Code Act No. 45 of Year 1860.*

<sup>48</sup> Yeo *Fault in Homicide* (The Federation Press 1996) at 278.

<sup>49</sup> *Ibid.*

<sup>50</sup> Charleton McDermott and Bolger *Criminal Law* (Butterworths 1999) at 546.

<sup>51</sup> Yeo *Fault in Homicide* (The Federation Press 1996) at 293.

offender knows to be likely to cause the death of the person to whom the harm is caused. According to example (b) of section 300 of the *Indian Penal Code*:

“A, knowing that Z is labouring under such disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health.”<sup>52</sup>

5.60 Third, culpable homicide is murder if the offender intends to cause bodily injury to any person which is sufficient in the ordinary course of nature to cause death. Thus, the accused is guilty of murder if he or she cuts the deceased with a sword or beats them with a club in a manner sufficient to cause death in the ordinary course of nature.<sup>53</sup> In *Dhupa Chamar & Ors v State of Bihar* it was stated that there is no principle that section 302 of the *Indian Penal Code* does not arise in all cases involving a single blow. The question has to be determined on the facts of each case.

“The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention and knowledge of the offender and the offence committed by him.”<sup>54</sup>

5.61 Fourth, a person will be found guilty of murder if when committing the act he or she knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits the act without any excuse for incurring the risk of causing such injury or death. So, if an accused shoots a loaded gun into a

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<sup>52</sup> Under example (b) of section 300 of the Indian Penal Code if the perpetrator gives the victim such a blow as would not in the ordinary course of nature kill a person in a sound state of health, not knowing that the victim has any disease, although the perpetrator may intend to cause bodily injury, he or she is not guilty of murder, if he or she did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

<sup>53</sup> In the seminal Indian case of *Virsa Singh v State of Punjab* [1958] INSC 20; (1958) SCR 1495 the court upheld the conviction of the appellant under s 302 of the *Indian Penal Code* although there was only one injury attributed to the appellant caused by a spear thrust. Vivian Bose J at 1501 stated that no one may run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they such inflict injuries they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or unintentional.

<sup>54</sup> [2002] 3 LRI 526, paragraph 13

crowd of people for no lawful reason and ends up killing one of them he or she is guilty of murder despite the fact that he may not have had any premeditated design to kill any particular person.

5.62 Under the exceptions to section 300 of the *Indian Penal Code* culpable homicide is not murder:

- if the offender kills while deprived of the power of self-control by grave and sudden provocation,<sup>55</sup> or
- as a result of excessive defence of person or property, or
- if when acting for the advancement of public justice he or she causes death by doing an act, in the honest belief that it is lawful and necessary and without ill-will towards the deceased, or
- when death is caused without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner, or
- when the deceased, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.<sup>56</sup>

A person convicted of culpable homicide amounting to murder in India may be sentenced to death or to life imprisonment and may also be liable to pay a fine.

5.63 Section 299 deals with the offence of culpable homicide.

“Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

The *Indian Penal Code* gives the following illustrations of scenarios in relation to culpable homicide not amounting to murder.

(a) A lays sticks over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby

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<sup>55</sup> The provocation cannot be sought or voluntarily provoked by the offenders as an excuse for killing or harming anyone, nor can it arise from someone doing something in obedience to law, or by a public servant in the lawful exercise of their powers, or in the lawful exercise of the right of private defence.

<sup>56</sup> The illustration for section 300 exception 5 states: “A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z’s youth, he was incapable of giving consent to his own death; A has therefore abetted murder.”



caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

5.64 Example (b) is an example of innocent agency and example (c) expressly rules out the application of Coke's harsh rule whereby a man would be guilty of murder if he unwittingly shot a boy hidden in the bush simply because of his felonious intent to shoot and steal the hen.<sup>57</sup>

5.65 As regards the concepts of "accident" and "causation", section 299 of the *Indian Penal Code* explains that if in causing bodily injury to someone suffering from some disorder, disease or bodily infirmity, the accused thereby hastens the death of that person, he or she will be deemed to have caused that death. The Code also explains that if a death results from some bodily injury, the person who causes such injury will be deemed to have caused the death notwithstanding the fact that resort to medical treatment in a timely manner may have prevented the fatality.

5.66 Under section 304 a person who commits culpable homicide not amounting to murder is punishable with imprisonment for life, or imprisonment for a term which may extend to ten years, and shall also be liable to a fine. Section 304 A provides for causing death by negligence.<sup>58</sup> A person who causes the death of any person by doing any rash or negligent act not amounting to culpable homicide can be punished with imprisonment for a term which may extend to two years, or with a fine, or with both.

5.67 By demanding largely subjective fault elements the *Indian Penal Code* promotes the aim of imposing liability for the serious crimes of murder and culpable homicide not amounting to murder only in the most morally culpable of cases. It makes sense as a matter of logic and fairness to have subjective fault elements for culpable homicide not amounting to murder,

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<sup>57</sup> Coke 3 *Institutes of the Laws of England* (6<sup>th</sup> ed Flesher 1660) at 56.

<sup>58</sup> Inserted by Act No 27 of 1870.

since this offence is “one rung in degree”<sup>59</sup> of moral culpability below the mainly subjective fault elements for murder.<sup>60</sup>

5.68 In 1962 the *Model Penal Code*<sup>61</sup> drafted by the American Law Institute adopted a schematic approach to homicide similar to that incorporated in the *Indian Penal Code* back in 1860. In abandoning the degree structure that dominated American murder provisions since the Pennsylvania reform of 1794, the Code adopted three categories of homicide – murder, manslaughter and negligent homicide. Section 210 of the *Model Penal Code* thus attempted a significant restructuring of the law of homicide.

5.69 Under section 210.1 of the *Model Penal Code* a person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being. Section 210.2 states that criminal homicide amounts to murder, a first degree felony where it is committed purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.<sup>62</sup>

5.70 Under section 210.2(b), recklessness and indifference are presumed if the actor is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape or deviant sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape. As a result of this presumption the strict liability dimensions of the felony-murder rule no longer apply but the probative significance of the concurrence of death and a violent felony is nonetheless recognised.

5.71 The *Model Penal Code* does not divide murder into degrees. Under the Pennsylvania Reform murder was divided into degrees so as to identify the situations where the death penalty might be appropriate. The drafters of the *Model Penal Code* decided to deal with capital punishment separately from the basic definition of the offence. Thus, under section 210.6 the Code envisages that a person convicted of murder could be sentenced to death where certain aggravating factors exist, such as where the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody, where it was perpetrated

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<sup>59</sup> Yeo *Fault in Homicide* (The Federation Press 1996) at 278.

<sup>60</sup> As discussed above “Clause Thirdly” of section 300 of the *Indian Penal Code* involves an objective assessment as to whether the injury intentionally inflicted by the accused was sufficient in the normal course of nature to cause death.

<sup>61</sup> See American Law Institute *Model Penal Code and Commentaries* (2<sup>nd</sup> ed American Law Institute 1980) Part II § 210.0 – 210.6.

<sup>62</sup> *Ibid* at 2 where it is stated that “these concepts provide a more satisfactory means of stating the culpability required for murder than did the older language of “malice aforethought” and its derivatives.”

for financial gain or where the defendant was serving a prison sentence or where a great risk of death was knowingly posed to many persons.

