The Law of Involuntary Manslaughter: *Wilson v The Queen*[*]

The High Court decision in *Wilson v The Queen* significantly alters the law with respect to involuntary manslaughter. It adopts a new test for "manslaughter by an unlawful and dangerous act" and rejects the existence of a separate category of battery manslaughter. A progressive approach by the majority opens the way for a further streamlining of the law in this area. The decision does give rise to some problems, however, and as a result the future direction of the law of involuntary manslaughter is difficult to assess with any certainty.

Facts

King CJ of the Court of Criminal Appeal (SA) succinctly outlines the relevant facts:

> On the evening of 15 September 1989, the appellant, his girlfriend, Kerri Bennier, and Cumming were at the home occupied by Cumming's father and the appellant's mother at Exeter. The appellant and Kerri set out on foot to go to a local hotel. On the way they encountered the deceased. He was a middle-aged man and was under the influence of liquor. Some words were exchanged between the three of them. The appellant requested Kerri to go back to get Cumming and she complied. After Cumming's arrival the appellant punched the deceased in the face. He fell backwards and struck the back of his head on the footpath. He died as a result of that blow. Cumming went through the deceased's pocket and took a wallet containing some money.[1]

Cumming then "smashed [the deceased's] head on the concrete ... twice".[2]

Background to the High Court Decision

In the first instance Wilson was found guilty of manslaughter by an unlawful and dangerous act. The trial judge directed the jury as follows:

> In this case if you have not found murder proved but have gone on to consider manslaughter it would be manslaughter by an unlawful and dangerous act. The killing of a man in the course of committing a crime is manslaughter. The crime must be an act in serious breach of the criminal law. A serious assault — you may think the punch by Wilson or the hitting of the head on concrete by Cumming to be serious assaults — would be an unlawful act for this purpose. Whether the particular act you are considering is a dangerous act is a matter for your judgment.[3]

The question for the Court of Appeal was whether the direction to the jury with respect to the element of dangerousness was a correct statement of the law. There were two possible lines of authority. First, the English decisions of R v Larkin,[4] which interpreted a dangerous act as one "which is likely to injure

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* (1992) 66 ALJR 517.

1 *Wilson v The Queen* (1991) 53 A Crim R 281 at 282.

2 *Wilson v The Queen* (1992) 66 ALJR 517 at 518.

3 Ibid.

4 [1943] 1 All ER 217 at 219.

another person" and of *R v Church*[5] which clarified *Larkin*. In *Church* it was stated that:

> [T]he unlawful act must be such as all reasonable and sober people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.[6]

In *Director of Public Prosecutions v Newbury*[7] the House of Lords affirmed the test applied in *Larkin* and *Church*. Secondly there was the Victorian decision of *R v Holzer*[8] in which Smith J recognised that:

> Authorities differ as to the degree of danger which must be apparent in the act. The better view, however, is I think that the circumstances must be such that a reasonable man in the accused's position performing the very act which the accused performed, would have realised that he was exposing another or others to an appreciable risk of really serious injury.[9]

The majority of the Court of Appeal, consisting of Cox and Matheson JJ, held that the test laid down in *Church* was the correct statement of the law. King CJ, dissenting, preferred the *Holzer* test but considered that the facts of the case allowed a finding of battery manslaughter. He quotes Smith J in *Holzer* with approval:

> [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 [10]

In cases where the intention is to inflict physical injury amounting to grievous bodily harm we enter the realm of murder. Battery manslaughter, then, covers the field between what is negligible or trivial and what amounts to grievous bodily harm. Matheson J concurred with King CJ on the issue of battery manslaughter.

When *Wilson* reached the High Court, then, there were three categories of involuntary manslaughter.

1. Manslaughter by an unlawful and dangerous act. With respect to unlawfulness the act had to be a serious breach of the criminal law. As to dangerousness the Supreme Court of South Australia, at least, was of the opinion that the English authorities were to be preferred. The act had to 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".[11]
2. Manslaughter by gross or criminal negligence. As the Victorian Law Reform Commission states:

> the type of negligence involved in this category is not the lower degree of negligence which would be sufficient for a civil case, but a very high

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5 [1966] 1 QB 59.
6 Id at 70.
7 [1977] AC 500.
8 [1968] VR 481.
9 Id at 482.
10 Above n1 at 285.
11 Above n6.

