CASE NOTE

*Craig Lloyd**

R v WILSON

BACKGROUND

DARYL Wilson was walking with his girlfriend to a local hotel. They encountered George Ormsby who was very drunk. Ormsby was rambling on and making it difficult for Wilson and his girlfriend to pass. Wilson punched Ormsby in the face causing him to fall back and hit his head on the footpath. Ormsby died from brain damage caused by the punch and the fall.[1]

THE DECISION

The Crown case was that Wilson intended to rob Ormsby. He was charged with murder. The trial judge directed the jury on the alternative verdict of manslaughter:

> 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

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1 *Wilson* (1992) 174 CLR 313.

> crime must be an act in serious breach of the criminal law. A serious assault - you may think the punch by Wilson ... [to be a serious assault] - would be an unlawful act for this purpose. Whether the particular act you are considering is a dangerous act is a matter for your judgement.[2]

Wilson was convicted of manslaughter. On appeal to the South Australian Supreme Court, he argued that the jury should have been directed about the requisite degree of danger in the "dangerous" requirement.

The Court unanimously dismissed the appeal.[3] Cox and Matheson JJ (King CJ dissenting) adopted an English test of "dangerousness". In addition King CJ and Matheson J (Cox J not deciding) endorsed the doctrine whereby deaths resulting from the intentional infliction of some harm result in manslaughter. Both of these tests covered the actions of Wilson.

On appeal to the High Court, the South Australian decision was reversed. The case was sent for retrial.

Unlawful and Dangerous Act

The majority of the High Court (Mason CJ, Toohey, Gaudron and McHugh JJ) stated, in a joint judgment, that death by an unlawful act was manslaughter if a reasonable person would have realised that they were exposing another to an appreciable risk of serious injury.[4]

This basically adopted the test articulated in the Victorian decisions of *Holzer*,[5] and *Wills*.[6] One modification to the *Holzer* test was that "serious injury" replaced "really serious harm" as the required gravity of harm in the dangerousness test.[7]

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2 *Wilson* at 318.
3 (1991) 55 SASR 565.
4 *Wilson* at 332-333.
5 [1968] VR 481.
6 [1983] 2 VR 20.
7 As above.

The majority rejected the position adopted in England,[8] and New South Wales,[9] where a lower test of dangerousness had been applied:

> [T]he 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.[10]

The *Wilson* test requires both a higher probability of harm, "appreciable risk" versus "a risk" and a higher gravity of harm, "serious injury" versus "some harm ... albeit not serious".

The minority (Brennan, Deane and Dawson JJ), in a joint judgment, would have upheld the South Australian decision and followed the UK/NSW approach.[11]

Battery Manslaughter

A possible separate doctrine of involuntary manslaughter is battery manslaughter or manslaughter by the intentional infliction of some harm.

The trial judge did not direct the jury on this issue, but King CJ and Matheson J in the South Australian Supreme Court held that Wilson would have been guilty of battery manslaughter if

> he commits the offence of battery on the deceased and death results directly from the commission of that offence, and the beating or other application of force was done with the intention of infliction on the deceased some physical injury not merely of a trivial or negligible character.[12]

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8 *R v Larkin* [1943] 1 All ER 217; *R v Church* [1966] 1 QB 59; *DPP v Newbury* [1977] AC 500.

9 *R v Coomer* (1989) 40 A Crim R 417. The New South Wales Court of Appeal made a passing approval of *Holzer*, but as the rest of the decision is an adoption of the UK approach, it appears that their Honours were mistaken as to the meaning of *Holzer*.

10 *R v Church* [1966] 1 QB 59 at 69-70.

11 *Wilson* at 341.

12 (1991) 55 SASR 565 at 569, adopting *Holzer* [1968] VR 481 at 482.

This doctrine was first stated in Australia by Windeyer J in *Mamote-Kulang*,[13] and was followed in *Holzer*.

The majority of the High Court rejected it on the basis that Windeyer J's original judgment was not based on compelling authority. The doctrine would have also resulted in convictions where death was "quite unexpected".[14]

The minority of the High Court also rejected battery manslaughter, but for an entirely different reason. In their view the battery manslaughter doctrine is subsumed by the UK/NSW unlawful and dangerous act test.[15] If the reasonable person would have foreseen infliction of harm it is superfluous to ask whether the accused intended such harm.

This leaves Australia with two categories of involuntary manslaughter - unlawful and dangerous act and criminal negligence.

DISCUSSION

Unlawfulness

The trial judge's direction on the requisite degree of unlawfulness was too generous to Wilson. The law does not require that the crime be a serious breach of the criminal law. Not surprisingly, Wilson did not contest this aspect of the direction.

