

PART IV – MANSLAUGHTER

I **Unlawful and Dangerous Act Causing Death**

A **Contextualisation**

In cases where the prosecution cannot establish that the accused either intended to cause or was reckless as to the causation of death or grievous bodily harm, the accused will not be convicted of murder. However, it may still be possible to record a conviction for manslaughter if the prosecution can establish that the accused wilfully performed an unlawful and dangerous act, with the effect of causing the victim's death. Unlawful and dangerous act ('UDA') manslaughter is most commonly relied upon as an alternative to intentional murder.

B **Actus Reus**

If the prosecution cannot establish beyond reasonable doubt that the accused acted with intent or recklessness as to the death of the victim, it may be possible to secure a conviction on the basis of an unlawful and dangerous act causing death (*Wilson*).

1 **Causation**

The act must cause death

- The same principles apply as in relation to intentional and reckless murder

2 **Unlawfulness**

The act must be unlawful (ie, an offence punishable by the criminal, not civil, law)

- P must prove BRD that A's conduct amounts to a criminal act (*Pemble*)
- Is it an assault? (cf *Lamb*)
 - *Lamb*: A pointing gun at V, V thought it was a joke, V killed; no assault (no apprehension of imminent violence); no UDA
- Is it a summary offence? (*Wilson*)
- Can the conduct be constructed as unlawful?
 - *Cato*: injection of an illegal drug causes death; UDA
 - Must be an act, not an omission (*Lowe*)

3 **Dangerousness**

Was A's conduct dangerous such that a reasonable person in the position of the accused would foresee an appreciable risk of serious injury?

- P must prove that a reasonable person in A's position would foresee an 'appreciable risk of serious injury' as a result of A's U act (*Wilson*)
- No idiosyncrasies relevant (no intoxication); ask in respect of 'all sober and reasonable persons' (*Newbury*)
- A 'mere threat of force' may not be dangerous – assault (*Chai*)
- P will seek to characterise the unlawful act as dangerous

- Look at circumstances in which A acted – appreciable risk?
 - Doesn't have to cause 'really' serious injury (*Wilson*)
 - Did it 'expose the deceased to injury'? (*Wilson* per Brennan, Deane and Dawson JJ)
 - Strong normative component to dangerousness assessment
- Examples of UDAs:
 - Robbery or burglary
 - Unlawful wounding
 - Unlawful administration of a noxious substance (*Cato*)
 - Discharging firearm in a public place (*Pemble*)

C *Mens Rea*

There must be an intent to do the named act; however, this intent is not consequential (ie, the consequences [death] need not be intended – just the act that causes them).

1 *Did A intend to do the UDA?*

- A need not know that the act is unlawful or dangerous (*Wilson*)
- Just need subjective awareness of circumstances making it dangerous and intent to carry out the act; need not advert to consequences or risks (*Wilson*)

To establish the mens rea, the prosecution must prove beyond reasonable doubt that the accused intended to do the unlawful and dangerous act that caused the victim's death. Even if the prosecution cannot secure a guilty verdict in respect of UDA manslaughter, it may still be possible to prosecute for negligent manslaughter.

D *Factual Application*

Wilson:

Facts:

- Wilson is with his girlfriend and a friend named Cummins; his mother and stepfather are having a party
- Wilson and his girlfriend are walking to the nearby pub, when they meet Moresby, who is obviously intoxicated
- Ormsby obstructs their passage; Wilson tells his girlfriend to return home and get Cummins
- When she returns with Cummins, Wilson says that Ormsby has pushed him, and claims that Ormsby tried to kiss him
- Wilson punches Ormsby when he sees his fist clenched, thinking he was about to be punched; Ormsby falls to the ground, while he leaves the scene with his girlfriend
- Cummings bashes Ormsby's head against the pavement
- Ormsby is later found lying dead in the gutter
- Wilson argues provocation and self-defence at the trial, but is convicted of manslaughter

Issue:

- What is the scope of an unlawful and dangerous act?