5.72 Section 210.3 of the *Model Penal Code* states that criminal homicide constitutes manslaughter, a felony in the second degree, when it is committed recklessly or when a homicide which would be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. This formulation marked a departure from the traditional common law approach to the crime of manslaughter and from US statutory definitions at the time the Code was drafted.<sup>63</sup>

5.73 Misdemeanour-manslaughter, the poor relation of felony murder, was completely abolished by the *Model Penal Code*. However, in the explanatory notes to sections 210.0-210.6 it is stated that the concurrence of homicide and a misdemeanour may have evidentiary significance in establishing the culpability required for manslaughter.

5.74 Section 210.4 of the Code states that criminal homicide constitutes negligent homicide, which is a felony of the third degree, when a death is caused by negligence. The purpose of this section was to clarify the concept of negligence that can give rise to punishment for inadvertent homicide. Section 210.4 was designed to replace specialised statutes, chiefly those dealing with vehicular homicide and to place all inadvertent homicides below the grade of manslaughter.

5.75 Prior to 1962 when the *Model Penal Code* was drafted, *mens rea* was as vague and confused a concept in the United States as it was elsewhere. The formulation of *mens rea* as established by the *Model Penal Code* has been most influential throughout North America in clarifying the different levels of *mens rea*. A crime can be committed (a) purposely, (b) knowingly, (c) recklessly and (d) negligently. These are the four levels of *mens rea* recognised by the Code.

5.76 If a defendant commits a crime “purposely” it means that it was his or her express purpose to commit the crime in question.<sup>64</sup> If a defendant

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<sup>63</sup> The Code defines recklessness with great precision and the doctrine of provocation is expanded beyond the traditional bounds of killing due to “sudden heat of passion” based on adequate provocation. *The Model Penal Code* adopts a subjective test in establishing the reasonableness of the accused’s explanation or excuse – *ie* reasonableness is determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be, although certain objective components remain. See American Law Institute *Model Penal Code and Commentaries* (2<sup>nd</sup> ed American Law Institute 1980) Part II §§ 210.0 – 210.6 at 49-80.

<sup>64</sup> Section 2.02(2)(a) of the *Model Penal Code* (American Law Institute 1985) at 21 defines “purposely”. Section 1.13(12) at 19 states that “intentionally” or “with intent” means purposely.

commits a crime “knowingly” he or she possessed knowledge that his or her actions would certainly result in a crime against someone even if he or she did not intend to commit the crime against the particular victim.<sup>65</sup>

5.77 Under the *Model Penal Code* a defendant “recklessly” commits a crime, if he or she knows that the intended actions pose an unjustifiable risk of leading to a certain result, but he or she goes on to act anyway, regardless of the consequences (“reckless disregard”). Section 2.02(2)(c) of Code states that:

“A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”

5.78 The “depraved heart” notion of *mens rea*, which means an extreme indifference to human life, a concept favoured by the Commission in its consultation paper *Homicide the Mental Element in Murder*<sup>66</sup> (see part P) is covered by this understanding of recklessness.

5.79 The fourth and final *mens rea* term recognised by the *Model Penal Code* is negligence. A person “negligently” commits a crime under the Code where he or she did not intend to bring about the result in question, but failed to exercise a reasonable duty of care to prevent that result from occurring.

5.80 The Commission’s analysis of the law governing unlawful and dangerous act manslaughter in Ireland, the UK and Australia in Chapter 2 and its investigation into the *Indian Penal Code* and the *Model Penal Code 1962* in this chapter have been undertaken with a view to rethinking the type of culpable killing which should constitute any newly defined offence of involuntary manslaughter. Throughout the discussion, the Commission has been mindful of its duty to promote the proper labelling of homicide

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<sup>65</sup> American Law Institute *Model Penal Code* (American Law Institute 1985) at 21. Section 2.02(2)(b) defines “knowingly”. Knowingly committing a crime includes wilful blindness whereby one knows that a certain result is very probable, but avoids concentrating one’s mind to gain that knowledge. The concept of wilful blindness is frequently used against drug mules, who knew that it was very likely that they were transporting prohibited substances, for example in the boot of the car they were driving, but refused to look.

<sup>66</sup> (LRC CP17-2001). See Provisional Recommendation 6.01: “The Commission provisionally recommends that the fault element for murder be broadened to embrace reckless killings manifesting an extreme indifference to human life.”

offences. In its *Seminar Paper on Homicide: The Mental Element in Murder* the Commission noted that:

“the labels employed by the criminal law should be broadly consonant with the general moral perception of the content and relative gravity of the wrongs to which those labels refer ... [and] in keeping with the narrative function of the criminal law in a democratic society, offence labels should be maximally descriptive in import and that value should not be sacrificed on the altar of administrative convenience.”<sup>67</sup>

5.81 Under sections 299 and 300 of the *Indian Penal Code* recklessness covers foresight of consequences ranging in degree of risk from probability to virtual certainty of death occurring. Knowledge of a virtual certainty of causing death will attract a murder conviction in India while knowledge of a probability will give rise to a conviction of culpable homicide not amounting to murder. Such a schematic approach to recklessness and foresight of consequences could perhaps be adopted in Ireland. It would remove negligent killings from the scope of manslaughter and would remove the injustice currently arising from the unlawful and dangerous act doctrine.

5.82 The conception of subjective recklessness under section 2.02(2)(c) of the *Model Penal Code* applies so that a person will not be guilty of manslaughter unless he or she consciously disregards a substantial and unjustifiable risk that his or her conduct will have fatal consequences.

5.83 If the Irish law were altered to provide that an accused had to be aware of the probability that the act would cause the death or serious injury of another, then a conviction for manslaughter would not arise if the accused took part in a street fight and gave a single punch to the victim where death was the unforeseen result of the blow.

5.84 The unlawful act doctrine has its roots in constructive liability and is related to the felony-murder rule,<sup>68</sup> which has long ceased to be a part of Irish law.<sup>69</sup> It is arguable that constructive manslaughter, which is the relic of a less forgiving era, should be abolished.

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<sup>67</sup> See LRC (SP 1-2001) at 8.

<sup>68</sup> The felony murder rule was the result of the doctrine of constructive malice which provided that malice aforethought would be established against an accused if he killed in the course of a felony or while resisting arrest. In such circumstances a murder conviction was deemed appropriate whether or not the accused realised that his felonious behaviour involved a risk of death.

<sup>69</sup> The rule was abolished by section 4 of the *Criminal Justice Act 1964*.

5.85 Many commentators argue that an intention to commit a lesser crime should not be sufficient to result in a manslaughter conviction. They argue that positive *mens rea* in the form of subjective recklessness along the lines of that established in the *Indian Penal Code* or the *Model Penal Code* should be established. On this basis, therefore, before being held liable for manslaughter, a person who assaults another should be shown to have foreseen that death or serious injury is a probable (as opposed to a virtually certain) consequence of the assault.

5.86 *The Commission invites submissions on the structure of homicide under the Indian Penal Code and the Model Penal Code and particularly invites comments on the possibility of introducing recklessness as the mens rea for manslaughter, either in the form of knowledge of a probability of death under the Indian model or subjective recklessness where the accused consciously disregards a risk of death under the US model.*

**(3) Recommendation on unlawful and dangerous act manslaughter**

**(a) Exclude low levels of deliberate violence**

5.87 It is provisionally recommended that low levels of deliberate violence should be removed from the scope of unlawful and dangerous act manslaughter. People who unwittingly cause the deaths of others for example by punching them once in the face have certainly committed an unlawful act deserving of punishment, nonetheless the Commission is of the view that the label of manslaughter is inappropriate in these cases as the culpability of the wrongdoers is at the bottom of the scale. It would be more just from a fair labelling perspective and would also promote the correspondence principle to charge a person with an assault if they engaged in a minor assault which gave rise to an unexpected death, taking the fact of death into account when fixing the appropriate sentence.