The minority of the High Court made a passing reference to the issue when they stated that "there is now no difficulty about what constitutes an unlawful act for the purpose of this offence. An unlawful act is one which is contrary to the criminal law."[16]

This definition of unlawfulness would include people who breached a strict liability, statutory offence without a blameworthy state of mind. It would also mean that those who breached s45 of the *Road Traffic Act* (SA) (careless driving) by acting negligently would be subject to the unlawful and dangerous act doctrine. The law has never been that harsh.[17]

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13 (1964) 111 CLR 62 at 79.
14 *Wilson* at 328-332.
15 At 341.
16 At 335.
17 *Newbury* [1977] AC 500 at 507 (strict liability); *Pullman* (1992) 58 A Crim R 222; *Andrews* [1937] AC 576 (negligence offences).

Recent cases[18] indicate that if the prosecution is trying to establish that a statutory offence is the requisite unlawful act, it must establish that the accused intentionally did the act. This is regardless of whether it is a strict liability offence. In other words the act must be accompanied by a culpable mens rea (intention or, presumably, recklessness) even if the offence does not require it.

The dicta of the minority also does not state the requisite causal link between the unlawful act and the death. It does not appear that driving without a licence would constitute the requisite unlawful act.[19]

A comprehensive discussion of causation is beyond the scope of this note, but it is sensible to suggest that unlawful acts with a more direct effect like batteries, assault and discharging a firearm would "cause" death[20] and therefore be sufficiently unlawful.

Therefore "unlawful" in the doctrine of unlawful and dangerous act has a special meaning. Only certain crimes are sufficiently unlawful.

The Underlying Philosophy of the Majority's Decision

There is always conceptual difficulty in defining the lower threshold of any doctrine of the criminal law. At what level of moral culpability should the given criminal sanction be activated? Stated in this way, one can appreciate that the question is both philosophical and pragmatic. In attempting to define the lower boundary one must be aware of the underlying policy which justifies the criminalisation and punishment of a particular act.

Wilson confronts one of the most challenging of these issues - the lower boundary of homicide. The real interest in the decision is not in the treatment of previous authority, but rather the philosophy behind its ultimate conclusions. Only when this is made explicit can a logical law of involuntary manslaughter be articulated.

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18 As above. For a more comprehensive look at this whole area, see the case note on *Pullman* (1992) 16 *CLJ* 261.

19 Practising medicine without a licence was held not to be sufficiently unlawful in *Butchell* (1829) 172 ER 576.

20 See also *Dawson* (1985) 81 Cr App R 150, where a robbery induced a heart attack.

The majority adopt the view that homicide should not be imposed where the death is "unexpected".[21] They reject the battery manslaughter doctrine for this reason and adopt the higher dangerousness test of *Holzer* because it will not lead to convictions for unexpected deaths.

Unfortunately they do not explicitly define "unexpected". The only hint we have of a definition is that in dismissing battery manslaughter, the majority express concern that it leads to convictions for actions which were "neither intended nor likely to cause death".[22]

Is it true that death must be likely or probable before homicide steps in? I do not think so and certainly the actual final decision of the majority is quite at odds with this proposition. It is submitted that in adopting a watered down *Holzer* test, the majority decision really points towards a definition of "unexpected" which states that if there is *a perceivable risk of death* then death is not "unexpected". The risk need not be high. Indeed it might be quite low. Only when a risk is miniscule or fanciful will we say that it is not a perceivable risk.[23]

Such a definition satisfies the deterrence function of the criminal law. It communicates the message that if a person engages in unlawful acts involving a high risk of death, then they will be not only guilty of the unlawful act, but also guilty of homocide.

Some might argue that the imposition of homicide liability for all death resulting from unlawful acts would act as an added deterrent to never engage in any unlawful behaviour. Theoretically this might be true, but practically if the accused does not (and the reasonable person would not) consider death as a possible consequence they will not be deterred by the fanciful possibility that a homicide conviction may result.

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21 *Wilson* at 332.

22 As above.

23 This idea presupposes that "appreciable" and "perceivable" have different meanings. A dictionary would differ. In the *Macquarie Dictionary* (2nd ed) "appreciable" means "capable of being perceived". It is an unfortunate fact that the English language has been a useless instrument when it comes to definitive words to describe probabilities. Words like possibility, probability, likely, appreciable, fanciful etc are all hopelessly ambiguous. In this note I am using "perceivable" to mean barely noticeable and "appreciable" to mean something greater than perceivable but less than probable.

The only argument remaining for prosecuting unexpected deaths, is that punishment would act as retribution for the deaths.[24] Retribution may well be an important function of the criminal law, but it can never be the sole justification for punishment. The criminal law is impotent as a form of social control if it does not serve to prevent harm.

