UNLAWFUL ACT MANSLAUGHTER

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Involuntary manslaughter is generally regarded as comprising two heads, negligent manslaughter and unlawful act manslaughter. By virtue of the unlawful act manslaughter doctrine an accused may, independently of criminal negligence, be guilty of manslaughter if, in the course of committing an unlawful act, he causes the death of another. This article attempts to present a detailed examination of this doctrine, and a consideration of its relationship with negligent manslaughter. The position in England will be examined, and compared with developments in Australia. The argument will be advanced that unlawful act manslaughter, as generally understood, is an unnecessarily harsh doctrine, and one which the courts are often at pains to try and modify. It will be argued that these attempts at modification are likely to continue, and a suggestion will be made as to how this may be achieved.

1 THE DEVELOPMENT OF UNLAWFUL ACT MANSLAUGHTER IN ENGLAND

From the beginning the history of unlawful act manslaughter is one of attempts to place limitations upon its operation. Hale and Foster drew the distinction between malum prohibitum and malum in se, stating that only where the unlawful act fell within the latter category was the accused necessarily guilty of manslaughter if death resulted.[1] East stated the general rule that death brought about in the course of an unlawful act was manslaughter, but added that "in such cases it seems that the guilt would rather depend on one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent".[2]

In its original form the doctrine had covered acts unlawful by virtue of the civil as well as the criminal law. Stephen wrote that the expression "unlawful act" included "all crimes, all torts, and all acts contrary to public policy or morality, or injurious to the public; and particularly all

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1 Sir Matthew Hale, *The History of the Pleas of the Crown*, Volume I (London: E. Rider 1800) p. 475; Sir Michael Foster, "Introduction to the Discourse on Homicide" in *Crown Cases* (3rd ed., London: E. & R. Brooke 1792) pp. 258-259.

2 Edward Hyde East, *A Treatise of the Pleas of the Crown*, Volume I (London: A. Strahan 1803) p. 257.

acts commonly known to be dangerous to life".[3] In *R.* v. *Fenton and Others*[4] the prisoners threw stones down a coal mine, overturning a corf in which a miner was descending. The miner fell from the corf and was killed. Tindal C.J. directed the jury that since the prisoners had committed the tort of trespass, the only question for them to consider was whether the death of the miner was a consequence of this wrong. This approach was dissented from in *R.* v. *Franklin*.[5] In that case the accused picked up a box from a refreshment stall on a pier at Brighton and threw it into the sea where it struck and caused the death of a boy swimming. Field J. declined to follow *Fenton* and put the matter to the jury on the basis of criminal negligence, stating "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".[6] Since that decision it has been clear that for the doctrine to apply there must be an act by the accused which is unlawful by virtue of some provision of the criminal law.[7]

The next clear limitation came with the decision in *R.* v. *Larkin*[8] where it was laid down that for the doctrine to apply the act must, in addition to being unlawful, be "dangerous". The accused had been charged with the murder of his mistress. His defence was that he was attempting to frighten a third party with a razor and his mistress, who had been drinking, swayed against him and accidentally cut her throat. He was convicted of manslaughter and appealed unsuccessfully to the Court of Criminal Appeal. In the course of delivering the Court's judgment Humphreys J. stated

> "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."[9]

The *Larkin* fomulation of the unlawful act manslaughter doctrine was adopted in three subsequent cases. In *R.* v. *Jarmain* the Court was concerned with the felony-murder rule, but the *Larkin* formulation of the unlawful act manslaughter rule was referred to and approved.[10] In

[3] Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, Volume III (London: Macmillan & Co. 1883) p. 16.
[4] (1830) 1 Lew 179, 168 E.R. 1004.
[5] (1883) 15 Cox C.C. 163.
[6] (1883) 15 Cox C.C. 163, 165. It has been suggested that the case really turned on a question of causation. R. J. Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174, 182-183; H. A. Snelling, "Manslaughter by Unlawful Act" (1956) 30 A.L.J. 382, 441. It is submitted that Field J.'s judgment cannot properly be interpreted in this way.
[7] *R.* v. *Lamb* [1967] 2 Q.B. 981; *R.* v. *Bush* [1970] 3 N.S.W.R. 500; *R.* v. *Haywood* [1971] V.R. 755.
[8] [1943] 1 All E.R. 217.
[9] [1943] 1 All E.R. 217, 219. This passage does not appear in the report at [1943] 1 K.B. 174.
[10] (1945) 31 Cr. App. Rep. 39, 45.

R. v. *Cashmore*[11] a soldier threatened a number of men with a rifle. The rifle discharged, killing one of them. It was held by the Courts Martial Appeal Court that the accused had been properly convicted of manslaughter, and the *Larkin* formulation was again referred to and approved.[12] In *R.* v. *Hall*[13] the material facts were identical with those in Larkin itself, and *Larkin* was followed and the accused convicted of manslaughter.

A new formulation of the doctrine was adopted by the Court of Criminal Appeal in *R.* v. *Church*.[14] The accused was charged with the murder of a woman whose badly injured body was found in the river Ouse. The cause of death was drowning. The accused's defence was that he had taken the woman to his van for sexual purposes, was mocked by her for failing to satisfy her, and, a fight ensuing, he had knocked her unconscious. He tried to rouse her for about half an hour then, thinking she was dead, panicked and threw her into the river. Glyn-Jones J. directed the jury that to throw a living body into a river is an unlawful act, and that if they accepted the accused's story they ought still to convict him of manslaughter. The accused was convicted of manslaughter and appealed to the Court of Criminal Appeal. It was held that Glyn-Jones J. had misdirected the jury. Delivering the judgment of the Court Edmund Davies J. stated

> "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 recognized as essential. . . . [A]n 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 recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."[15]

The accused's appeal was, however, dismissed. It was held, following *Thabo Meli* v. *The Queen*,[16] that his conduct in inflicting the initial injuries and later throwing the body into the river constituted a single series of acts, and that therefore a verdict of guilty of manslaughter at least was inevitable.[17]

The formulations adopted in *Larkin* and *Church* are similar. Both are clearly objective. It need not be shown that the accused foresaw the risk of harm, but only that a "reasonable man" or "all sober and reasonable

[11] [1959] Crim. L.R. 850.
[12] [1959] Crim. L.R. 850, 851.
[13] (1961) 45 Cr. App. Rep. 366.
[14] [1966] 1 Q.B. 59.
[15] [1966] 1 Q.B. 59, 70.
[16] [1954] 1 All E.R. 373; [1954] 1 W.L.R. 228.
[17] [1966] 1 Q.B. 59, 71. On this aspect of the case see Richard F. Sparks, "The Elusive Element of 'Unlawfulness' " (1965) 28 M.L.R. 600, 601-602; Note (1965) 81 L.Q.R. 469.

people" would have foreseen such a risk.[18] The reference to mens rea in *Church* would appear to mean no more than that the accused must possess the mens rea necessary to constitute the unlawful act on which the application of the doctrine is founded. This is the interpretation which has been adopted in subsequent cases.[19]

As the doctrine is formulated in *Church* there must be a high degree of probability of harm involved in the unlawful act. Had Edmund Davies J. been contemplating a low or moderate degree of probability of harm he would almost certainly have used a phrase such as "a reasonable man might have recognized" rather than "all sober and reasonable people would inevitably recognize". This would seem to involve some narrowing of the *Larkin* formulation, for the word "dangerous" does not refer to any particular degree of probability.

However, on both formulations the quantum of harm which must be shown to have been at risk is clearly very low. In *Larkin* a "dangerous" act was defined simply as an act likely to "injure" another person, and the words "some harm . . . albeit not serious harm" used in *Church* would seem to embrace everything except very trivial harm.