5.88 *The Commission provisionally recommends that low levels of deliberate violence should be removed from the scope of unlawful and dangerous act manslaughter and instead prosecuted as assaults.*

**(b) Exclude situations where death results from drug injections**

5.89 Regarding drug injection cases, where death results and the accused assisted the deceased by supplying the drugs, preparing the syringe containing heroin, holding the belt as a tourniquet or by directly injecting the substance, the Commission is provisionally of the view that it is inappropriate to charge the accused with such a serious homicide offence as manslaughter, not simply because of the difficulties involved in identifying the base unlawful act for the purposes of unlawful and dangerous act manslaughter, but because generally the injection of the heroin involved a free, deliberate and knowing act of the deceased.

5.90 The Commission notes that the American State of Illinois introduced a specific offence in 1989 to cover deaths caused by drug use. The offence called “drug-induced homicide”<sup>70</sup> provides:

“(a) A person who violates subsection (a) or subsection (b) of Section 401 of the Illinois Controlled Substances Act by unlawfully delivering a controlled substance to another, and any person dies as a result of the injection, inhalation, or ingestion of any amount of that controlled substance, commits the offense of drug-induced homicide.

(b) Sentence. Drug-induced homicide is a ... felony.”<sup>71</sup>

5.91 This provision filled a gap in the criminal homicide laws of Illinois. Only felonies which are “forcible” in the sense that they involve the use or threat of violence or physical force come under the Illinois felony-murder rule and the supply of a drug could not be classified as a forcible felony. According to Decker:

“the creation of the offense of drug-induced homicide now makes the drug “pusher” responsible for a death arising out of his or her felony distribution of narcotics in much the same fashion as the felony-murder rule makes the forcible felon responsible for the death of victims of his or her forcible felony.”<sup>72</sup>

5.92 The Commission believes that charging a person who supplies heroin with fatal results with an offence such as drug-induced homicide which clearly marks the fact that a death occurred would be more suitable than charging them with manslaughter.

5.93 *The Commission provisionally recommends that situations where death is caused by a drug injection should not form part of the scope of unlawful and dangerous act manslaughter.*

## **F Reforming gross negligence manslaughter**

### **(1) Arguments for abolition of gross negligence manslaughter**

5.94 Turner states that there are no different degrees of inadvertence as indicating a state of mind. If a man is inadvertent, his mind:

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<sup>70</sup> 720 ILCS 5/9-3.3 (1999).

<sup>71</sup> 720 ILCS 5/9-3.3 (1999) (referring to 720 ILCS 570/401 (1999).

<sup>72</sup> Decker *Illinois Criminal Law* (3<sup>rd</sup> ed Lexis Publishing 2000) at 320.

“is a blank as to the consequences in question; his realization of their possibility is nothing and there are no different degrees of nothing.”<sup>73</sup>

Those who subscribe to a subjectivist theory of responsible agency see no place for negligence as a fault element because a negligent individual does not choose to risk or cause harm. They claim that negligence is not a species of *mens rea* and they regard negligence-based offences as being offences of objective liability. If *mens rea* necessarily involves a positive state of mind linked to the *actus reus* of the offence committed, then negligence which is typically characterised by either careless inadvertence or a serious deviation from the expected standard of care, falls very far short.

5.95 Opponents of criminal liability based on negligence maintain that it is unjust to punish a defendant for what he or she failed to think about or foresee. Colvin claims that criminal liability with its ordinary range of penalties is unsuitable for an actor who “owing to mere forgetfulness, never thought of a risk at all.”<sup>74</sup>

5.96 Although Horder argues that latent knowledge or “back of the mind” awareness (for example about the dangers of driving too fast) is a form of actual knowledge, Colvin maintains that there is a fundamental difference between latent knowledge which can be described as “experience of risk” and actual knowledge or “consciousness of risk” which the law should recognise. Subjectivist insistence on the importance to criminal liability of conscious awareness of risk centres on the belief that criminal liability is only justified if the agent-neutral reasons against an accused’s action objectively outweigh the reasons in favour of it, and yet knowing or suspecting this, the accused nonetheless went on to act on one of the reasons in favour.

5.97 This “practical reasoning” account of subjectivism focuses on whether the defendant took the reasons against embarking on a certain course of conduct into account and nonetheless went on to act that way.<sup>75</sup> The theory dictates that a man who causes death due to driving at excessive speeds or drunkenness should not be found criminally culpable, regardless of his latent knowledge as to the risks of speeding unless he took this knowledge into account when he put his foot on the accelerator and decided to drive faster.

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<sup>73</sup> Turner “The Mental Element in Crimes at Common Law” in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261, at 211.

<sup>74</sup> Colvin “Recklessness and Criminal Negligence” (1982) 32 UTLJ 345, at 368.

<sup>75</sup> Horder “Gross Negligence and Criminal Culpability” (1997) 47 UTLJ 495, at 512.



“The fact that a defendant has latent knowledge of a risk, and the extent to which he or she could easily have brought that knowledge to mind and hence taken it into account in his or her practical reasoning are factors that may make negligence more gross; but on the practical reasoning theory of subjectivism, there is clear water between a theory of gross negligence and a theory of subjective criminal culpability. For only according to the latter will the fact that a defendant acted *in spite of* the reasons against so acting be crucial to criminal culpability; however gross one’s negligence in acting, one never acts *in spite of* the reasons against so acting...”<sup>76</sup>

5.98 Before negligence can amount to manslaughter, it must be proven to be a higher, more severe form of carelessness than would satisfy mere civil liability, nonetheless according to subjectivists, negligence is essentially “a negative state of mind” – it is an absence of *mens rea*. They would argue that it is pointless to speak of degrees of negligence since degrees of what is absent cannot exist.<sup>77</sup>

5.99 Lord Radcliffe commented that there is “a certain virile attraction” in the idea of making a person answer for the foreseeable consequences of his or her conduct without troubling to search his or her mind for motives or purposes “but it does not go well with the dock or the prison gate.”<sup>78</sup>

5.100 Glanville Williams stated that punishment for negligence as a serious offence with considerable social stigma could be justified neither on a deterrent nor on a retributive basis. He argued further that imprisonment (rather than the imposition of a fine) was inappropriate even for quite severe negligent acts.<sup>79</sup>

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<sup>76</sup> Horder “Gross Negligence and Criminal Culpability” (1997) 47 UTLJ 495, at 512-3.

<sup>77</sup> Charleton *Offences Against the Person* (Round Hall 1992) at 86.

<sup>78</sup> *Censors* (London 1961) at 20.

