OXFORD CAMBRIDGE AND RSA EXAMINATIONS

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G154/RM

LAW

Criminal Law Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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G154 CRIMINAL LAW

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

EXTRACT ADAPTED FROM THE JUDGMENT OF EDMUND-DAVIES LJ IN *R V CHURCH* [1966] 1 QB 59.

Church was mocked about his impotence by his female victim. He knocked her unconscious and, not being able to revive her, he panicked thinking she was dead, and threw her into a river where she drowned. He was acquitted of murder but convicted of manslaughter. He appealed unsuccessfully on the direction of the trial judge on the requirements of manslaughter.

EDMUND-DAVIES LJ:
Two passages in the summing up are here material. They are these: (1) "If by an unlawful act of violence done deliberately to the person of another, that other is killed, the killing is manslaughter even though the accused never intended death or grievous bodily harm to result. If this woman was alive, as she was, when he threw her into the river, what he did was the deliberate act of throwing a living body into the river. That is an unlawful killing and it does not matter whether he believed she was dead or not, and that is my direction to you," and (2) "I would suggest to you, though it is of course for you to approach your task as you think fit, that a convenient way of approaching it would be to say: What do we think about this defence that

he honestly believed the woman to be dead? If you think that it is true, why then, as I have told you, your proper verdict would be one of manslaughter, not murder."

Such a direction is not lacking in authority … Nevertheless, in the judgment of this court it was a misdirection. It amounted to telling the jury that, whenever any unlawful act is committed in relation to a human being which resulted in death there must be, at least, a conviction for manslaughter. This might at one time have been regarded as good law … it appears to this court that the passage of years has achieved a transformation in this branch of the law and, even in relation to manslaughter, a degree of *mens rea* has become recognised as essential. To define it is a difficult task, and in *Andrews v DPP* [1937] AC 576 Lord Atkin spoke of the "element of 'unlawfulness' which is the elusive factor." Stressing that we are here leaving entirely out of account those ingredients of homicide which might justify a verdict of manslaughter on the grounds of (a) criminal negligence, or (b) provocation, or (c) diminished responsibility, the conclusion of this court is that an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. 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.

If such be the test, as we judge it to be, then it follows that in our view it was a misdirection to

tell the jury simpliciter that it mattered nothing for manslaughter whether or not the appellant believed Mrs Nott to be dead when he threw her in the river ... in the circumstances, such a misdirection does not, in our judgment, involve that the conviction for manslaughter must or should be quashed.

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SOURCE 2

EXTRACT ADAPTED FROM THE JUDGMENT OF LORD MACKAY LC IN *ADOMAKO* [1995] 1 AC 171 HL.

An anaesthetist was convicted when the patient in his care became disconnected from the oxygen supply during an operation and he failed to notice it for ten minutes so that the patient eventually suffered a cardiac arrest and died.

LORD MACKAY LC:
In my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty has caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be categorised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.

It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being a correct test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of

degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.

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SOURCE 3

EXTRACT ADAPTED FROM *SMITH & HOGAN CRIMINAL LAW.* 10TH EDITION. 2002. PROFESSOR J C SMITH. BUTTERWORTHS LEXIS NEXIS. PP 378-9 AND 382.

[Involuntary manslaughter] includes all varieties of homicide which are unlawful at common law but committed without malice aforethought. It is not surprising, therefore, that the fault required takes more than one form. And, as the limits of malice aforethought are uncertain, it follows inevitably that there is a corresponding uncertainty as to the boundary of manslaughter. The difficulties do not end there, for there is another vague borderline between manslaughter and accidental death. Indeed Lord Atkin said [in *Andrews v DPP* (1937) 2 AC 576 at 581] that:

> **"[O]f all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions … the law … recognises murder on the one hand based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intent to kill, but with the presence of an element of 'unlawfulness' which is the elusive factor."**

The element of 'unlawfulness' is little less elusive today than when Lord Atkin spoke.

SOURCE 4

EXTRACT ADAPTED FROM THE JUDGMENT OF EVANS LJ IN *R V LIDAR* [2000] 4 ARCHBOLD NEWS.

Following an argument outside a club the victim had reached in the window of the appellant's car attacking his passenger. The appellant drove off and the victims legs caught under the rear wheel and he was killed when the car ran over him. The appellant was acquitted of murder, convicted of manslaughter and appealed against sentence and claimed the judge was in error for failing to direct on gross negligence.