While the history of the doctrine is one of judicial attempts to place limitations upon it, the present status quo must nonetheless be regarded as unsatisfactory. It is not proposed in this article to enter to any great extent into the difficult field of the relationship between moral culpability and criminal responsibility. However, some general points need to be made. It is generally accepted that if a person foresees a probable consequence of his proposed actions then, if he performs those actions and the foreseen consequence occurs, he can properly be regarded as morally responsible for that consequence even though he may not have desired that the consequence occur. Thus, a person who foresees death as the probable consequence of his actions possesses the mens rea required to constitute the crime of murder even though he may not have desired that death result.[20] It will be argued later in this article that gross negligence also constitutes a morally acceptable basis for the imputation of criminal responsibility in respect of a resulting death. In such a case the accused will be guilty of manslaughter only since a person who is grossly negligent is regarded as far less morally culpable than one who foresees the probability of death occurring as a result of his actions. More difficult is the question whether a person can be regarded as morally responsible for a death when he only intended to inflict less serious injury upon his victim.

[18] In two recent English cases the trial judge has, however, explained the rule to the jury in terms which would seem to incorporate a subjective element. *R.* v. *Boswell* [1973] Crim. L.R. 307; *R.* v. *Hasken* [1974] Crim. L.R. 48.

[19] *R.* v. *Lamb* [1967] 2 Q.B. 981, 988; *R.* v. *Lipman* [1970] 1 Q.B. 152, 159; *R.* v. *Holzer* [1968] V.R. 481, 482.

[20] *R.* v. *Jacac* [1961] V.L.R. 367; *R.* v. *Hallett* [1969] S.A.S.R. 141, *Pemble* v. *The Queen* (1971) 45 A.L.J.R. 333; 124 C.L.R. 107; *R.* v. *Sergi* [1974] V.R. 2; *R.* v. *Hyam* [1974] 2 W.L.R. 607.

In the main the courts have adopted the view that an accused can be regarded as morally responsible for a resulting death in such circumstances. Thus if a person intends to cause grievous bodily harm and death results he may be guilty of murder;[21] if he intends to inflict bodily injury short of grievous bodily harm and death results he may be guilty of manslaughter.[22] The view that a person can properly be regarded as morally responsible for a death which occurs in such circumstances may be open to attack, but it will be accepted for the purposes of the present article.

The unlawful act manslaughter doctrine, as formulated in *Larkin* and *Church*, goes a considerable distance beyond the position outlined in the preceding paragraph. It may, of course, apply in cases where the accused would not be found guilty of manslaughter by criminal negligence. It may apply even though the accused did not foresee the possibility of *any* harm resulting from his actions, provided only that the hypothetical sober and reasonable man would have foreseen "the risk of *some* harm . . . albeit not serious harm". In such a case, where the person causing death acted without criminal negligence, where he intended no harm to his victim, and where the sober and reasonable man would only have foreseen the risk of less than serious harm, it is submitted that the person causing death would be unlikely to be regarded as morally responsible for the victim's death. It is therefore suggested that he should not be held criminally responsible for that death. It cannot be said that sufficient moral culpability flows from the unlawful act, for the presence or absence of an unlawful act may often turn on a legal nicety and have no relevance to the accused's moral culpability. This can be illustrated by considering the case of *R.* v. *Lamb*.[23] In that case the accused pointed a partly loaded revolver at his friend. Two chambers of the revolver's cylinder contained bullets, but neither bullet was in the chamber opposite the barrel. Because the accused and his friend did not understand the way in which a revolver works both thought there was no danger and treated the matter as joke. The accused pulled the trigger, the revolver's cylinder rotated placing a bullet opposite the barrel, and the gun discharged killing his friend. It was held that as the friend was treating the matter as a joke there was no technical assault and therefore the unlawful act manslaughter doctrine did not apply. Clearly the correct result was reached. Three expert witnesses had agreed that the accused's misunderstanding of the way in which a revolver functions was reasonable, and to have convicted the accused of manslaughter in such circumstances would certainly have been unjust. However, if the accused had intended to give his friend a slight scare, and the friend had possessed an accurate knowledge of the working of revolvers and

[21] *R.* v. *Miller* [1951] V.L.R. 346; *R.* v. *Vickers* [1957] 2 Q.B. 664; *D.P.P.* v. *Smith* [1961] A.C. 290; *R.* v. *Hyam* [1974] 2 W.L.R. 607.
[22] *R.* v. *Holzer* [1968] V.R. 481.
[23] [1967] 2 Q.B. 981.

appreciated the danger, the decision would probably have gone the other way. Yet the accused's moral culpability seems no greater on this variation of the facts than on the actual facts of *Lamb's* case.

A final limitation on the unlawful act manslaughter doctrine needs to be mentioned. It now appears that the doctrine applies to unlawful *acts* only; an unlawful omission is not sufficient to bring it into operation. In *R.* v. *Lowe*[24] the accused was alleged to have neglected his daughter, a nine week old baby, by failing to call a doctor when she became ill. The child died some ten days later of dehydration and gross emaciation. The accused was charged with the statutory offence of wilful neglect of a child,[25] and with manslaughter. The trial judge directed the jury that if they found the accused guilty of the offence of wilful neglect they were bound, as a matter of law, to find him guilty of manslaughter. The accused was convicted of both offences and appealed. The Court of Appeal affirmed the conviction for wilful neglect but quashed the manslaughter conviction. Delivering the judgment of the Court Phillimore L.J. stated

> "We think there is a clear distinction between an act of omission and an act of commission likely to cause harm. Whatever may be the position in regard to the latter it does not follow that the same is true of the former. In other words if I strike a child in a manner likely to cause harm it is right that if the child dies I may be charged with manslaughter. If, however, I omit to do something with the result that it suffers injury to health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate."[26]

2 UNLAWFUL ACT MANSLAUGHTER IN AUSTRALIA

(a) *The Common Law States*

Until comparatively recently the Australian cases were characterized by an uncritical acceptance of the English position.[27] The doctrine was considered by the Full Court of the Supreme Court of Victoria in *R.* v. *Turner*.[28] Thefts had been occurring from the accused's parked car. The accused armed himself with a rifle and kept watch on the car. He apprehended the deceased breaking into the car, called to him, and when he ran threatened to shoot and then fired a shot intending it to go over the deceased's head. The shot hit and killed the deceased, and the accused was tried for murder and convicted of manslaughter. On appeal to the Full Court the conviction was quashed since it was not clear that the

[24] [1973] 1 All E.R. 805.
[25] *Children and Young Persons Act* 1933 s. 1(1).
[26] [1973] 1 All E.R. 805, 809.
[27] See for example *R.* v. *Terry* [1955] V.L.R. 114; *R.* v. *Clarke and Wilton* [1959] V.R. 645; *R.* v. *Simpson* (1959) 76 W.N. (N.S.W.) 589.
[28] [1962] V.R. 30.

accused had not been lawfully exercising the power of arrest. In the course of their judgment the Full Court stated

> "The correct statement of law is that a man is prima facie guilty of manslaughter if he, without having any intention to kill or do grievous bodily harm, kills another by an act which is both unlawful and dangerous."[29]

The Full Court did not consider the meaning of the word "dangerous". However, the trial judge had defined a dangerous act as an act "likely to injure another person",[30] and this definition was not dissented from. It can therefore be said that the view of the law adopted by the Full Court in *Turner* was identical with that adopted by the Court of Criminal Appeal in *Larkin*.[31]

However, in the earlier Victorian case of *R.* v. *Parmenter*[32] Sholl J. had formulated the doctrine in a different manner. His Honour had stated

> "If a man unintentionally causes death in the course of committing an unlawful act not amounting to a felony, an act such as the accused contemplated, or a reasonable man would have contemplated, as likely to create the danger of death or grievous bodily harm . . . that is manslaughter."[33]

It is not clear from the passage whether an objective or a subjective test was intended. The degree of probability of harm required to have been present for the doctrine to apply would appear to be the same as under the *Larkin* formulation. However, the quantum of harm required to have been at risk is clearly much greater than under the *Larkin* formulation; what must have been at risk is not merely injury but death or grievous bodily harm.