<sup>79</sup> See Williams *Criminal Law* (2<sup>nd</sup> ed Stevens & Sons 1961) at 93-4 where the author writes: “Paradoxically, the justification for punishing negligence is stronger in minor offences involving neither imprisonment nor odium than in major offences. “Regulatory offences” generally relate to the conduct of a business or other undertakings where the situation is a recurring one. Fines, and if necessary repeated fines, prod people into taking care. On the other hand, a substantial sentence of imprisonment would make little sense, since it would be disproportionate to the occasion. As regards the offender himself it would be more likely to destroy his occupation than to improve his standards. Even where the harm done is great, if the situation is one of only isolated occurrence there may be little or no social advantage in inflicting heavy punishment on the inadvertent and unlucky offender. Such a sentence, passed for reasons of general deterrence, is unlikely to make ordinary people attend more anxiously to the consequences of their conduct, except perhaps in

5.101 Turner argued that since negligence should not give rise to criminal liability at common law it most definitely had no place in the law of manslaughter. He also claimed that the concept of degrees of negligence and therefore of gross negligence was a nonsense. Firmly subscribing to the belief that an accused should be proven to have possessed foresight of consequences in order to be held responsible for acts or omissions under the criminal law, Turner contended that allowing negligence to act as a basis for criminal liability meant reverting to a system of absolute liability.<sup>80</sup>

5.102 Turner understood the expression *mens rea* to be comprised of two elements: (1) the accused's conduct must be voluntary and (2) the accused must have foresight of the consequences of the conduct. According to Turner, in order for a man to be guilty of manslaughter he "must have had in his mind the idea of bodily harm to someone".<sup>81</sup> Moreover he claimed that judges when trying cases of manslaughter should avoid making any reference to negligence and should instruct juries to convict a person of manslaughter if their conduct was voluntary and they either intended to inflict physical injury on someone or foresaw the possibility of inflicting such injury and nonetheless took the risk.<sup>82</sup>

5.103 In 1980 the Criminal Law Revision Committee in England recommended that gross negligence manslaughter be abolished, noting that:

"sometimes the jury may not be able to find more than that the defendant was extremely foolish; and although the foolishness may amount to gross negligence we do not think that it should be sufficient for manslaughter in the absence of advertence to the risk of death or serious injury. It seems that in fact prosecutions falling exclusively under this heading of manslaughter are very rare, and bear no relation to the number of accidental deaths on the roads, in factories, in construction industries, in the home, and so on. If the law of manslaughter by gross negligence were strictly enforced, many drivers, employers, workmen and parents would be in the dock on this charge."<sup>83</sup>

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the cases already mentioned where compliance may be demanded with some identifiable rule of prudence."

<sup>80</sup> See Turner "The Mental Element in Crimes at Common Law" in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261.

<sup>81</sup> *Ibid* at 231.

<sup>82</sup> *Ibid*.

<sup>83</sup> Criminal Law Revision Committee *Fourteenth Report: Offences Against the Person* (1980) Cmnd 7844 paragraph 121 at 56-57.

5.104 In *The People (AG) v Dunleavy*<sup>84</sup> the Court of Criminal Appeal held that a conviction for gross negligence manslaughter would only arise where the prosecution proved that the accused was, by ordinary standards, negligent, that the negligence which caused the death of the victim was of a very high degree and involved a high risk of substantial personal injury to others. Staunch subjectivists would argue that it is unjust to hold people responsible for such a serious crime as manslaughter where they deviated from the standard of care expected of a reasonable person.

5.105 In gross negligence manslaughter cases, liability is based on an objective standard, with no reference to subjective culpability, that is, awareness of the risk of serious injury or death and a willingness to nonetheless run the risk. Liability is objective in the sense that the accused's guilt depends on whether he or she could have taken the care which he or she failed to exercise. From a labelling perspective, subjectivists employ the powerful argument that it is most inappropriate that a person who kills under provocation, which is really murder under extenuating circumstances, receives the same legal label as a person convicted of manslaughter by gross negligence where no positive *mens rea* is established.

5.106 *The Commission invites submissions on the possibility of abolishing gross negligence manslaughter on the basis that liability is wholly objective and the person accused of the negligence did not choose to risk or cause harm and therefore is not sufficiently culpable to be convicted of such a serious offence as manslaughter.*

**(2) Moderate reform of gross negligence manslaughter**

**(a) Focus on capacity of the accused**

5.107 The Commission has already discussed the argument that people should only be held criminally liable for their negligent acts or omissions if they were capable of measuring up to the law's expectations but failed to behave as a reasonable person in their situation should, falling below the expected standard by "a marked and obvious distance".<sup>85</sup> Ashworth, who generally supports a subjectivist approach, believes that criminal liability for negligence is appropriate where those who negligently cause harm "could have done otherwise".<sup>86</sup>

5.108 In the Commission's view, it would be unjust if a legal system would hold intellectually disabled people responsible for causing death by

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<sup>84</sup> [1948] IR 95.

<sup>85</sup> See paragraphs 3.215-3.234, above. See also Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) Consultation Paper No 135 paragraph 5.63 at 124.

<sup>86</sup> Ashworth *Principles of Criminal Law* (2<sup>nd</sup> ed Clarendon Press 1995) at 190.

gross negligence if they failed to take precautions against a particular form of harm to which they did not advert and would *never* advert, even though the “reasonable person” would have easily recognised such a risk. Applying a purely objective standard which paid no attention to the fact that the accused was less intelligent, mature or capable than the average person<sup>87</sup> would be to resort to *absolute* or *strict liability* for such a serious offence as manslaughter.

5.109 Section 222 of the *German Criminal Code* deals with the offence of negligent homicide, *fahrlässige Tötung*. Anyone who causes death through negligence can be fined or imprisoned for up to 5 years.<sup>88</sup> The relevant standard of care is objective in relation to the circumstances, but is subjective as regards the personal knowledge and abilities of the accused in discharging their duty of care.<sup>89</sup> The capacity of the accused to appreciate the risk is relevant to the foreseeability of the fatal consequences. Thus, an accused will only be guilty of negligent homicide if he or she was capable of exercising prudence and care at the time of the alleged negligent conduct, and could have foreseen that death and not merely physical injury was a likely the outcome of his or her conduct.<sup>90</sup>

5.110 The current test for establishing liability for gross negligence manslaughter as set down in *The People (AG) v Dunleavy*<sup>91</sup> does not make any reference to the capacity of the accused to advert to risk or to attain the expected standard. It is submitted that a moderate reform of the law of involuntary manslaughter could and arguably should change this. In *The People (AG) v Dunleavy*<sup>92</sup> the Court of Criminal Appeal held that a high degree of negligence is required to amount to manslaughter. To ground a conviction for gross negligence manslaughter in Ireland, it is necessary to prove four key things that the accused was, by ordinary standards, negligent; that the negligence caused the death of the victim; that the negligence was of a very high degree; that the negligence involved a high degree of risk or likelihood of substantial personal injury to others. The above test could

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<sup>87</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 4.20 at 34.

<sup>88</sup> See§222 on Fahrlässige Tötung in Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1217. „Wer durch Fahrlässigkeit den Tod eines Menschen verursacht wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.“ A translation of the section is available at the German Law Archive, <http://www.iuscomp.org/gla/>

<sup>89</sup> Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1218.

<sup>90</sup> *Ibid* at 1225.

<sup>91</sup> [1948] IR 95.

<sup>92</sup> [1948] IR 95.

possibly be amended so that a fifth requirement provides that the accused is capable of appreciating that risk at the material time.

5.111 *The Commission invites submissions on whether the test for gross negligence manslaughter should include a requirement that the accused was capable of appreciating the risk at the time when the negligent act or omission causing death took place, but simply did not do so.*

**(b) *Raise the level of risk from “risk or likelihood of substantial personal injury” to “risk of death” or “risk of death or serious injury”***

5.112 Under the test established by the Court of Criminal Appeal in *The People (AG) v Dunleavy* an accused can be convicted of gross negligence manslaughter where he or she was negligent to a very high degree and such negligence caused the death in question, provided also that the negligence involved a high degree of risk or likelihood of substantial personal injury to others.

5.113 Although the reference to “risk or likelihood of substantial personal injury to others” is a remnant of implied malice murder whereby an intention to cause serious injury is sufficient to give rise to a murder conviction, it is arguable that the current gross negligence manslaughter test, which does not involve any intention to harm or injure, pitches the necessary risk at too low a level.