> degree of negligence consistent with culpability and punishment for a serious criminal offence.[12]

3. Manslaughter by the intentional infliction of bodily harm or battery manslaughter as outlined above.

High Court Decision

The High Court majority consisted of Mason CJ, Toohey, Gaudron and McHugh JJ. On the issue of manslaughter by an unlawful and dangerous act they preferred a test more in line with the *Holzer* decision than with the English authorities. They did not accept *Holzer* unequivocally:

> While the *Holzer* direction does not seem to have given rise to difficulties in this regard, the emphasis on really serious injury brings manslaughter perilously close to murder in this respect ... It is better to speak of an unlawful and dangerous act carrying with it an appreciable risk of serious injury.[13]

Under the High Court's test the qualifier "really" has been omitted.

The High Court did not, however, come to the same conclusion as King CJ in the Court of Appeal. The majority rejected the existence of a doctrine of battery manslaughter (which was also an important aspect of the *Holzer* decision). They state clearly that "[m]anslaughter by the intentional infliction of some harm ... continues the rigour of the early common law and ought to play no part in contemporary law". The majority justified its rejection of battery manslaughter on the ground that "it tends to confuse intent with a willed act".[14] The act of battery does not constitute, without construction, the requisite intent for anything but assault. There is no compelling reason why an accused who commits an act but does not have the requisite intention for murder or could not reasonably have expected death or grievous bodily harm to result can be held liable for anything more than assault.

The majority judgment, then, significantly alters the law with respect to involuntary manslaughter. The judgment states categorically that:

> This approach leaves two categories of involuntary manslaughter at common law: Manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury and manslaughter by criminal negligence.[15]

Perhaps even more significantly the decision paves the way for continuing reform of this area of the law. The majority is aware of arguments to fuse these two remaining categories and cites the Law Reform Commission, Victoria.[16] In the case at hand the majority refuses to take this further step and points out the existing differences between the two categories:

> [A]s the law stands there are differences between them. In the case of manslaughter by criminal negligence, it is unnecessary to prove that the accused's act was unlawful ... And the tests of dangerousness are different.[17]

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12 Law Reform Commission Victoria, Discussion Paper No 13 *Homicide* (1988) para 78 at 34-35.
13 Above n2 at 524.
14 Id at 522.
15 Id at 524.
16 Above n12 para 178 at 68.
17 Above n2 at 524.

However, the decision goes on to say that:

> As the question of criminal negligence was not relied on in the present appeal, we need say no more as to the appropriateness of the distinctions that presently exist between this category of manslaughter and manslaughter by an unlawful and dangerous act.[18]

It is submitted that the very reference to the Law Reform Commission suggests that the court is open to a consideration of this argument for the fusion of the two categories when next the issue arises. This idea will be further explored in this case-note.

The minority was made up of Brennan, Deane and Dawson JJ. They held that the English authorities with respect to manslaughter by an unlawful and dangerous act should be followed. They preferred the test as stated in *Larkin*: "an act which is likely to injure another person".[19]

The minority also saw the doctrine of battery manslaughter as unnecessary but only in the event that the *Larkin* test represented the law. Quite simply, the minority reasoned that, due to "the sanctity of human life ... the law does and should regard death in those circumstances with gravity".[20] This is so regardless of the illogicality of the argument. The minority recognised that

> [T]his can no doubt be said to be illogical, since the culpability is the same [as for assault], but nevertheless it is an illogicality which runs throughout the whole of our law[21]

Under the *Larkin* test, death caused by an intentional infliction of harm would be covered by manslaughter by an unlawful and dangerous act and, so, battery manslaughter would be unnecessary. If the *Holzer* test was applied "then there would be a gap in the law which could only be filled by some such doctrine".[22]

Commentary

A striking feature of the judgments at both the Court of Appeal and the High Court level is the thorough examination of the historical development of the murder/manslaughter distinction. History is traced through to the modern cases concerning manslaughter by an unlawful and dangerous act and the different judges manage to find support for their own particular standpoints. Matheson J in the Court of Appeal goes so far as to favour the English approach because one particular decision "was given in a period in which appeals lay from this country to the Privy Council ... [and therefore] a decision of the House of Lords is very persuasive".[23] As the High Court majority made clear, "[t]his ... is a tenuous basis on which to resolve the conflict of authority".[24]

To a great extent this invocation of authority is a sham. As Matthew Goode points out in a case note on the Court of Appeal decision:

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18 Id at 524-525.
19 Above n4.
20 Above n2 at 528.
21 Ibid.
22 Ibid.
23 Above n1 at 307.
24 Above n2 at 521-522.