LORD JUSTICE EVANS:
The [judge directed on] manslaughter:

"[T]he Crown have to prove that the defendant acted recklessly. Recklessly in this context means that the defendant foresaw that some physical harm, however slight, might result to Kully from driving the car as he did and yet ignoring that risk he nevertheless went on to drive as he did. Mere inadvertence is not enough. The defendant must have been proved to have been indifferent to an obvious risk of injury … or actually to have foreseen the risk but to have determined nevertheless to run it."

In *Adomako* the House of Lords affirmed the characteristics of "gross negligence" manslaughter and … also held that juries might properly be directed in terms of recklessness … Lord Mackay LC said this:

"I consider it perfectly appropriate that the word "reckless" be used in cases of involuntary manslaughter, but as Lord Atkin put it "in the ordinary connotation of that word." ... I entirely agree with the view that the circumstances to which a charge of involuntary manslaughter may apply are so various that it is unwise to attempt to categorise or detail specimen directions."

Nothing here suggests that for the future "recklessness" could no longer be a basis for proving the offence of manslaughter: rather, the opposite. Smith and Hogan records that: "For many years the courts have used the terms "recklessness" and "gross negligence" to describe the fault required for involuntary manslaughter ... without any clear definition of either term. It was not clear whether these terms were merely two ways of describing the same thing, or whether they represented two distinct conditions of fault". After referring to *Adomako*, the learned author continues:

"Gross negligence is a sufficient, but not necessarily the only fault for manslaughter. To some extent manslaughter by overt recklessness, conscious risk-taking still survives".

In our judgment, the judge was correct in his view that this was a case of "reckless" manslaughter and to direct the jury accordingly. We reject the alternative submission that he was wrong not to direct the jury as to gross negligence manslaughter, whether in place of or in substitution for the direction as to recklessness. Indeed, in a case such as the present, we find it

difficult to understand how the point of criminal liability can be reached, where gross negligence is alleged, without identifying the point by reference to the concept of recklessness as it is commonly understood: that is to say, whether the driver of the motor vehicle was aware of the necessary degree of risk of serious injury to the victim and nevertheless chose to disregard it, or was indifferent to it. If the gross negligence direction had been given, the recklessness direction would still have been necessary. The recklessness direction in fact given made the gross negligence direction superfluous and unnecessary.

SOURCE 5

EXTRACT ADAPTED FROM *CRIMINAL LAW.* 9TH EDITION. 2009. MICHAEL JEFFERSON. PEARSON LONGMAN. PP 496, 499, 500, 507 AND 515.

The Court of Appeal in *Lidar* … said that manslaughter could be committed by consciously taking a risk of serious injury and that 'to some extent' this form of manslaughter survives the revival of gross negligence manslaughter. It is not absolutely certain whether the court considered subjectively reckless manslaughter to be a separate offence or whether it was part of gross negligence manslaughter. While the existence is admitted, it is uncertain whether the formulation is correct. Perhaps there must be a high probability of serious injury, as *Lidar* suggested, and not just foresight of a risk of serious harm as possibly occurring. At present it seems that facts giving rise to this form of manslaughter are treated as ones which fall within constructive and gross negligence manslaughter, which are easier to prove than subjectively reckless manslaughter ....

[T]he term gross negligence was never clearly defined in the cases … In *Bateman* [1925] All ER Rep 45, Lord Hewart … (talked of the negligence being 'criminal', 'culpable', 'wicked', 'clear' and 'complete' as synonyms for 'gross'. None of these terms is of much help to a jury. Indeed, different juries may convict or acquit on the same facts, one finding the carelessness not gross, the other disagreeing). This formula has also been criticised for leaving a question of law to the jury ….

[In *Adomako*] Lord Mackay stated that the law in *Bateman* and *Andrews* [(1937) AC 576 HL] was correct and 'satisfactory'. He approved the classic if circular definition of Lord Hewart CJ in *Bateman* '[T]he 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'. He also approved the opinion of Lord Atkin in *Andrews* that '[A] very high degree of negligence is required, and that the crime's mental element covers both an indifference to a risk and the situation where the accused appreciated the risk and intended to avoid it and yet [showed] such a high degree of negligence in the manner adopted to avoid the risk as would justify conviction' ….