5.114 Perhaps this is why juries, in the few gross negligence manslaughter cases which have come before the Irish courts, are unwilling to convict. It could well be that jurors (assuming that they understand the trial judge’s directions and the application of the law to the facts of the case) think that the stigma of a manslaughter conviction should not apply in cases where there is no deliberate violence or intention to injure, unless the risk to which the accused fails to advert or his or her failure to meet an expected standard involves a risk of *death* rather than *substantial personal injury*.

5.115 As the Law Commission for England and Wales stated in its Consultation Paper *Criminal Law: Involuntary manslaughter*:

“if there is to be a crime of negligent manslaughter at all, it will neither achieve its social purpose nor operate fairly unless it is kept within strict bounds ... The crime of manslaughter is a last resort, by which we mean that it should be available only when other sanctions which already exist against the behaviour complained of seem inappropriate, whether these be civil negligence actions, professional condemnation and disqualification, health and safety legislation, or the road traffic

laws. It also does, or should, apply only to behaviour which is seriously at fault.”<sup>93</sup>

5.116 Behaviour that poses an objectively judged risk of *death* (or perhaps of serious injury) is graver and more worthy of social and legal condemnation than a risk of *substantial personal injury to others*.

5.117 The Law Commission for England and Wales also noted that manslaughter is a crime about death where the accused’s fault relates to a consequence which falls a great deal short of the death for which he or she is held accountable.<sup>94</sup> The Law Commission therefore proposed that the unifying feature of a general law of manslaughter should be that the defendant’s conduct was such that it created a significant risk that death or perhaps serious personal injury would result because attention of the tribunal of fact would be focused the upon the actual nature of the accused’s conduct and would test that conduct according to its propensity to threaten the outcome which in fact occurred.<sup>95</sup>

5.118 The Law Commission for England and Wales therefore provisionally recommended that the accused’s negligent conduct should involve a significant or substantial risk of death or serious injury.<sup>96</sup> While noting that the risk ought strictly speaking relate to death because the event of death is the unifying factor of the offence, the Law Commission included the risk of serious injury because on a practical level risking serious injury and risking death are not very distant and it was thought that it might be easier to deal with cases of serious misconduct if the jury would not have to be satisfied that they created a risk of death.<sup>97</sup>

5.119 In 2006 the Law Commission for England and Wales published a report on *Murder, Manslaughter and Infanticide* where it once again recommended that in gross negligence manslaughter cases there should be gross negligence as to the risk of *causing death* not merely as to causing serious injury.<sup>98</sup> The Law Commission stated that if liability for such a

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<sup>93</sup> See Consultation Paper No 135 paragraphs 5.43 and 5.44 at 119.

<sup>94</sup> *Ibid* paragraph 5.49 at 121.

<sup>95</sup> *Ibid* paragraph 5.50 at 121.

<sup>96</sup> *Ibid* paragraph 5.57 at 121. The provisional gross negligence manslaughter proposal was expressed as follows: (1) the accused ought reasonably to have been aware of a significant risk that his conduct could result in death or serious injury; and (2) his conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm.

<sup>97</sup> Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) Consultation Paper No 135 paragraph 5.52 at 122.

<sup>98</sup> (2006) Law Com No 304 paragraph 3.58 at 64.

serious offence as manslaughter is to be justified where a person is unaware that he or she is posing a risk, then the negligence of the accused must relate to the risk of bringing about the very harm he or she has caused – death. If this is not the case then the crime of manslaughter becomes overly broad and does not properly label what the offender has done.<sup>99</sup>

5.120 The Commission has discussed the duties owed by those professing special skill and knowledge such as medical practitioners.<sup>100</sup> *R v Adomako*,<sup>101</sup> one of the English cases discussed involved an anaesthetist who was convicted of gross negligence manslaughter. The Court of Appeal affirmed his conviction, as did the House of Lords where Lord Mackay of Clasker LC stated that:

“The jury will have to consider whether the extent to which the defendant’s conduct departed from the proper standard of care incumbent upon him, involving as it must have done *a risk of death to the patient*, was such that it should be judged criminal.”<sup>102</sup>

5.121 In the wake of the House of Lords decision in *R v Adomako* the Law Commission for England and Wales published its Report on involuntary manslaughter in 1996.<sup>103</sup> Its final recommendation on gross negligence manslaughter was modelled on the test of “dangerousness” in the road traffic offences.<sup>104</sup> Similar to the road traffic offences, the proposed offence of killing by gross carelessness was to target the person whose conduct fell *far* below that which could be expected of him or her, in the face of a risk which would have been obvious to a reasonable person in his position. The Law Commission thought the offence would avoid reliance on the troubled concepts of negligence and duty of care.<sup>105</sup> The recommended offence of killing by gross carelessness had the requirement that the risk of

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<sup>99</sup> Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) CP no 135 paragraph 3.59 at 64.

<sup>100</sup> See paragraphs 3.105-3.177 above.

<sup>101</sup> [1993] 4 All ER 935 (Court of Appeal) and [1994] All ER 78 (House of Lords).

<sup>102</sup> *R v Adomako* [1994] 3 All ER 79, 87.

<sup>103</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237.

<sup>104</sup> Section 2A(1) of the *Road Traffic Act 1988*, inserted by section 1 of the *Road Traffic Act 1991* provides: that a person drives dangerously if (a) the way he drives falls far below what would be expected of a competent and careful driver, and (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

<sup>105</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.25 at 49.

death or serious injury be “obvious” in the sense of “immediately apparent”, “striking” or “glaring”.<sup>106</sup>

5.122 In response to the question posed by the Law Commission for England and Wales in Consultation Paper 135 as to whether it was appropriate that the proposed gross carelessness offence should be formulated in terms of a risk of serious injury as well as death,<sup>107</sup> most respondents said that it should. According to the Crown Prosecution Service, similar problems to those arising in attempted murder cases could arise if the risk of death had to be proved.<sup>108</sup>

5.123 Nonetheless, since 1994 when the House of Lords upheld the anaesthetist’s manslaughter conviction in *R v Adomako*,<sup>109</sup> the English test for establishing gross negligence manslaughter is stricter than the Irish one, by requiring that the risk posed by the defendant’s negligence be one of *death* only. In *R v Misra; R v Srivastava*<sup>110</sup> the English Court of Appeal affirmed that the risk must relate to death rather than mere bodily injury.

5.124 Arguably the fourth requirement of the gross negligence manslaughter test laid down in *The People (AG) v Dunleavy*,<sup>111</sup> that is, that the negligence involved a high degree of *risk or likelihood of substantial personal injury to others*, should be changed so that the negligence involve a high degree of risk or likelihood of *death* or alternatively *death or serious injury*, reflecting the death or serious injury structure of murder.

5.125 In its *Report on Corporate Killing*<sup>112</sup> the Commission recommended that a corporation should be liable for manslaughter if the prosecution proved that: (a) the undertaking was negligent; (b) the negligence was of a sufficiently high degree to be characterised as “gross” and so warrant criminal sanction; and (c) the negligence caused the death.<sup>113</sup> Regarding the risk of circularity<sup>114</sup> involved in the bare test for establishing

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<sup>106</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.26 at 49.

<sup>107</sup> Consultation Paper No 135 paragraph 6.14 at 136.

<sup>108</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.26 at 49.

<sup>109</sup> [1994] 3 All ER 79.

<sup>110</sup> [2004] EWCA Crim 2375; [2005] 1 Cr App R 21.

<sup>111</sup> [1948] IR 95.

<sup>112</sup> (LRC 77-2005).