Reasoning:

- The Court adopts a culpability-dangerousness approach:
 - Culpability: criteria of intent is the primary determinant of criminal responsibility (a mental question)
 - Dangerousness: the *action* of taking excessive risks
- Historically, UDAs came to the attention of the court by the prosecution having to disprove a *per infortunium* (by misadventure/mistake) defence, because misadventure could not be pleaded where it occurs in the act of taking an excessive risk
 - UDA manslaughter started off as a defence and then became a substantive crime
 - The classic common law crime of felony murder was connected to UDA manslaughter by Foster, who noted that dangerousness has the function of justifying the attribution of criminal responsibility for an act which was not intended to cause death
 - The role of misadventure (accident) in homicide is minimal today – accused persons are still liable for mistakes causing death
- The first question to be asked is: did the act of *punching* cause the victim's death?
 - Forensic evidence: the cause of death could be the punch, since he fell and hit his head
 - But Cummings also slammed his head against the pavement, which would probably cause death on its own
 - However, though Cummings' act was voluntary, it does not relieve liability because the accused's act of initiating the violence was still a substantial cause of the victim's death
- The second question to be asked is: is punching a crime?
 - Yes, it is (assault)
- The third question to be asked is: is punching dangerous?
 - This is the all-important issue, out of which the test for dangerousness emerges
 - An act is dangerous if the risk is 'appreciable'
 - The reasonable person would appreciate a risk of serious injury
 - The act risk doesn't have to be causing *really* serious injury; otherwise, it could be confused with the grievous bodily harm aspect of murder
 - Would a reasonable person have realised that the action of the accused exposed another to an *appreciable* risk of serious injury?
 - The idea of 'appreciable risk' maintains the parallel between risk and moral culpability: greater risks are more admonished (eg, grievous bodily harm)
 - The reference to the reasonable person renders this test objective; no personal characteristics are taken into account
 - Thus, the reasonable person who is to appreciate the risk is never drunk and always sober, regardless of the state of the actual accused at the time they performed the act

Decision:

- As the jury were not directed that to consider whether the accused's act of punching was a dangerous act, a miscarriage of justice has occurred and a retrial should be ordered
- The jury must now determine whether the appellant's act in punching the deceased was, from the standpoint of a reasonable person, an act carrying with it an appreciable risk of serious injury to the deceased

E *Distinguishing UDA Manslaughter from Reckless Murder*

Reckless murder necessitates an affirmative answer to the question: 'did the accused foresee (subjectively) the probability of death and willingly run the risk of that probability eventuating?'.

UDA manslaughter revolves around the question: 'would the reasonable person (objectively) have realised that the act of the accused exposed another to an appreciable risk of serious injury'.

These differences may be summarised as follows:

Crime	Type of risk	Quantum of risk	Identity of risk-assessor	Assessment of risk
<i>Reckless murder</i>	Grievous bodily harm or death	Probability	The actual accused (subjective)	Objective
<i>UDA manslaughter</i>	Serious injury	Appreciable	The reasonable person (objective)	Objective

II *Negligent Manslaughter*

A *Definition*

Alternatively, a verdict of manslaughter may be arrived by establishing criminal negligence. More specifically, if the prosecution can prove that the accused's conduct amounts to such a falling short of the standard of care expected of a reasonable person as to be criminally negligent, then they can be found liable for acts (or omissions, though there are added requirements) causing the death of another despite there being no recklessness as to its occurrence. Negligent manslaughter is most commonly relied upon as an alternative to reckless murder.

Criminal negligence consists in the doing of an act where the objective, reasonable man would realise he was creating a high risk of death (*Nydam*).

Nydam:

Facts:

- The accused entered a hair dresser in St Kilda with a bucket of petrol, and threatened to immolate himself if his ex-girlfriend (currently in the salon) did not return to him
- Nydam threw the bucket of petrol over himself, some of which splashed onto his ex-girlfriend and a member of staff
- He lit a cigarette lighter that he was carrying, igniting the petrol; whereupon he ran out into the street to douse the flames on himself
- Though he survived, his girlfriend and the staff member were fatally burnt

- The prosecution claim that Nydam deliberately set out to burn the woman because he believed she had deserted him (this would be a case of intentional murder)
 - They also claimed that he was reckless as to death or grievous bodily harm by igniting the petrol
 - The trial judge directed on the basis of intentional/reckless murder
- The defence deny intent, claiming that Nydam meant only to threaten self-immolation as a means 'to impress her'
 - They claim that this enterprise simply got out of hand; each is burnt; she dies, he lives
 - The affair was a misadventure and should only be negligent manslaughter

Issue:

- How should negligent manslaughter be distinguished from reckless murder?