After *Turner* the problem next arose for consideration in Victoria in *R.* v. *Longley*.[34] The accused was charged with the murder of his wife who was found shot through the chest in a room in their house. His defence was that the fatal shot was fired not by him but by his father-in-law while they struggled for a gun in the father-in-law's possession. The trial judge directed the jury that if they rejected the accused's story he must at least be guilty of manslaughter. The accused was convicted of manslaughter and appealed to the Full Court. His conviction was quashed on the ground that the trial judge's direction was incorrect, since there were other versions of the facts which might have been accepted by the jury which would not have amounted to manslaughter. In the course of his judgment Sholl J. again analysed the unlawful act doctrine. Referring to *Parmenter* His Honour stated that for the doctrine to apply the unlawful act must

29 [1962] V.R. 30, 34.
30 Ibid.
31 C. Howard, "An Australian Letter" [1962] Crim. L.R. 435, 439.
32 [1956] V.L.R. 312.
33 [1956] V.L.R. 312, 314-315.
34 [1962] V.R. 137.

be "of a character which the accused must have realized involved an appreciable danger of death or serious injury".[35] Thus, as regards the quantum requirement His Honour took the same view he had taken in *Parmenter*[36] but made it clear that he had there been laying down a subjective test. His Honour then referred to the passage I have quoted from *Turner* and stated

> "If I may respectfully say so, I understand that to pose a subjective test, scil., 'realized by him as dangerous'. If it is intended to state an objective test, it partly overlaps the definition of manslaughter by criminal negligence, which it seems to me better to keep separate, even though both definitions may in some cases be satisfied by the same conduct on the part of the accused."[37]

Neither of the other judges embarked upon an analysis of the doctrine.[38]

If Sholl J.'s view were to be adopted by the courts its effects would be far-reaching. As interpreted in *Larkin, Church* and *Turner*, the unlawful act manslaughter doctrine poses an objective test, and only slight injury need be at risk to bring it into operation. Sholl J.'s formulation turns the test into a subjective one, and requires that the unlawful act must be one involving danger of death or serious injury.

The most recent Victorian case in which unlawful act manslaughter has been considered is *R.* v. *Holzer*.[39] The accused punched the deceased in the face, causing him to fall backwards and strike his head on a roadway. As a result of this fall the deceased died, and the accused was charged with manslaughter. The case was heard before Mr Justice Smith. His Honour took the view that unlawful act manslaughter is comprised of two distinct doctrines; one subjective and the other objective.[40] The former of these His Honour termed "manslaughter by the intentional infliction of bodily harm".[41] Referring to this doctrine His Honour stated

[35] [1962] V.R. 137, 141. His Honour also referred to *R.* v. *Helen Clark* (Unreported, 1961).

[36] The terms "serious injury" (*Longley*) and "grievous bodily harm" (*Parmenter*) would appear to have the same meaning; see *D.P.P.* v. *Smith* [1961] A.C. 290, 334; *R.* v. *Miller* [1951] V.L.R. 346, 357-358. Although the adjective "really" was used in *Smith* to qualify "serious" it would seem to have been mere surplusage.

[37] [1962] V.R. 137, 142.

[38] Smith and Monahan JJ.

[39] [1968] V.R. 481.

[40] Professor Howard takes the view that the former subjective doctrine is, and always has been, quite distinct from unlawful act manslaughter. C. Howard, *Australian Criminal Law* (2nd ed., Australia: The Law Book Company Ltd. 1970) p. 105, and note Preface p. V. This view is, with very great respect, doubted. None of the standard English textbooks makes any reference to a separate subjective form of involuntary manslaughter. Indeed, no such doctrine was mentioned in the first edition of Professor Howard's *Australian Criminal Law*. Such a doctrine is referred to in an obiter dicta by Windeyer J. in *Mamote-Kulang of Tamogot* v. *The Queen* (1963) 111 C.L.R. 62, 79 (relied upon by Smith J. in *Holzer*). However, apart from *Mamote-Kulang* I have been unable to find any English or Australian case prior to *Holzer* in which such a doctrine is referred to. If Professor Howard is right and I am wrong it does not appear to affect any of the substantial arguments advanced in this article.

[41] [1968] V.R. 481, 482.

> "a person is guilty of 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 inflicting on the deceased some physical injury not merely of a trivial or negligible character, or, it would seem, with the intention of inflicting pain, without more injury or harm to the body than is involved in the infliction of pain which is not merely trivial or negligible."[42]

Referring to the second objective doctrine His Honour stated

> "the circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury. . . . It is not sufficient, as it was held to be in *R.* v. *Church*, to show there was a risk of some harm resulting, albeit not serious harm."[43]

The doctrine of manslaughter by the intentional infliction of bodily harm would appear to be the same as the unlawful act manslaughter doctrine as it was formulated in *Larkin* and *Church*, save for the vital difference that the test is subjective. In *Holzer* Smith J. stated that the harm must not be "trivial", and gave as examples of trivial harm a "scuff mark" caused by a fingernail or a slight ache due to a slap on the hand.[44] The degree of harm contemplated by the *Larkin* and *Church* formulations is very low, and it is probable that harm would have to be "trivial" within the *Holzer* formulation to be excluded under the *Larkin* and *Church* formulations.[45] The adoption of a subjective test is certainly desirable on principle. A subjective test requiring that the accused himself must have intended some physical harm of a non-trivial nature to result from his actions would ensure that there was a reasonably close relationship between his moral culpability and his legal responsibility.

Smith J.'s formulation of the second objective head of unlawful act manslaughter also appears desirable on principle. The quantum of harm required to have been at risk is the same as under the *Longley* formulation, viz. death or serious injury.[46] The placing of the quantum requirement at this high level raises the question of the relationship between this doctrine and the negligent manslaughter doctrine. Smith J. thought that negligent manslaughter was a subjective doctrine requiring actual foresight on the accused's part of the risk of serious injury and a decision to run that risk.[47] It will be argued in the next section that negligent manslaughter

[42] Ibid.
[43] Ibid.
[44] [1968] V.R. 481, 484.
[45] See Richard F. Sparks, "The Elusive Element of 'Unlawfulness' ", op. cit. p. 603.
[46] In *Holzer* Smith J. used the adjective "really" to qualify "serious harm", whereas in *Longley* Sholl J. did not. It has already been suggested that such a difference is of no importance. Supra fn. 36.
[47] [1968] V.R. 481, 482.

is an objective head of liability, and if this argument is correct it may well be that this form of unlawful act manslaughter merges into the doctrine of negligent manslaughter. This point will be discussed further later in this article.

The last three cases discussed (*Parmenter, Longley* and *Holzer*) all show a dissatisfaction with the unlawful act manslaughter rule as formulated in cases such as *Larkin* and *Church*. In each case the judges can be seen attempting to find a formulation of the rule which will not operate unduly harshly against an accused. It might have been hoped that when the matter finally came before the High Court these threads of authority would have been brought together, and a clear modification of the *Larkin/Church* rule enunciated. Unfortunately this was not to happen.