[Unlawful act or constructive manslaughter] gets its name from the requirement that the victim must have died as a result of an unlawful criminal act and liability is constructive because the accused is guilty even though he did not foresee death … [the doctrine is] harsh in the effect on the accused … [but] 'Given the finality of death and the absolute unacceptability of killing another human being, it is not amiss to preserve the test which promises the greatest measure of deterrence, provided the penal consequences of the offence are not disproportionate'.

The same act could be both this form of manslaughter and gross negligence manslaughter. In *Goodfellow* [(1986) 83 Cr App R 23 (CA)] the accused set fire to a house so that he could be rehoused. Three died. The unlawful act was arson, and he was grossly negligent as to the risk of injury ….

The main criticism of unlawful act manslaughter is that it is a serious crime, yet a person is guilty of it if a reasonable person might foresee that some harm might occur: it is not necessary that some reasonable person might have foreseen death or GBH. Subjectivists are of course most unhappy that the accused is not being judged by what he foresaw but by what a reasonable person might have foreseen. Subjectivists also think that gross negligence manslaughter is unsupportable because again a jury does not consider what the accused intended or foresaw but uses the tort test of reasonable foreseeability.

SOURCE 6

EXTRACT ADAPTED FROM *CASE NOTES. CONSTRUCTIVE MANSLAUGHTER – CAUSATION.* PROFESSOR PAUL DOBSON. STUDENT LAW REVIEW. VOLUME 53. SPRING 2008. PP 19-20.

[In] *R v Kennedy* [2007] UKHL 38, [2007] WLR 612 the defendant handed to the deceased a syringe of heroin prepared and ready for immediate use. The deceased, acting freely and voluntarily, injected himself and died as a result. The defendant was convicted of manslaughter. The Court of Appeal upheld his conviction, holding that the activity of the defendant … and the activity of the deceased … was a joint activity … The Court of Appeal certified the following question for the opinion of the House of Lords.

> **'When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug which is then freely and voluntarily self-administered by the person to whom it is supplied, and the administration of the drug then causes his death?'**

Held [by the House of Lords] … The answer to the question certified by the Court of Appeal was 'in the case of a fully-informed and responsible adult, never'.

In this case the House of Lords confirmed that there can be no liability for constructive manslaughter unless:

(i) the defendant committed an unlawful act;
(ii) that unlawful act amounted to a crime;
(iii) that unlawful act was a significant cause of the death.

[T]his decision of the House of Lords has brought some welcome clarity to the law where one person, D, supplies an illegal drug to another, V, who then dies from that drug. Irrespective of whether it was D who first supplied the drug to V, if D injects V with an illegal drug and V dies as a result, D is almost certainly guilty of both (i) administering a noxious substance and (ii) constructive manslaughter: *Cato* [1976] 1 WLR 110. If, however, all that D has done is to supply the illegal drug, that act, although it is an unlawful act, a crime, is most unlikely to be a basis of convicting D of manslaughter, because the act of supply would of itself cause no harm to V. V's free, voluntary and informed decision to take the drug will break the chain of causation … In *Rogers* [2003] 1 WLR 1374 the Court of Appeal tried to make a distinction between, on the one hand, the situation where D assists V's act of self injection and, on the other hand, where D and V are engaged in a joint combined operation of injecting V. In *Rogers* the defendant had applied and held a tourniquet round the arm of the deceased raising a vein into which the deceased inserted a syringe and injected himself with a dose of heroin, a dose which caused the deceased's death. The Court … held that the defendant had not been a mere secondary party to the activity of the deceased but had played an active part as principal in the combined operation of injecting the deceased … This decision was overruled by the House of Lords in *Kennedy*

[which] held that … The deceased had injected himself as a result of his own voluntary and informed decision to do so and that act broke the chain of causation. So consider this. A and B, are drug abusers. They agree to prepare syringes of heroin and that each will be injected. Both are of full age, fully informed and acting freely and voluntarily when they carry out their plan which results in one of them dying from the drug. Is the survivor guilty of manslaughter? If each injected the other, the answer is 'Yes'. If each injected himself, the answer is 'No'. Perhaps it is time for Parliament to address this issue. It could do so by creating two new substantive offences: (i) assisting or encouraging someone to self administer an illegal drug, (ii) assisting or encouraging someone to self administer an illegal drug where that self administration results in death. The latter offence could be punishable as manslaughter ….

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