Reasoning:

- The difference between recklessness and negligence is:

'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'

- The example is given of dropping a brick from a high building onto a crowded street
 - If the brick is dropped intentionally, and with knowledge of the probability of causing death or grievous bodily harm to the persons below, then it is reckless murder (as in *Hancock and Shankland*)
 - If, however, the brick is accidentally knocked by failing to take care, it is negligent manslaughter
- 'Probability' is the highest measure of risk, and applies to recklessness
 - This is followed by 'high risk'
 - This applies to negligence
 - 'Appreciable risk' is fairly similar, though perhaps lower
 - It also applies to reckless endangerment
 - 'Possibility' is the lowest measure of risk
 - This applies to non-fatal offences against the person, such as assault

Decision:

- The definition of criminal negligence is that the prosecution must show that the act of the accused was voluntary, caused death, fell short of the standard of care that a reasonable man would have exercised, and involved such a high risk that death or grievous bodily harm would result that its performance merits criminal punishment
- Because the trial judge's directions on negligence were incorrect, the conviction should be quashed and a new trial ordered

B *Interaction with UDA Manslaughter*

Manslaughter is a general category, so the prosecution can argue both UDA and negligent manslaughter at once. Typically, however, UDA manslaughter is secondary to intentional murder, while negligent manslaughter is secondary to reckless murder. This is significant overlap

between the kinds of factual scenarios they cover, however, since many unlawful and dangerous acts are also negligent.

C Physical Elements

Nydam outlines the requirements of criminally negligence:

- 1 *Did the accused's conduct breach the standard of care required by law?*
 - A's conduct falls short of the required standard if a reasonable person would have realised that there was a 'high risk' of death/GBH resulting from X (*Nydam*)
 - 'Probability' → 'High risk' → 'appreciable risk'

- 2 *Did the accused's conduct involve such a high risk of death or grievous bodily harm that it merits criminal punishment?*
 - A's conduct must constitute 'such a falling short' of the standard of care required by law, and involve 'such a high risk' that death/GBH would follow X that it merits criminal punishment (*Nydam*)
 - Was X 'culpable', 'gross' or 'wicked', showing disregard for life and safety? (*Bateman*)
 - Need more than breach of a civil standard (*Andrews*)
 - Culpable driving:
 - *Shields*: degree of negligence same as for manslaughter
 - Cf *Andrews*: lower threshold required

Even if the prosecution cannot establish criminal negligence, it is likely that a non-fatal offence against the person (such as reckless endangerment) will apply.

III Manslaughter by Omission

A Duty of Care

Is a failure to do something an act? The law characterises a failure to do or provide something as an omission, and while liability for omissions causing death *can* be attached, there are additional hurdles to be overcome by the prosecution. Additionally, problems of voluntariness sometimes arise.

Liability for omissions causing death arises in the context of negligent manslaughter. The prosecution must prove the satisfaction of the following requirements:

- 1 *A duty of care is upon the accused*

A duty of care arises only in particular circumstances. There are several types (of which types b) and c) are the most important for our purposes):

- a) Civil law: by statute or by contract

- b) By a status relationship that exists between accused and deceased

Status relationships giving rise to a duty of care are seen in *Russell* and *Stone & Dobinson*. In *Russell*, it is held that a parent-child status relationship is sufficient to give rise to a positive duty to act. However, husband-wife is insufficient.

Russell:

Facts:

- The accused's wife drowns herself and her two children; the accused (the father) stands by passively as she does so
- He is charged with three counts of murder, but is convicted of manslaughter

Issue:

- Was the status relationship between the accused and the victims sufficient to give rise to a duty of care such that breach of it would be negligent manslaughter by omission?
 - Does the fact of being the woman's husband and the children's father give rise to a status relationship?

Decision:

- There is a duty in relation to the children, but not to the wife, because the children are helpless

Where a party voluntarily assumes responsibility for another, a duty of care may arise in respect of the provision of care (*Stone & Dobinson*).