The unlawful act manlaughter doctrine finally came before the High Court in the case of *Pemble* v. *The Queen*.[48] The accused had been jilted by his girl friend. The girl was sitting on the bonnet of a car outside a hotel when he approached her from behind carrying a sawn-off rifle. The rifle discharged, and the bullet entered the back of the girl's head, killing her. The accused's story was that he only intended to frighten her, and that the rifle had discharged accidentally when he stumbled. He was tried for murder in the Supreme Court of the Northern Territory and convicted. On appeal to the High Court of Australia his conviction for murder was quashed on the ground that the trial judge's summing up had been defective, and by a majority of three to two a verdict of manslaughter was substituted.

Two of the three judges who constituted the majority reached their decision on the basis of the unlawful act manslaughter doctrine. It is to be noted that the girl had been facing the other way when the accused approached her, so there had not been the putting in fear necessary to constitute a technical assault. Barwick C.J. adopted the *Larkin* formulation of the unlawful act manslaughter rule and held that as the act of the accused in brandishing the rifle was "dangerous" and in the circumstances amounted to an attempted assault he was, on his own version of the facts, guilty of manslaughter.[49] Amazingly, His Honour simply accepted *Larkin* without discussion and did not refer to *Longley, Holzer*, or even *Church*. McTiernan J. held that the verdict of the jury showed they rejected the accused's story that the rifle discharged accidentally, and he had therefore committed the unlawful act of discharging a firearm in a public place.[50] His Honour stated that it was "obvious" that such an act was dangerous, and that therefore the accused was necessarily guilty of manslaughter.[51] Yet even if the English approach is adopted in preference to either *Longley* or *Holzer*, it is far from obvious that the discharge of a

[48] (1971) 45 A.L.J.R. 333; 124 C.L.R. 107.
[49] (1971) 45 A.L.J.R. 333, 339; 124 C.L.R. 107, 122-123.
[50] *Police and Police Offences Ordinances* 1923 (N.T.) s. 75(1A).
[51] (1971) 45 A.L.J.R. 333, 341; 124 C.L.R. 107, 127-128.

firearm in a public place necessarily involves the high degree of probability of harm to other people required to satisfy the *Church* formulation of the rule.[52] McTiernan J. also made no mention of *Longley, Holzer* or *Church.*

Windeyer J. agreed with the conclusion of Barwick C.J. and McTiernan J. While his judgment does contain passages which would appear to involve acceptance of the views of Barwick C.J. and McTiernan J. as regards unlawful act manslaughter, Windeyer J. rested his decision on the ground that a jury, obedient to their oaths, would have had to have found the accused guilty of manslaughter by gross negligence.[53]

Menzies and Owen JJ. dissented, taking the view that a new trial should be ordered. Menzies J. rested his decision on the ground that the accused was entitled to the verdict of a properly instructed jury.[54] His Honour referred to *Holzer* with approval.[55] Owen J. dissented on the ground that in his view a jury might properly have brought in a verdict of not guilty of both murder and manslaughter.[56]

While the decision in *Pemble* represents a setback to Australian attempts to modify the unlawful act manslaughter doctrine, it is submitted that the matter is still far from settled. Only two of the five judges in *Pemble* clearly adopted the *Larkin* formulation of the rule. Both did so without discussion of the principles involved, and without referring to the decision of the English Court of Appeal in *Church* or to the decisions of the Victorian Supreme Court in *Longley* and *Holzer,* all three of which decisions are in conflict with *Larkin.* In such circumstances it can only be concluded that the present status of the unlawful act manslaughter rule in Australia is unclear.

(b) *The Code States*

(i) *Tasmania*

Section 156(2) of the Tasmanian *Criminal Code* (1924-1968) provides that it is culpable homicide to cause death

> "(a) by an act intended to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and which is not justified under the provisions of the Code; . . . or
>
> (c) by an unlawful act."

Manslaughter is culpable homicide which does not amount to murder.[57] If paragraph (c) were to be interpreted literally the law in Tasmania would be the same as it was in England prior to *Franklin.* Such a situation is clearly unthinkable. In *R.* v. *McCallum*[58] the accused was charged with

52 Supra, p. 237.
53 (1971) 45 A.L.J.R. 333, 346; 124 C.L.R. 107, 139.
54 (1971) 45 A.L.J.R. 333, 345; 124 C.L.R. 107, 137.
55 (1971) 45 A.L.J.R. 333, 344; 124 C.L.R. 107, 133-134.
56 (1971) 45 A.L.J.R. 333, 347; 124 C.L.R. 107, 141-142.
57 S. 159(1).
58 [1969] Tas. S.R. 73.

manslaughter when he brought about the death of his wife by thrusting a candle into her vagina. Burbury C.J. took the view that the concept of manslaughter by an unlawful act is a common law concept expressed in general terms in the Code. Section 156(2)(c) should therefore be interpreted in accordance with the modern common law.[59] After a review of the authorities His Honour decided that the correct course was to direct the jury in accordance with the approach taken to unlawful act manslaughter by Smith J. in *Holzer*.[60] *R.* v. *McCallum* was approved by Windeyer J. in *The Queen* v. *Phillips*.[61] The accused was charged with the murder of a 14 year old girl whom he had knocked unconscious and left on the bank of a tidal river. The girl had drowned when the tide came in. The accused was convicted of murder. On appeal to the High Court the conviction was quashed because of a misdirection by the trial judge, and a new trial ordered. In the course of his judgment Windeyer J. discussed paragraph (c) of section 156(2). Referring to the judgment of Burbury J. in *McCallum* His Honour stated

> "[I]n my opinion Burbury C.J. was right when . . . he said that s. 156(2)(c) should be understood as referring to an unlawful act capable of causing physical injury leading to death, that is an inherently dangerous act. That, I take it, means an act that a reasonable man would know was fraught with a risk of serious harm to some person whether or not the accused actor was actually aware of this."[62]

Difficulties are caused by the question of the relationship between paragraph (a) and paragraph (c) of section 156(2). Burbury C.J. adverted to these difficulties in *McCallum*, and said

> "I am very conscious that if the view I have taken is correct there is little if any practical difference between paras. (a) and (c) of s. 156(2) —because under both paragraphs there must be an act which is not justified under the *Code* and essentially an act which is dangerous, because an act which is commonly known to be likely to cause bodily harm is a dangerous act."[63]

It is suggested that the best approach which the courts could adopt would be to treat the expression "or which is commonly known to be likely to cause death or bodily harm" in paragraph (a) as being equivalent to the objective form of unlawful act manslaughter embodied in paragraph (c). Thus it is suggested that paragraph (a) should for practical purposes be treated as laying down a wholly subjective test (did the accused intend to

[59] [1969] Tas. S.R. 73, 84.
[60] [1969] Tas. S.R. 73, 87.
[61] (1971) 45 A.L.J.R. 467.
[62] (1971) 45 A.L.J.R. 467, 479. His Honour did not discuss the subjective form of the unlawful act manslaughter doctrine. Had His Honour adverted to it he would certainly have included it as an alternative method by which an accused may be convicted of manslaughter under s. 156(2)(c). See His Honour's judgment in *Mamote-Kulang of Tamogot* v. *The Queen* (1963) 111 C.L.R. 62, 79.
[63] [1969] Tas. S.R. 73, 87.

cause death or bodily harm). Paragraph (c) should be treated as embodying both the subjective and objective forms of the unlawful act manslaughter doctrine as laid down by Smith J. in *Holzer.*