<sup>113</sup> *Ibid* paragraph 2.10 at 49.

<sup>114</sup> This difficulty was alluded to by Davitt J in *The People (AG) v Dunleavy* [1948] IR 95, 100.



the ‘gross’ nature of the negligence, the Commission thought that the circularity could be overcome if the law clarified the factors that differentiate gross negligence from civil negligence rather than simply calling it “criminal”.<sup>115</sup> While the juries should have the difference between civil and criminal negligence explained to them, the Commission was aware that an overly precise definition might simply be confusing and restrictive. The Commission therefore recommended that negligence will be characterised as “gross” for the purposes of establishing the second element of gross negligence under the *Dunleavy* test if it:

- (a) was of a very high degree; and
- (b) involved a significant risk of death or serious personal harm.<sup>116</sup>

5.126 *The Commission invites submissions on whether the prosecution should have to prove that the negligence involved a high degree of risk of death only or alternatively a high degree of risk of death or serious injury, rather than “substantial personal injury” before a conviction for gross negligence manslaughter could be sustained.*

**(3) *Radical reform: negligent homicide – a lesser category of killing?***

5.127 As a species of culpable fault, negligence clearly belongs to a less serious category of fault than recklessness. If subjective recklessness became the official *mens rea* for manslaughter under a scheme similar to the *Indian Penal Code* or the *Model Penal Code*, then any deaths caused by gross negligence should perhaps be placed in a lesser category of homicide. Duff explains the subjectivist approach to recklessness and negligence as follows. Negligence involves:

“fault only in so far as the negligent agent could take care by *choosing* to do so. She is condemned for failing to make a choice (to take care) which she could and should have made: but failing to make a choice which I ought to make is, surely, less culpable than making a choice (to cause, or risk causing harm) which I should not make, since it is by the choices we actually make that we primarily define our responsible agency. The negligent agent is less closely related, as an agent, to the harm or danger which she causes than is one who actually chooses to cause harm or

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<sup>115</sup> Law Reform Commission *Report on Corporate Killing* (LRC 77-2005) paragraph 2.61 at 59.

<sup>116</sup> *Ibid* paragraph 2.63 at 60.

danger: since the harm or danger does not flow from her active will, it is less fully hers – less fully something which she *does*.”<sup>117</sup>

5.128 The *Indian Penal Code*, which was discussed in detail above, arranges the fault elements for homicide into a scheme where murder is top of the ladder, culpable killings amounting to manslaughter (the fault element for which is subjective reckless) are located in the middle of the homicide ladder and culpable killings falling short of manslaughter, that is negligent killings are at the bottom of the ladder.

5.129 Section 304 A of the *Indian Penal Code* provides for causing death by negligence. A person who causes the death of any person by doing any rash or negligent act not amounting to culpable homicide can be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

5.130 As discussed earlier in this chapter, there are four *mens rea* terms recognised by the *Model Penal Code*. Crimes can be committed purposely, knowingly, recklessly or negligently. A person “negligently” commits a crime under the *Model Penal Code* if he or she did not intend to bring about the result in question, but failed to exercise a reasonable duty of care to prevent that result from occurring. According to section 2.02(2)(d) of the Code:

“A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”<sup>118</sup>

5.131 Section 210.4 of the Code states that criminal homicide constitutes negligent homicide, a felony of the third degree, when a death is caused by negligence.<sup>119</sup> The purpose of this section was to clarify the concept of negligence that can give rise to punishment for inadvertent homicide. Section 210.4 was designed to replace specialised statutes, chiefly those dealing with vehicular homicide and to place all inadvertent homicides below the grade of manslaughter.

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<sup>117</sup> Duff *Intention, Agency and Criminal Liability* (Basil Blackwell 1990) at 155-6.

<sup>118</sup> See American Law Institute *Model Penal Code* (American Law Institute 1985) at 21.

<sup>119</sup> See American Law Institute *Model Penal Code and Commentaries* (2<sup>nd</sup> ed American Law Institute 1980) Part II §§ 210.9-213.6 at 80.

5.132 As stated above, the *Model Penal Code* restricts the offence of manslaughter to cases of conscious risk-taking, that is, subjective recklessness. The American Law Institute which drafted the Code was of the opinion that a new, less culpable category called negligent homicide should deal exclusively with deaths caused by negligence. Under the offence of criminally negligent homicide a higher level of negligence is demanded than in civil cases.

5.133 The *Model Penal Code* commentary remarks on the situation before the Code was drafted in the following terms:

“[T]he Model Code was drafted against a background of inconsistency and imprecision in determining the content of negligence for purposes of criminal homicide. There was also a general failure to focus upon the need for a grading differential between conduct involving conscious risk creation and conduct involving inadvertence. The most common situation was that negligent homicide was treated as a species of involuntary manslaughter, with judicial formulation of the appropriate standard expressed in a jumble of language that obscured the essential character of the inquiry.”<sup>120</sup>

5.134 Most US states followed the *Model Penal Code* definition of negligence, the majority of which cover negligent homicide in a separate negligent (or vehicular homicide) statute. Some states were, however, enacted to deal with specific types of circumstances, for example the Minnesota statute deals with hunting accidents, vicious animals and vehicular homicide,<sup>121</sup> the Ohio statute focuses on negligent killings caused by deadly weapons or other dangerous instrumentality<sup>122</sup> and the Wisconsin law is aimed at vicious animals, vehicles or weapons and intoxicated users of vehicles or firearms.<sup>123</sup>

5.135 Section 222 of the *German Criminal Code* provides for the specific offence of negligent homicide, *fahrlässige Tötung*, whereby anyone who causes death through negligence can be fined or imprisoned for up to 5 years.<sup>124</sup> Similar to the *German Criminal Code*, Article 589<sup>125</sup> of the *Italian*

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<sup>120</sup> See American Law Institute *Model Penal Code and Commentaries* (2<sup>nd</sup> ed American Law Institute 1980) Part II §§ 210.9-213.6 at 85.

<sup>121</sup> Minn §§ 609.205.21.

<sup>122</sup> Ohio §§ 2903.05.

<sup>123</sup> Wis § 940.07 to .09.

<sup>124</sup> See §222 on *Fahrlässige Tötung* in Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1217. A translation of the section is available at the German Law Archive, <http://www.iuscomp.org/gla/>

*Criminal Code* provides for the offence of negligent homicide whereby anyone who negligently causes the death of a person faces imprisonment for 6 months up to 5 years. Where the death came about due to the violation of road traffic laws or regulations for the prevention of industrial accidents the term of imprisonment ranges from one year up to 5 years. If more than one person is killed or seriously injured, then the punishment shall be that which should be inflicted for the most serious violation committed (that is 5 years) increased up to one-third, but this punishment may not exceed 12 years.

5.136 It is arguable that any law reform proposals in Ireland should take note of other jurisdictions which specifically recognise that inadvertent killings are less culpable than intentional or (subjectively) reckless ones. As negligence essentially involves an absence of *mens rea* rather than the presence of a guilty state of mind, killings which occur due to gross negligence arguably do not belong in so serious an offence category as manslaughter.