> But when it is all said and done, this was not a matter of authority. Whatever might be said about the New South Wales position, and the persuasive nature or otherwise of High Court dicta on point, the fact was that the Court of Criminal Appeal could have chosen one path or the other.[25]

Goode points out that with the issues involved in *Wilson* "as in other areas of homicide law in particular, it is possible to see how the content of the law is derived from moral arguments and premises".[26] The conflicting judgments in *Wilson* are very much a result of differing moral positions.

The majority gleans from the historical developments a "very gradual evolution ... from an almost exclusive concern with the external act which occasioned the death to a primary concern with the mind of the man (sic) who did the act".[27] For this reason they adopt the rationale laid down by King CJ in the Court of Criminal Appeal:

> There are good reasons why the test in *Holzer* should be preferred to that in *Newbury*; ... One is the development of the law "towards a closer correlation between moral culpability and legal responsibility" (*Wilson* (1991) 53 A Crim R, at 286). Another is that the scope of constructive crime "should be confined to what is truly unavoidable" (at 286). A further reason ... is that the persuasive authority of a decision of the Full Supreme Court of an Australian State in this area of the law is greater than the decisions of courts in other countries.[28]

Similarly, the minority judgment relies ultimately on issues of morality: "One principle which stands higher than all others in the criminal law is the sanctity of human life".[29] The real difference between the two judgments is a value laden one as to how to deal with instances of what amounts to unexpected death.

Both judgments refer to a "gap in the law". It is this perception of a "gap" which marks the fundamental difference between the two standpoints. The minority state that:

> If the test were to be set at the higher level suggested by Smith J in *Holzer*, then there would be a gap in the law ... there would be a need for the law to hold at the same time that, where a person deliberately and without lawful justification or excuse causes injury to another which is not trivial or negligible and the other dies as a result, the crime of manslaughter is committed....[30]

As stated earlier the minority are aware of the "illogicality" involved in this position.[31] The majority do not perceive such a gap:

> Adoption of the test in *Holzer* as to the level of danger applying to manslaughter by an unlawful and dangerous act and abolition of battery manslaughter do not create a gap in the law. Cases of death resulting from a serious assault ... will be covered by manslaughter by an unlawful and dan-

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25 Goode, M, "Case and Comment" (1991) 15 *Crim LJ* 440 at 441.
26 Id at 442.
27 Above n2 at 519.
28 Id at 522.
29 Above n1 at 528.
30 Above n2 at 528.
31 Above n21.

> gerous act. Cases of death resulting unexpectedly from a comparatively minor assault ... will be covered by the law as to assault.[32]

The majority judgment is to be preferred. As the judgment points out, a finding of manslaughter from minor assault "does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility, and is therefore inappropriate".[33] The conservative minority judgment registers the fact of the death and issues a finding accordingly. It is an outdated and blinkered moral vision. A rigid determination that such cases should constitute manslaughter is a simplistic consideration of the moral issues at hand. The more progressive majority judgment does regard death with "gravity". It also regards such death realistically and recognises a moral obligation to deal justly with the accused. The majority weigh up the dynamics of the situation at hand and arrive at a decision appropriate to the actions and intent of the accused.

The majority judgment is not without it limitations. The variation of the *Holzer* test creates problems. To begin with it is not clear whether or not the High Court intended the omission of the word "really" to result in any substantive alteration of the test. They refer to their adoption of the *Holzer* test without qualification, suggesting that the alteration is not of great import.[34] However, they refer to *R v Perks*[35] on the distinction between "serious" and "really serious". That case suggests that the difference can be substantial. "Really serious" is to be equated with grievous bodily harm while "serious" is somewhat less. It is here that the High Court majority gets into real trouble.