(ii) *Queensland and Western Australia*

Unlike the Tasmanian Code, the Queensland and Western Australia Codes contain no provision adopting the unlawful act manslaughter doctrine. Manslaughter is defined as an unlawful killing not amounting to wilful murder or murder.[64] An unlawful killing is one not authorized or justified or excused by law.[65] The Codes contain a number of sections setting out circumstances in which a killing is justified or excused. The only one which appears relevant in the present context is section 23 which provides

> "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally liable for an act or omission which occurs independently of the exercise of his will, *or for an event which occurs by accident.*"

It is the words in italics which are of importance for present purposes. The cases on the subject appear to have established the following propositions

1. Where death is the result of an intentional blow the fact that the victim had some constitutional defect (such as an egg-shell skull) unknown to the person striking the blow, and which made the victim more susceptible to death than would be a person in normal health, does not enable the assailant to claim that the death is "an event which occurs by accident" within the meaning of section 23.[66]

2. However, the accused may have a defence under section 23 even though he struck an intentional blow if "some unexpected occurrence supervenes which is the immediate cause of injury to the person struck from which he dies . . . [and] that occurrence was not foreseen and was unlikely".[67] In *R.* v. *Callaghan* Philp J. stated

> "Now the word 'event' has two ordinary meanings, namely (1) an incident or happening, and (2) a result or consequence of action, so that if A. intentionally struck B. a light blow but by accident grievous bodily harm result, the blow is not an incident which occurs by accident, but the grievous bodily harm is a result which occurs by accident. That under these circumstances A. should escape liability for the grievous bodily harm while being liable for the assault, is quite consistent with one's notion of justice. Why, then, should not the section have a similar application when the accidental result of the blow, is death?

[64] Queensland Code, s. 303; Western Australia Code, s. 280.
[65] Queensland Code, s. 291; Western Australia Code. s. 268.
[66] *R.* v. *Martyr* [1962] Qd. R. 398; *Mamote-Kulang of Tamogot* v. *The Queen* (1963) 111 C.L.R. 62.
[67] Per Virtue S.P.J. in *Ward* v. *R.* [1972] W.A.R. 36, 46.

* * * * *

> I do not agree with [the trial judge] that if the blow was not intended to do grievous bodily harm or to kill, but was intended as a blow, and in the result the man at whom the blow was directed is in fact killed, the killing could not be an accident within the meaning of the Code. . . . In my view, under s. 23, the killing under those circumstances would not be manslaughter, for the reasons I have outlined above."[68]

On this point Philp J. was in the minority in *R.* v. *Callaghan.* However, subsequent cases would seem to have established that the passage quoted is now good law.[69] If this is so then, in a case such as *Holzer,* where the accused struck the victim who fell down and died as a result of his head striking the roadway, the accused might have a defence under section 23 to a charge of manslaughter.

3. The question whether the original act which resulted in death was "lawful" or "unlawful" is of no relevance in determining whether the accused is guilty of manslaughter.[70] In cases in which there was no intent on the part of the accused to cause harm to another the question whether he is guilty of manslaughter will depend upon the ordinary rules of criminal negligence. If he was not criminally negligent he will have a defence under section 23.

3 NEGLIGENT MANSLAUGHTER

(a) *The Relationship Between Unlawful Act Manslaughter and Negligent Manslaughter*

In *Andrews* v. *D.P.P.*[71] the question of the relationship between unlawful act manslaughter and negligent manslaughter arose for consideration by the House of Lords. While driving a van the accused struck and killed a pedestrian. The trial judge directed the jury that if a person causes another's death in the course of an unlawful act he is guilty of manslaughter, and directed them to consider whether the accused had committed the unlawful act of driving in contravention of section 11 of the *Road Traffic Act* 1930.[72] The accused was convicted of manslaughter and appealed to the House of Lords. The appeal was dismissed on the ground that when the direction of the trial judge was considered as a whole it appeared that the true question had been submitted to the jury. However,

[68] [1942] St. R. Qd. 40, 50-51. In the Report the word in line three of the passage quoted is "unintentionally" rather than "intentionally". In a subsequent case Philp J. explained that this was simply a printing error. *R.* v. *Martyr* [1962] Qd. R. 398, 413.

[69] *R.* v. *Martyr* [1962] Qd. R. 398; *Ward* v. *R.* [1972] W.A.R. 36. See also *Timbu-Kolian* v. *The Queen* (1968) 111 C.L.R. 47.

[70] *R.* v. *Martyr* [1962] Qd. R. 398. See also the judgment of Philp J. in *R.* v. *Callaghan* [1942] St. R. Qd. 40, 50.

[71] [1937] A.C. 576.

[72] "If any person drives a motor vehicle recklessly, or at a speed or in a manner which is dangerous to the public . . . he shall be liable."

Lord Atkin, with whose judgment the other Lords agreed,[73] took the view that this type of case should be considered solely on the basis of the negligent manslaughter doctrine, and that it would be a misdirection to direct the jury in accordance with the unlawful act doctrine.[74] His Lordship stated

> "There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter."[75]

This passage has been criticized,[76] but its meaning appears clear. On the one hand there are acts which are unlawful irrespective of the manner in which they are performed. On the other hand there are acts such as driving a motor car which are only unlawful when they are performed in a particular manner, for example, when they are performed negligently. Where the act is of the latter class and the legislature has specified a degree of negligence which will render the act unlawful, that degree of negligence may not be sufficient to bring the negligent manslaughter doctrine into operation. *Andrews'* case establishes that where the act is of a class unlawful only when performed negligently, then if a person dies as a result of the performance of such an act the question whether the accused has committed the crime of manslaughter shall be considered exclusively on the basis of the negligent manslaughter doctrine.[77]

(b) *The Nature of Negligent Manslaughter*

Commentators have expressed differing views on the nature of negligence for the purposes of the negligent manslaughter doctrine. Dr J. W. C. Turner has argued that there must be a realization on the accused's part of the risk of death or serious bodily harm.[78] Smith J. adopted this view in an obiter dicta in *R.* v. *Holzer.*[79] Most writers, however, take the view that the test to be applied is an objective one. The accused is said to be guilty of manslaughter if he causes death by negligence of a particularly high degree.[80]

[73] Viscount Finlay, Lord Thankerton, Lord Wright, and Lord Roche.
[74] [1937] A.C. 576, 584-585.
[75] [1937] A.C. 576, 585.
[76] Sir W. O. Russell, *Crime* (12th ed., London; Stevens and Sons 1964) by J. W. C. Turner, Volume 1, p. 583; J. W. C. Turner, "The Mental Element in Crimes at Common Law" in L. Radzinowicz and J. W. C. Turner, *The Modern Approach to Criminal Law* (London: Macmillan & Co. 1945) 195, 238.
[77] The position is the same under the Tasmanian Code as at common law. See *R.* v. *Davis* [1955] Tas. S. R. 52.
[78] J. W. C. Turner, *Russell on Crime*, 12th ed., op. cit. Volume 1, pp. 291-294; C. S. Kenny, *Outlines of the Criminal Law* (19th ed., Cambridge 1966) by J. W. C. Turner, pp. 189-190; J. W. C. Turner, "The Mental Element in Crimes at Common Law" op. cit. pp. 240-241.
[79] [1968] V.R. 481, 482.
[80] J. C. Smith and B. Hogan, *Criminal Law* (3rd ed., London: Butterworths 1973) p. 256; C. Howard, *Australian Criminal Law*, op. cit. pp. 105-106; R. Cross and

The controversy centres on the decision in *Andrews'* case. Lord Atkin there stated

> "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 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."[81]

The argument that the test is subjective is based upon His Lordship's choice of "reckless" as the most suitable epithet. However, the word "reckless" has more than one meaning. It can be used to describe the situation where the accused foresees the possibility of injury to the deceased and, without desiring such injury, decides to run the risk of it occurring. Here the word is being used in a subjective sense.[82] Alternatively, it can be used in an objective sense to describe the accused's conduct where he does not foresee the possibility of injury to the deceased, but is being grossly negligent in not foreseeing it.[83]

It is difficult to be certain whether an objective or a subjective test was intended in *Andrews'* case. Passages from Lord Atkin's judgment can be cited in support of either opinion.[84] However, it would seem that His Lordship was taking an objective view, and that when he used the word "reckless" he was intending it to have the second of its two possible meanings. The more natural way of reading the quoted passage is to interpret "reckless" simply as an adjective which is used to stress the very high degree of negligence necessary to constitute manslaughter. There is certainly no suggestion that the word "negligence" was being used by His Lordship in anything other than its normal objective sense, and it is submitted that a qualifying adjective should not be read as altering the basic meaning of the noun it qualifies.