Of course not all behaviour with a perceivable risk of death will lead to homicide liability. Lawful actions such as building work and playing sport have their risks. We allow this because of the social benefits of these activities. We are also not strict on unlawful actions which cause death but are not sufficiently unlawful for the unlawful and dangerous act doctrine. We hope that remorse and the imposition of the maximum penalty for the strict liability offence will adequately punish the conduct.

One could start off with the proposition that in a perfect world liability would attach to all killings where there was a perceivable risk of death. The above exceptions recognise that we do not live in a perfect world. All of us have the capacity to do risky things. As such a risky action is not much of a departure from the norms of social interaction. Only where there is a gross departure from the norm, such that there is an unjustifiably high risk of death or grievous bodily harm, will the criminal negligence doctrine be used to convict a person who kills another.[25]

However, by deliberately engaging in criminal behaviour which is sufficiently unlawful, the accused has already grossly departed from the norms of social interaction. This forfeits the right to a more lenient dangerousness test and the question simply becomes - "Did the act carry a perceivable risk of death?"

Does the Philosophy fit the Final Rule?

Given that the lower boundary of homicide depends on whether the death is unexpected, does the decision in *Wilson* carry this philosophy in to practical effect?

Wilson is a case where the final rule (the dangerousness test) is meant to be of general application to all unlawful acts. As with many judicial decisions, the final rule is influenced by the specific facts of the case at

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24 The minority place emphasis on the ciminal law's concern for the "sanctity of human life" (*Wilson* at 341). This is a neat argument which attempts to hide the fact that, in some circumstances, the UK approach is almost purely retributive.

25 *Wilson* at 333, adopting *Nydam* [1971] VR 430.

bar. It may well carry the underlying philosophy into effect in the specific facts of the case, but it does not carry the philosophy into effect when it is applied generally.

The specific unlawful act in *Wilson* was a battery. If there is a battery with an appreciable risk of serious injury, then one can see that there is a perceivable risk of death. Despite the advances of modern medicine, death from serious injuries (broken bones, woundings etc)[26] is not fanciful or unexpected. Where there is a fatal battery and the *Wilson* "dangerousness" test is applied, the majority's philosophy is upheld. The accused will only be convicted where the death is not unexpected.

Unfortunately other unlawful acts which lead to death do not fit so well within the dangerousness test. Examples of these would be:

(1) Pointing a loaded rifle at someone (a common law assault).

(2) Vigorous blackmail of a person who is known to be in a fragile state of health.

In these situations, a search for the risk of serious injury is an inappropriate means of deciding if there is a perceivable risk of death. There may not be an "appreciable risk of serious injury". The person with the firearm may be well trained in gun use. Yet, death in these situations is not unexpected.

For almost all non-battery unlawful acts there may be a perceivable risk of death, even though there is no appreciable risk of serious injury. To carry the philosophy that underlies *Wilson* into effect we need to modify the final rule. It is proposed that for batteries, courts should use the *Wilson* test of dangerousness, but if the act is not a battery yet still sufficiently unlawful, then the jury should simply be asked whether there is a perceivable risk of death.

This would not mean a return to a separate battery manslaughter doctrine. This doctrine relied on the subjective knowledge of consequences by the accused. Under the propostion all danger is objectively measured and there is simply a more appropriate direction for both batteries and non-battery unlawful acts.

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26 See *Perks* (1986) 41 SASR 335.

This proposition may go against the form of the final rule in *Wilson* but it is submitted that it upholds the substance of the rule (that is, the underlying philosophy). It could also be argued that the proposition is not inconsistent with the decision in *Wilson* at all. One could easily argue that the ratio decidendi was restricted to batteries. The remainder of the final rule as it relates to other unlawful acts is obiter, and therefore a separate direction for them is possible.

CONCLUSION

Wilson has added some certainty to a cloudy area of the law, by producing a uniform dangerousness test for the doctrine of unlawful and dangerous act (to which I would only make the one modification as outlined above). Yet many questions about involuntary manslaughter remain:

(1) Must the unlawful act be a criminal offence with a mens rea requirement?

(2) Is the dangerousness test in the criminal negligence doctrine too high?

(3) When does a duty arise for criminal negligence by omission?

The majority did not address these issues, and also left for another day the question of whether the doctrines of unlawful and dangerous act and criminal negligence should be scrapped and replaced by a single "dangerous act manslaughter doctrine", as suggested by the Victorian Law Reform Commission.[27] It is submitted that this should not happen. There is something inherently abhorrent in acting unlawfully that warrants a lower dangerousness test for such behaviour.

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27 Law Reform Commission of Victoria, *Homocide: The Commission* (Report No 40, 1991) pp116-117.