Their reason for making the qualification is that:

> [T]he emphasis on really serious injury brings manslaughter perilously close to murder in this respect ... A direction in those [serious] terms gives adequate recognition to the seriousness of manslaughter and to respect for human life, while at the same time preserving a clear distinction from murder.[36]

The reasoning here is flawed. The inclusion of the word "really" does not bring the *Holzer* test closer to murder. The real distinction between the categories of murder by grievous bodily harm and manslaughter by an unlawful and dangerous act is not the level of harm resulting from the act but the intention of the accused. It would seem a simple task to direct the jury in these terms. The test for grievous bodily harm is subjective. If the accused intended to inflict grievous bodily harm there is no controversy. This constitutes murder. The test for involuntary manslaughter is objective. If no requisite intention exists for murder and the accused commits an unlawful act then, if a reasonable person would have recognised an appreciable risk of "serious injury", the finding will be manslaughter. The first task is to determine intent. The level of intent will determine whether or not the finding will be murder or manslaughter, not the level of harm.

The majority seem to shy away from their belief in a "closer correlation between moral culpability and legal responsibility".[37] They hoist themselves on

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32 Id at 525.
33 Ibid.
34 Ibid.
35 (1968) 41 SASR 335 at 337.
36 Above n2 at 524.

their own petard and "confuse intent with a willed act".[38] The *Holzer* test should remain unaltered. If a reasonable person would have recognised an appreciable risk of "really serious injury" or, in other words, grievous bodily harm the finding should be manslaughter. If the reasonable person would not have recognised such a risk there is no reason to find other than assault.

Future Developments

As mentioned earlier the decision of the majority to abolish the category of battery manslaughter is in line with the recommendations of the Law Reform Commission of Victoria.[39] The High Court did not go to the extent of adopting a single category of involuntary manslaughter, that is, dangerous act or omission manslaughter. It is open, however, for the High Court to consider this issue in the future. It is by no means clear how the Court will respond.

Wilson reveals an eagerness to reform the law in this area but the High Court is aware of the differences that exist between the two remaining categories. There are the requirements of unlawfulness and differing levels of dangerousness. As the Law Reform Commission points out "[d]angerousness is the key element ... The requirement of unlawfulness has nothing relevant to add".[40] The problem they concede is in determining a requisite level of dangerousness. The level they propose is much higher than that laid down in *Wilson*.

> The test for the new category of manslaughter by dangerous act or omission should be that the defendant does an act in gross breach of the duty of care — or omits to do an act where there is a legal duty to act — which a reasonable person in the circumstances would realise exposed another to a high risk of life-endangering injury.[41]

By altering the test in *Holzer* the High Court has made it more difficult to move toward the recommendations of the Law Reform Commission in the future. Broadly speaking there are two possible future outcomes. First, the High Court may adhere to the substantive difference between the test in *Wilson* and the test in *Holzer*. If this is the case it is difficult to see how the recommendations of the Commission could be adopted.

Certainly they would require modification. The High Court would not be prepared to adopt such a high requirement of dangerousness. An omission of the word "high" may make the test more palatable with respect to the unlawful and dangerous act of manslaughter but would result in a radical and restrictive alteration to the law of manslaughter by criminal negligence. More probably, if the distinction is adhered to, two categories of involuntary manslaughter will remain.

Secondly the High Court may review the *Wilson* decision and rectify the faulty reasoning. This would allow them to capitalise on the real progress made by *Holzer*. Willis argues that "[t]he major achievement of Smith J in *Holzer* was to provide the basis for a much needed reform and simplification

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37 Above n28.
38 Above n14.
39 Above n12 para 173 at 66.
40 Id paragraph 174 at 66.
41 Id para 175 at 67.

of the law of 'unlawful and dangerous act' manslaughter".[42] The majority applied a progressive moral reasoning in *Wilson*; they made direct reference to the Law Reform Commission recommendations and left open the question of whether or not the two remaining categories would be fused. In light of these facts it is submitted and hoped that the High Court will take the next opportunity to adopt the recommendation proposed by the Law Reform Commission and fuse the remaining categories of involuntary manslaughter. It is worth noting that this is an issue which is not necessarily determined by a logical progress of the common law and that *Wilson* is a decision that suggests that the High Court is ready for reform only by the barest majority.

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42 Willis, J, "Manslaughter by the Intentional Infliction of Some Harm: A Category That Should be Closed" (1985) 9 *Crim LJ* 109 at 124.

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