This interpretation is supported by the fact that in the great majority of the cases concerning negligent manslaughter decided before *Andrews* an

P. A. Jones, *An Introduction to Criminal Law* (7th ed., London: Butterworths 1972) p. 159; *Harris's Criminal Law* (22nd ed., London: Sweet & Maxwell 1973) by I. McLean and P. Morrish, p. 445; Professor G. L. Williams adopts the intermediate position that the authorities favour the objective approach, but that the matter is still unsettled and open for consideration by the House of Lords, *Criminal Law: The General Part* (2nd ed., London: Stevens and Sons 1961) pp. 106-111.

81 [1937] A.C. 576, 583.

82 *R.* v. *Bradshaw* (1878) 14 Cox C.C. 83, 85; *R.* v. *Ashman* [1957] V.R. 364, 366; *Vallance* v. *The Queen* (1961) 108 C.L.R. 56, 82; *Pemble* v. *The Queen* (1971) 45 A.L.J.R. 333; 124 C.L.R. 107; *R.* v. *Sergi* [1974] V.R. 1, 10; J. C. Smith and B. Hogan, *Criminal Law*, op. cit. p. 45; C. Howard, *Australian Criminal Law*, op. cit. pp. 105-106.

83 *R.* v. *Elliott* (1889) 16 Cox C.C. 710, 714; *R.* v. *Bonnyman* (1942) 28 Cr. App. Rep. 131, 135-136; *R.* v. *Evgeniou* (1964) 37 A.L.J.R. 508, 513.

84 See Smith and Hogan, *Criminal Law*, op. cit. p. 255.

objective test was clearly adopted.[85] Had the House of Lords intended to lay down a new subjective test in *Andrews* it is submitted that they would almost certainly have been more explicit. In *R.* v. *Bonnyman*[86] the test laid down in *Andrews* was treated as an objective one. In Australia, apart from the obiter dicta of Smith J. in *Holzer*, the suggestion that the test is subjective would appear to derive no support from the cases which seem always to have been decided on the assumption that negligent manslaughter is an objective head of liability.[87]

It is urged against the objective approach that since negligence is a negative state of mind, i.e. a failure to advert to possible consequences, the notion of degrees of negligence is non-sensical because there can be no degrees of inadvertence.[88] Professor Hart has shown that the fallacy in this argument lies in assuming that to say that a person was negligent is equivalent to saying that he did not advert to the possibility of harm. He writes

> "when harm has resulted from someone's negligence, if we say of that person that he has acted negligently we are not thereby *merely* describing the frame of mind in which he acted. . . . [W]e are referring to the fact that the agent failed to comply with a standard of conduct with which any ordinary reasonable man *could* and *would* have complied: a standard requiring him to take precautions against harm."[89]

When negligence is analysed in this way it becomes clear that there can be degrees of negligence. Professor Hart states that negligence can be said to be gross "if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take".[90]

This analysis also meets the objection that there is necessarily something unjust about punishing an accused in cases where his mind was a blank as to the possible consequences of his actions. Professor Hart states that

[85] *R.* v. *Dalloway* (1847) 2 Cox C.C. 273; *R.* v. *Markuss* (1864) 176 E.R. 598; *R.* v. *Spencer* (1867) 10 Cox C.C. 525, 526-527; *R.* v. *Jones* (1874) 12 Cox C.C. 628, 629; *R.* v. *Finney* (1874) 12 Cox C.C. 625, 626; *R.* v. *Salmon and Others* (1880) 6 Q.B.D. 79, 83; *R.* v. *Doherty* (1887) 16 Cox C.C. 306, 309; *R.* v. *Elliott* (1889) 16 Cox C.C. 710, 714; *R.* v. *Dallorz* (1908) 1 Cr. App. Rep. 258; *R.* v. *Burdee* (1916) 12 Cr. App. Rep. 153; *R.* v. *Bateman* (1925) 19 Cr. App. Rep. 8, 11-12. A subjective test appears to have been adopted by Brett J. in *R.* v. *Handley* (1874) 13 Cox C.C. 79, 81; and *R.* v. *Nicholls* (1875) 13 Cox C.C. 75, 76.

[86] (1942) 28 Cr. App. Rep. 131, 134-135.

[87] *Kelly* v. *The King* (1923) 32 C.L.R. 509, 515; *R.* v. *Newell* (1927) 27 S.R. (N.S.W.) 274; *Callaghan* v. *The Queen* (1952) 87 C.L.R. 115; *R.* v. *Wood* [1957] S.R. (N.S.W.) 638; and note *R.* v. *Longley* [1962] V.R. 137, 142. A possible exception is *R.* v. *Gunter* (1921) 21 S.R. (N.S.W.) 282, 286.

[88] J. W. C. Turner, "The Mental Element in Crimes at Common Law" op. cit. p. 211; *Kenny's Outlines of the Criminal Law*, 19th ed., by J. W. C. Turner, op. cit. p. 39.

[89] H. L. A. Hart, "Negligence, Mens Rea and Criminal Responsibility" in A. G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford University Press 1961) p. 29, 40.

[90] Ibid. p. 42.

this view seems to be based upon the belief that possession of knowledge of consequences is a necessary and sufficient basis for the imputation of moral responsibility.[91] Yet plainly this is not so. In the case of a signalman who has a duty to signal trains, and who causes an accident by going off to play a game of cards without thinking about a coming train, moral responsibility is imputed although his mind was a blank as to possible consequences.[92] Professor Hart concludes

> "a hundred times a day persons are blamed outside the law courts for not being more careful, for being inattentative and not stopping to think. . . . [I]f anyone is ever responsible for anything, there is no general reason why men should not be responsible for such omissions to think, or to consider the situation and its dangers before acting."[93]

Negligent manslaughter is thus seen as an objective head of liability, but of such a nature that it does not operate unjustly against an accused. The courts have used various adjectives to stress the very high degree of negligence which must have been present for the accused to be guilty of manslaughter. In *R.* v. *Bateman* Lord Hewart C.J. listed "culpable", "criminal", "gross", "wicked", "clear" and "complete", but attached no particular importance to any of them.[94] In *Andrews* v. *D.P.P.* Lord Atkin suggested 'reckless' was the most suitable adjective.[95] Whatever the adjective used, the substance of the distinction between this degree of negligence and ordinary civil negligence appears to be that for a person to be guilty of negligent manslaughter his conduct must have fallen so far below an acceptable standard of care as to amount to moral culpability on his part. In *R.* v. *Bateman* Lord Hewart C.J. stated

> "To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment."[96]

In *Andrews* v. *D.P.P.* Lord Atkin doubted whether the expressions used by Lord Hewart C.J. were, or were intended to be, a precise definition, but he said that "the substance of the judgment is most valuable, and in my opinion is correct".[97] Thus, an accused will only be guilty of negligent manslaughter if his negligence has been of such a degree as to render him morally culpable in respect of the deceased's death.