5.137 *The Commission invites submissions on the possibility of placing deaths which could currently sustain a conviction for gross negligence manslaughter into a new lesser category of negligent homicide.*

**(4) Recommendation on gross negligence manslaughter**

5.138 The Commission provisionally recommends that the test for gross negligence manslaughter established in *The People (AG) v Dunleavy*<sup>126</sup> should be slightly adjusted to make the capacity of the accused relevant to culpability. A person should only be held criminally liable for his or her negligent act or omission if he or she was capable of meeting the law's expectations but failed to behave a reasonable person in the same situation would. The Commission is satisfied that criminal liability for negligence is only appropriate where those who negligently cause harm could have done otherwise.<sup>127</sup>

5.139 In cases of gross negligence manslaughter the Commission believes that the focus should be on what could justifiably be expected of the individual charged<sup>128</sup> so that an accused would only be guilty of gross negligence manslaughter if it is proven that he or she was capable of advertent to the risk but failed to do so or could have attained the expected standard but fell far below it.

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<sup>125</sup> See The American Series of Foreign Legal Codes *The Italian Penal Code* (Sweet & Maxwell 1978). Article 590 deals with the offence of negligent personal injury and article 584 addresses preterintentional homicide.

<sup>126</sup> [1948] IR 95.

<sup>127</sup> Ashworth *Principles of Criminal Law* (2<sup>nd</sup> ed Clarendon Press 1995) at 190.

<sup>128</sup> Mitchell "In Defence of a Principle of Correspondence" [1999] Crim LR 196, at 196.

5.140 To ground a conviction of gross negligence manslaughter in Ireland, the prosecution must currently prove four key things:

- that the accused was, by ordinary standards, negligent;
- that the negligence caused the death of the victim; that the negligence was of a very high degree;
- that the negligence involved a high degree of risk or likelihood of substantial personal injury to others.

The Commission provisionally recommends that the above test should be modified so that a fifth requirement provides that:

- The accused is capable of appreciating that risk at the material time.

5.141 *The Commission provisionally recommends that the current test for gross negligence manslaughter as set down in *The People (AG) v Dunleavy*<sup>129</sup> should be amended so that the capacity of the accused to advert to risk or to attain the expected standard is relevant to liability.*

## **G Reforming motor manslaughter and the related statutory driving offences**

5.142 The Commission considers that there are three possible courses of action which could be taken regarding motor manslaughter and the related offences of dangerous driving causing death and careless driving.

### **(1) *Maintaining the status quo***

5.143 The Commission firstly considers the possibility of simply maintaining the legal status quo so that the statutory offences of dangerous driving causing death and careless driving would continue to exist alongside manslaughter, whereby drivers who kill would only be prosecuted for manslaughter in extreme cases of very high culpability where there a combination of serious factors, for example where a vehicle is stolen and there is a high speed police chase resulting in death and destruction.

5.144 In response to its 1994 consultation paper on *Criminal Law: Involuntary Manslaughter* the Law Commission received submissions from a group of influential respondents, such as the Department of Transport and the Campaign Against Drinking and Driving (the CADD) who recommended that both the separate road traffic offences *and* the proposed offence of killing by gross carelessness be retained; that is, they did not want to see any radical changes to the law governing road deaths. The CADD submitted:

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<sup>129</sup> [1948] IR 95.

“It is significant that complaints to CADD on undercharging and over lenient sentencing have now almost disappeared [since the creation of the new offences of causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs by the Road Traffic Act 1991] ... It is clear that juries are now more ready to convict for road deaths brought under the Road Traffic Act than they previously were. CADD believes that to start tinkering again with the law in this area would be a retrograde step.”<sup>130</sup>

5.145 Following the consultation process in relation to Consultation Paper No 135 the Law Commission for England and Wales concluded in their 1996 Report that there should be no change to the existing road traffic offences because juries might still be unwilling to convict for a general homicide offence, although they would be prepared to convict for a road traffic homicide offence.<sup>131</sup> Nonetheless, the Law Commission believed that the proposed new offences of reckless killing and killing by gross carelessness should be available in cases where death is caused due to extremely bad driving. It stated:

“Although in the overwhelming majority of such cases the appropriate charge will be one of the causing death by dangerous driving, there will be some cases in which the prosecutor may wish to charge one of our new, general, homicide offences. For example, one of our consultees told us of a case in which the accused had blindfolded himself before driving off: a charge of reckless killing would clearly be appropriate in such a case. We would expect the CPS to reserve the charge of killing by gross carelessness for driving cases in which there might be some technical impediment to proceeding on a charge of causing death by dangerous driving, for example where it is not certain whether the accused was actually driving, or whether he was on a public road.”<sup>132</sup>

5.146 *The Commission invites submissions on the possibility of keeping the law governing road deaths as it is so that the statutory offences of dangerous driving causing death and careless driving would continue to exist alongside manslaughter and drivers who kill would only be prosecuted for manslaughter in extreme cases of very high culpability.*

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<sup>130</sup> Law Commission for England and Wales *Legislating the Criminal Code Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.67 at 63.

<sup>131</sup> *Ibid.*

<sup>132</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.69 at 63.

**(2) Radical reform**

**(a) Remove deaths caused by negligent driving from the scope of manslaughter**

5.147 The Commission believes that a more radical reform proposal would involve the removal of deaths caused by negligent driving from the scope of manslaughter altogether, so that there could never be a manslaughter conviction where a car is the instrument of killing, no matter how great the level of culpability on the part of the driver.

5.148 One of the reform proposals suggested by the Law Commission for England and Wales in its consultation paper on *Criminal Law: Involuntary Manslaughter*<sup>133</sup> was that the offence of manslaughter should no longer apply to death caused by negligent driving on the roads. The Law Commission maintained that there was a strong argument for such a change in the law<sup>134</sup> since the maximum term of imprisonment for causing death by dangerous driving had been increased to 10 years.<sup>135</sup> The Law Commission believed that it would be unlikely that any case of objectively reckless driving would deserve a harsher penalty than 10 years. At any rate the proposed offence of manslaughter by subjective recklessness would be available in extreme cases.<sup>136</sup>

5.149 In discussing this suggestion in the 1996 Report on involuntary manslaughter, the Law Commission remarked that removing road deaths from manslaughter:

“would leave only the statutory offence of causing death by dangerous driving available in cases where death was caused by *very careless* driving, but it would be possible to charge reckless killing where the death was caused by *subjective recklessness*.”<sup>137</sup>

The Law Commission claimed that this proposal would not effect a defendant’s overall liability but would simply tidy up the law by removing co-existent liability for two identical offences.

5.150 Consultees were divided on the issue of whether death caused by negligent driving should be excluded from the Law Commission’s proposed

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<sup>133</sup> (1994) Consultation Paper No 135.

<sup>134</sup> *Ibid* paragraph 5.25 at 114.

<sup>135</sup> *Road Traffic Offenders Act 1988* Schedule 2, as amended by section 67(1) of the *Criminal Justice Act 1993*.

<sup>136</sup> See Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) Consultation Paper No 135 paragraphs 5.16-5.21 at 112-113.

<sup>137</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.64 at 62.

new offence of gross carelessness. A small majority favoured the exclusion of the negligent causing of death by driving from any general homicide offence. They thought that the statutory road traffic offences and the proposed offence of reckless killing would be adequate. The Law Commission reported that the Crown Prosecution Service claimed that the concept of gross negligence manslaughter was “an irritant” in road traffic cases, since it was unclear when manslaughter should be charged instead of death caused by dangerous driving. Apparently prosecutors felt under pressure from the public to charge the more serious offence.<sup>138</sup>

5.151 As discussed in Chapter 4, the company director in *R v Spree and Keymark Services Ltd*,<sup>139</sup> (who encouraged employees to falsify their driving records so as to drive for longer periods, putting vast numbers of road-users at risk of serious injury and death) was convicted of manslaughter. It might not be desirable if a person such as Spree could not be convicted of manslaughter, simply because the fatalities were happened on a public road rather than in a hospital operating theatre or on a building-site. Many of the Australian driving cases discussed in the previous chapter attracted manslaughter convictions because the driving which caused death was objectively very bad and departed considerably from the standard of the careful, competent driver. It might not be a positive step to remove such cases from the scope of manslaughter simply because of the context of the killings.