Stone & Dobinson:

Facts:

- Stone is partially deaf, and almost blind; Dobinson suffers from sub-normal intelligence; Stone's sister, Fanny, is an anorexic
- Stone and Dobinson are living together; owing to Fanny's anorexia, she becomes helpless and moves in with them
- Stone and Dobinson fail to provide adequate care for Fanny; she dies

Issue:

- Did Stone and Dobinson assume a duty of care for Stone's sister, Fanny?

Reasoning:

- There is sufficient evidence to conclude that Stone and Dobinson did something to voluntarily assume the duty; namely
 - Fanny began to occupy a room in their house
 - They were aware of her physical condition
 - "They did make efforts to care", by assisting with
 - Washing
 - Provision of food
 - Contacting the doctor when necessary
 - However, they made no attempts to call an ambulance when the time came
- The evidence is sufficient to found a duty, but there is also a status relationship of brother and sister between Stone and Fanny

- The basis of the assumed duty is the evidence that the accused parties did, in fact, do something (as opposed to doing nothing) to help the victim

Decision:

- Because Stone and Dobinson assumed responsibility and made efforts to care for Fanny, but failed to do so, their omission places them in breach of an assumed duty to take care
- This breach is the cause of the victim's death and is not compelled or involuntary, so they are liable for negligent manslaughter

- c) By the accused's voluntary assumption of care for the deceased

Voluntary assumptions of care are seen in *Taktak* and *Stone and Dobinson*. *Taktak* sets the limit of where the courts will discern a breach.

Taktak:

Facts:

- Taktak and Kirby are in no way related; their acquaintance was short and extremely casual
- Kirby does not live with Taktak
- The time from Kirby arriving at Taktak's employer's house to her death in Taktak's apartment is no more than 5 hours (at a maximum)
- Kirby overdosed on drugs; Taktak takes her inside off the street, but does not call an ambulance

Issue:

- Is Taktak criminally negligent in failing to call an ambulance for Kirby?

Reasoning:

- In taking Kirby inside, laying her on his bed, and covering her with a blanket, Taktak assumed a duty to assist her in that he denied her the chance to be rendered aid by passing strangers (it was a busy street in the CBD)
- However, Taktak's failure to call an ambulance, though causative of Kirby's death, does *not* place him in breach of his assumed duty; therefore, his omission is insufficient to amount to negligence

Decision:

- Despite failing to call an ambulance, Taktak is not in such severe breach of the duty of care he assumed towards Kirby as to merit criminal punishment

- A will note that he is under no general duty to take positive action (*Shephard*)
- P must categorise the failure as one covered by an recognised relationship of care
 - Civil duties: by statute or contract
 - Eg, employment contact (*Lowe*)
 - Status relationship between A and V
 - Eg, parent-child (*Russell*: to save A's child from drowning)

- No husband-wife duty (*Russell*)
- *Smith*: no duty to call doctor when wife ill
- Voluntary assumption of care
 - Making efforts to care (*Stone & Dobinson*; *Tak Tak*)
 - Placing V in a position where others can no longer help her (*Tak Tak*)
 - *Tak Tak*: duty arises after taking overdosed V off street, denying her the chance to be rendered aid by passing strangers; however, no 'mere negligence' here insufficient for manslaughter
 - Creating a dangerous situation (*Miller*: starting a fire)

2 *The failure to care is what actually causes death*

3 *This failure is criminally negligent*

- Apply *Nydam* [2.4.5]
- 'Grossly negligent' failure to obtain medical care (*Stone & Dobinson*)
- A's failure to care for V because too poor to provide food insufficiently 'wicked' to be negligent (*Nicholls*)
- Relevant factors:
 - Nature of efforts to care (*Tak Tak*: finding a doctor, *Ston & Dobinson*: nothing)
 - V's chances of being helped by others (*Tak Tak*: reduced)
 - Duration of time in which V in A's care (*Tak Tak*: too short)
 - A's awareness of V's situation (*Tak Tak*: not wholly aware)

B *Omissions Summary*

When faced with a failure to take care, ask whether:

1 *The accused is under a duty of care in relation to the victim*

- (a) Voluntarily assumed? (*Taktak* sets the limits of this assumption and what might be said to be negligent under it)
- (b) Implied from a familial/occupational status relationship? (*McAuthur*)

2 *The accused falls short of the standard of care expected of a reasonable person*

- (a) Look for specific facts or evidence

3 *The other elements of negligent manslaughter are met*