91 Ibid. pp. 42-43.
92 Ibid. pp. 43-44.
93 Ibid. p. 44.
94 (1925) 19 Cr. App. Rep. 8, 11.
95 [1937] A.C. 576, 582.
96 (1925) 19 Cr. App. Rep. 8, 11-12.
97 [1937] A.C. 576, 583.

4 DEATH RESULTING FROM AN UNLAWFUL ABORTION

The law relating to the liability of an accused where he causes death while performing an unlawful abortion has developed along similar lines in both England and Australia. Unlawfully performing an abortion was a felony in England prior to 1967,[98] and remains a felony in Victoria and South Australia.[99] The older view was that if death resulted the abortionist was necessarily guilty of murder because of the operation of the felony-murder rule.

In 1898 in *R.* v. *Whitmarsh* Bingham J. directed the jury in the following terms

> "I tell you, as a matter of law, that if you are of opinion that the girl died as a result of the prisoner's unlawful operation, he is guilty of murder."[100]

His Honour went on to place a very limited gloss on this rule

> "I do not mean to say that there are not some cases where this rule of law is not applicable. There may be cases where the death is so remote a contingency that no reasonable man could have taken it into his consideration. . . . If you can bring yourselves to think that in administering the mercury he may not have contemplated the possibility of death, that would amount only to manslaughter."[101]

Not surprisingly, the accused was convicted of murder. In *R.* v. *Bottomley*[102] *Whitemarsh's* case was relied upon, but the qualification was expressed in terms more favourable to the accused and he was convicted of manslaughter only. A similar approach was adopted in *R.* v. *Lumley*.[103] In *R.* v. *Stone*[104] the accused brought about the death of the deceased while raping her. The trial judge directed the jury that to cause death in such circumstances amounted to murder. The accused was convicted of murder and appealed to the Court of Criminal Appeal where his counsel argued that a direction similar to those in *Whitmarsh* and *Lumley* should have been given. This argument was rejected, and the abortion cases were approved but distinguished. Swift J. stated

> "There, although an illegal and improper act was being done, there was no intention to do any harm; there was no intention to do anything against the wish of the person hurt; indeed the desire was to help or assist the person who was hurt. It may well be, in those circumstances, that a proper direction is that, if a jury thinks that no reasonable person

98 *Offences Against the Person Act* 1861, s. 51; *Criminal Law Act* 1967, s. 1.
99 *Crimes Act* 1958 (Vic.) s. 65; *Criminal Law Consolidation Act* 1935 (S.A.) s. 81(b). But not in N.S.W., see *Crimes Act* 1900 (N.S.W.) s. 83.
100 (1898) 62 J.P. 711, 712.
101 Ibid.
102 (1903) 115 L.T. 88.
103 (1912) 76 J.P. 208.
104 [1937] 3 All E.R. 920.

could contemplate that death would result from the act, they may find a verdict of manslaughter."[105]

In Australia also the harsh felony-murder rule[106] was gradually modified in cases of death resulting from unlawful abortions.[107] In 1949 the matter came before the Full Court of the Supreme Court of Victoria in *R.* v. *Brown and Brian.*[108] The older Australian cases were distinguished and the English approach approved and adopted. In their joint judgment Lowe and Martin JJ. stated

"the proposition may be stated positively that the prisoner is guilty of manslaughter only unless, when he did the act in question, he must have contemplated or as a reasonable man would have contemplated that death or grievous bodily harm was likely to result."[109]

It is to be noted that in none of the cases so far referred to was it ever doubted that the accused was at least guilty of manslaughter. The only question considered was whether the felony-murder rule, which was felt to operate unduly harshly in this area, could be modified so that the accused might be found guilty only of the lesser crime of manslaughter. With the abolition of the felony-murder rule in England[110] it might have been hoped that the question of the accused's liability for manslaughter would have been re-considered on its merits.

In *R.* v. *Buck and Buck*[111] it was argued that where death results from an unlawful abortion the accused is not necessarily guilty of manslaughter. Edmund Davies J. rejected the argument, and stated

"In my judgment, where death flows directly from a felony of the kind here charged the offence must, at the very least, be manslaughter. . . . It is an offence which involves a considerable risk to the person, no matter with what care it may be committed."[112]

In *R.* v. *Creamer*[113] the Court of Criminal Appeal was concerned with the liability of a person who arranged an abortion for a woman who was pregnant by him and who died as a result of the abortion. It was held that since the intent to commit the unlawful act is sufficient to render the principal guilty of manslaughter if death results, counselling and procuring the unlawful act is sufficient to render an accessory equally guilty of manslaughter in that event.[114] It was assumed by the Court that

[105] [1937] 3 All E.R. 920, 921-922.
[106] See *R.* v. *Radalyski* (1899) 24 V.L.R. 687; *Ross* v. *The King* (1922) 30 C.L.R. 246, 252.
[107] *R.* v. *Trim* [1943] V.L.R. 109, 111; *R.* v. *Carlos* [1946] V.L.R. 15, 18-19.
[108] [1949] V.L.R. 177.
[109] [1949] V.L.R. 177, 181. The Full Court affirmed its decision in *Brown and Brian* in *R.* v. *Ryan and Walker* [1966] V.R. 553, 563-564.
[110] *Homicide Act* 1957 s. 1.
[111] (1960) 44 Cr. App. Rep. 213.
[112] (1960) 44 Cr. App. Rep. 213, 219-220.
[113] [1966] 1 Q.B. 72.
[114] [1966] 1 Q.B. 72, 82.

the principal (who had been convicted but had not appealed) was necessarily guilty of manslaughter.

The rule that where an unlawful abortion results in death the abortionist is necessarily guilty of at least manslaughter was recently adverted to by the Full Court of the Supreme Court of Victoria in *R.* v. *Salika*.[115] The accused was charged with the murder of a woman whose death was caused by his attempt to perform an unlawful abortion upon her. In relation to murder the trial judge directed the jury in accordance with the rule laid down in *Brown and Brian*,[116] and further directed them that if they did not find the accused guilty of murder they could return a verdict of manslaughter. The accused was convicted of murder and appealed to the Full Court. Counsel for the accused argued before the Full Court that the unlawful act manslaughter rule, so far as it relates to death resulting from an unlawful abortion, no longer exists. The judgment of the Court was delivered by Winneke C.J. The accused's appeal was dismissed on the ground that, even if counsel's argument was correct, as the accused had been convicted of murder the trial judge's direction in relation to manslaughter could not have prejudiced him. The Chief Justice referred to *Buck and Buck, Creamer*, and *Brown and Brian*, and noted that they ran counter to counsel's argument.[117] His Honour concluded that "[w]hilst the submission . . . ventilates an arguable question of law, it is, in our opinion, unnecessary to determine the point in this case".[118] The point was thus left undecided by the Court.