5.152 Arguably, a charge of gross negligence manslaughter should be open to the prosecution if the level of culpability on the part of a driver who causes death was very high and posed a high risk of death or serious injury – that is, where his or her driving at the time of the incident fell far below that which would be expected of a reasonable driver in the circumstances.

**(b) *Abolish the statutory offences***

5.153 The second radical reform proposal regarding road deaths would be to abolish the statutory offences of dangerous driving causing death and careless driving and to simply prosecute all cases of bad driving causing death as manslaughter as was the case in the first half of the 20<sup>th</sup> century.

5.154 According to the Law Commission for England and Wales in its 1996 Report, some consultees suggested that the separate road traffic offence should be abolished.<sup>140</sup> Such consultees maintained that the causing of death

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<sup>138</sup> Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.65 at 62.

<sup>139</sup> Crown Court December 2004.

<sup>140</sup> Law Commission for England and Wales *Legislating the Criminal Code Involuntary Manslaughter* (1996) Law Com No 237 paragraph 5.66 at 62-3.



by bad or dangerous driving should fall within a general homicide offence as was the case prior to 1950 because public sympathy towards dangerous motorists had declined and the cultural reasons for having separate dangerous driving offences were therefore redundant. Those in favour of abolishing the statutory offences claimed that it was no longer true that juries would be unwilling to convict bad drivers who kill of manslaughter.

5.155 One possible disadvantage with this approach would be that juries might still be reluctant to convict a driver of manslaughter, no matter how negligent he or she was, due to social stigma attached to the offence. In the absence of lesser statutory offences such as dangerous driving causing death and careless driving, the families of victims may be very aggrieved if the offenders get off “scot-free”.

## **H Recommendation on motor manslaughter and the related statutory driving offences**

5.156 The Commission provisionally recommends that there be no change to the law governing deaths which occur on Irish roads. Therefore, the statutory offences of dangerous driving causing death and careless driving should continue to exist alongside manslaughter. The Commission believes that drivers who kill should only be prosecuted for manslaughter in extreme cases of very high culpability such as in *R v Spree and Keymark Services Ltd*.<sup>141</sup>

5.157 The Commission thinks that it would be inappropriate to remove road deaths entirely from the scope of manslaughter simply because of the context of the killing because wrongdoers such as the defendant in *R v Spree and Keymark Services Ltd* could not be prosecuted for the more serious offence even though their culpability was at the high end of the scale.

5.158 The Commission is also provisionally of the view that it would be too radical a move to abolish the statutory offences and to prosecute all deaths which are caused by bad driving as manslaughter in the future because juries may still prove to be unwilling to convict a negligent driver of such a serious homicide offence.

5.159 *The Commission provisionally recommends that there should be no change to the law governing road deaths. Both the statutory offences of dangerous driving causing death and careless driving should continue to exist alongside the more serious offence of manslaughter.*

5.160 *The Commission provisionally recommends that judges should be able to take the fact that a death occurred into account when imposing*

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<sup>141</sup> Crown Court December 2004.

*sentence in a case of careless driving where the culpability of the accused has been clearly established by the prosecution.*

## CHAPTER 6 SUMMARY OF PROVISIONAL RECOMMENDATIONS

6.01 The provisional recommendations contained in this Paper may be summarised as follows:

6.02 The Commission invites submissions on the possibility of codifying the current law of involuntary manslaughter without any reform. [Paragraph 5.28]

6.03 The Commission invites submissions on the possibility of placing low levels of violence which unforeseeably cause death outside the scope of unlawful and dangerous act manslaughter. Such acts could be prosecuted as assault and the judge would take the fact of death into account when imposing sentence. [Paragraph 5.34]

6.04 The Commission invites submissions on the possibility of reducing the scope of unlawful and dangerous act manslaughter by restricting unlawful acts for the purposes of the offence to assaults whereby all other unlawful acts such as criminal damage would be excluded. Submissions are also welcome on the possibility of naming the offence “causing death by assault” to capture the essence of the wrongdoing in the name of the offence. [Paragraph 5.40]

6.05 The Commission invites submissions on the possibility of restricting unlawful and dangerous act manslaughter to acts which are unlawful and likely to endanger life, so that minor levels of violence which cause death would fall outside the offence. [Paragraph 5.48]

6.06 The Commission invites submissions on the possibility of introducing an offence such as “Bodily Injury resulting in Death” under section 227 of the *German Criminal Code* which would cover cases where death arose due to deliberate assaults and also where it was caused by neglect. This offence would be lower down the homicide ladder than manslaughter in terms of culpability. [Paragraph 5.54]

6.07 The Commission invites submissions on the structure of homicide under the *Indian Penal Code* and the *Model Penal Code* and particularly invites comments on the possibility of introducing recklessness as the *mens rea* for manslaughter, either in the form of knowledge of a probability of

death under the Indian model or subjective recklessness where the accused consciously disregards a risk of death under the US model. [Paragraph 5.86]

6.08 The Commission provisionally recommends that low levels of deliberate violence should be removed from the scope of unlawful and dangerous act manslaughter and instead prosecuted as assaults. [Paragraph 5.88]

6.09 The Commission provisionally recommends that situations where death is caused by a drug injection should not form part of the scope of unlawful and dangerous act manslaughter. [Paragraph 5.93]

6.10 The Commission invites submissions on the possibility of abolishing gross negligence manslaughter on the basis that liability is wholly objective and the person accused of the negligence did not choose to risk or cause harm and therefore is not sufficiently culpable to be convicted of such a serious offence as manslaughter. [Paragraph 5.106]

6.11 The Commission invites submissions on whether the test for gross negligence manslaughter should include a requirement that the accused was capable of appreciating the risk at the time when the negligent act or omission causing death took place, but simply did not do so. [Paragraph 5.111]

6.12 The Commission invites submissions on whether the prosecution should have to prove that the negligence involved a high degree of risk of death only or alternatively a high degree of risk of death or serious injury, rather than “substantial personal injury” before a conviction for gross negligence manslaughter could be sustained. [Paragraph 5.126]

6.13 The Commission invites submissions on the possibility of placing deaths which could currently sustain a conviction for gross negligence manslaughter into a new lesser category of negligent homicide. [Paragraph 5.137]

6.14 The Commission provisionally recommends that the current test for gross negligence manslaughter as set down in *The People (AG) v Dunleavy*<sup>1</sup> should be amended so that the capacity of the accused to advert to risk or to attain the expected standard is relevant to liability. [Paragraph 5.141]

6.15 The Commission invites submissions on the possibility of keeping the law governing road deaths as it is so that the statutory offences of dangerous driving causing death and careless driving would continue to exist alongside manslaughter and drivers who kill would only be prosecuted for manslaughter in extreme cases of very high culpability. [Paragraph 5.146]

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<sup>1</sup> [1948] IR 95.

6.16 The Commission provisionally recommends that there should be no change to the law governing road deaths. Both the statutory offences of dangerous driving causing death and careless driving should continue to exist alongside the more serious offence of manslaughter but the Commission invites submissions on this matter. [Paragraph 5.159]

6.17 The Commission provisionally recommends that judges should be able to take the fact that a death occurred into account when imposing sentence in a case of careless driving where the culpability of the accused has been clearly established by the prosecution. [Paragraph 5.160]