Can the view adopted in *Buck and Buck* and *Creamer*, that where death results from an unlawful abortion the abortionist is necessarily guilty of manslaughter, be supported on principle? It is suggested that the answer is no. The reason advanced for the rule by Edmund Davies J. in *Buck and Buck* was that abortion is necessarily a dangerous operation, and it therefore follows that the accused ought to be guilty of manslaughter if death results from an unlawful abortion. Historically the abortion laws were concerned with the welfare of the unborn child rather than the welfare of the mother.[119] In modern times the premise upon which Edmund Davies J.'s argument is based would seem to be untrue.[120] In the United Kingdom in 1969, 54,819 women had legal abortions; of these 17 died.[121] It does not

115 [1973] V.R. 272.
116 Supra, p. 253.
117 [1973] V.R. 272, 275.
118 Ibid.
119 G. L. Williams "Constructive Manslaughter" [1957] Criminal Law Review 293, 296; G. L. Williams, *The Sanctity of Life and the Criminal Law* (London: Faber and Faber Ltd. 1958) pp. 139-147.
120 See generally L. Lader, *Abortion II: Making the Revolution* (Boston: Beacon Press 1973) pp. 48, 154, 156-157, 166; T. McMichael (ed.), *Abortion: The Unenforceable Law* (Melbourne: Abortion Law Reform Association Publication 1972) pp. 57-60. Note also the recent decision of the United States Supreme Court in *Roe* v. *Wade* (1973) 41 L.W. 4213, 4224.
121 *The Registrar General's Statistical Review of England and Wales for the Year*

seem reasonable to characterize an operation which can have a mortality rate of .031% when properly performed as one necessarily involving "a considerable risk to the person". This is especially so when it is borne in mind that a considerable number of those who died were probably women whose health was poor and on whom an abortion was performed because it was thought to involve less danger than childbirth. It is true that these figures relate to lawful abortions performed by doctors under conditions of hygiene, while in *Buck and Buck* and *Creamer* the abortions appear to have been performed by unqualified persons in less than perfect conditions. However, this merely stresses that the circumstances of each individual abortion should be looked at, and that the courts should not proceed upon the mistaken view that *all* abortions are necessarily dangerous, and that if death results from *any* unlawful abortion the abortionist must therefore be guilty of manslaughter.

Another argument in favour of the rule might be advanced in Victoria and South Australia where the felony murder rule has been retained. It might be argued that there exists a distinct rule of law that where death results from the commission of any felony, but the requirements of the felony murder rule are not satisfied, the accused is necessarily guilty of manslaughter. Since unlawfully performing or attempting to perform an abortion is a felony in both states[122] it would follow, if such a rule exists, that where death results from the unlawful performance or attempted performance of an abortion the abortionist is guilty of manslaughter. In *R.* v. *Parmenter* (not a case concerning abortion) Sholl J. took the view that such a general rule exists.[123] It is suggested that Sholl J.'s view is incorrect. Such a rule had not been established in England prior to the abolition of the felony-murder rule by section 1 of the *Homicide Act* 1957.[124] The view adopted by Sholl J. was rejected by Starke J. in *R.* v. *Christian*[125] (also not a case concerning abortion). His Honour stated that

1969, Supplement on Abortion (London: H.M.S.O. 1971) Table 1, p. 2 and Table 22, p. 32.

122 Supra fn. 95.

123 [1956] V.L.R. 312, 313-314.

124 No mention is made of such a rule in the last editions of Kenny and Archbold published before the passing of the Act. See C. S. Kenny, *Outlines of the Criminal Law* (16th ed. Cambridge University Press 1952) by J. W. C. Turner, pp. 139-146; J. F. Archbold, *Criminal Pleading, Evidence and Practice* (33rd ed., London: Sweet and Maxwell 1954) by T. R. Fitzwalter Butler and M. Garcia, pp. 945-947. The rule is mentioned and its existence apparently accepted in Sir W. O. Russell, *Crime* (10th ed., London: Stevens and Sons Ltd. 1950) by J. W. C. Turner, Volume I, p. 636. In Cross and Jones the possible existence of such a rule is referred to, but it is stated that the question has not come before an appellate tribunal and the point is left open. R. Cross and P. A. Jones, *An Introduction to Criminal Law* (3rd ed., London: Butterworth and Co. 1953) p. 262.

125 (1965) Unreported. Referred to in C. Howard, *Australian Criminal Law*, op. cit. p. 67. I am grateful to Stark J. for providing me with a copy of the relevant part of the transcript.

the felony-murder rule is strictly confined to the crime of murder and cannot be used to support an argument that the accused is guilty of manslaughter. It is submitted that this is the preferable approach, and the one most likely to be adopted by the Victorian and South Australian courts.

It is suggested that where death occurs as the result of an unlawful abortion the liability of the abortionist for manslaughter should be determined by an application of the principles of negligent manslaughter. The fact that the abortion was unlawful would, of itself, seem to have little bearing on the question of the accused's moral responsibility for the woman's death. If the accused lacks the skill and training of a doctor, or if the abortion is performed in circumstances in which acceptable surgical standards are not adhered to, his negligence in carrying out the operation will almost certainly be sufficient to render him guilty of manslaughter. Where, however, the accused is a qualified doctor or possesses the skill of a qualified doctor and acceptable surgical standards are met, yet the woman dies through no fault of the accused, then it is submitted that he should be guilty only of the substantive offence of performing an unlawful abortion. As regards the accused's moral culpability there is a vast difference between these two types of case, and it is submitted that the law should recognize this difference by holding the accused to be guilty of manslaughter only in the former.

It is suggested that it is open to the courts to adopt such an approach. Apart from *Buck and Buck* the question whether the abortionist is necessarily guilty of manslaughter where death results from an unlawful abortion has never been considered on principle, and it is submitted that the unsatisfactory reasoning adopted in *Buck and Buck* renders it a weak authority.

5 A POSSIBLE FUTURE DEVELOPMENT

It has been argued that the unlawful act manslaughter doctrine as formulated in cases such as *Larkin, Church* and *Turner* is unsatisfactory. It has been suggested that *Pemble's* case does not finally settle the law in Australia, and that judicial attempts to modify the doctrine are likely to continue. This article will conclude with a suggestion as to a possible approach to the doctrine which could be adopted by the courts in the common law states and in Tasmania.

It is submitted that the best approach which could be adopted would be to follow the decision in *Holzer*, and treat the second objective head of liability as merging into negligent manslaughter. It will be remembered that Smith J. treated unlawful act manslaughter as consisting of two distinct doctrines. The first of these he termed "manslaughter by the intentional infliction of bodily harm". This was a subjective doctrine

requiring that the accused intend "some physical injury not merely of a trivial or negligible character". The second doctrine was an objective one requiring that "a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury". The quantum of harm which must have been at risk to make this doctrine applicable is the same as for negligent manslaughter. Certainly this doctrine is not in terms identical with the doctrine of negligent manslaughter, but it would not seem to require very bold judicial action to hold that this doctrine is to be treated as merging into the doctrine of negligent manslaughter. It may be noted that if such a result were to be achieved the position in the common law states and in Tasmania would still be less favourable to the accused than is the case under the Queensland and Western Australia Codes.[126]

The advantage of this approach is that it would result in the accused's legal liability being more closely tied to his moral responsibility than is the case under the *Larkin* and *Church* formulations of the rule. An accused would be guilty of manslaughter if death resulted from a battery inflicted by him with the intention of causing some physical injury of a non-trivial nature. Where a person has caused the death of another by such a battery he would normally be regarded as morally responsible for that death, and legal responsibility would follow. Alternatively, an accused would be guilty of manslaughter if his negligence is not foreseeing the possibility of death or serious injury occurring as a result of his actions was of such a high degree as to render him morally culpable in respect of the resulting death. Since there is no intent to inflict harm present in abortion cases, such an approach would lead to the desirable result that cases of death caused by unlawful abortions would be considered exclusively on the basis of the negligent manslaughter doctrine.*

[126] Supra, pp. 246-7.

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