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Euthanasia: A judge warns doctors must not 'play God'

by Neville Hodgkinson
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AS HISTORY was being rewritten last week with the revelation that King George V's death was hastened with drugs injected by his physician, a High Court judge restated the British judiciary's views on the illegality of euthanasia, whether with or without the patient's consent.

Mr Justice Mars-Jones declared: "A doctor is not entitled to play God and cut short life because the time has come to end the pain and suffering and to enable his patient to 'die with dignity'."

But despite a summing-up clearly hostile to the defence case, a jury at Leeds crown court yesterday cleared a family doctor of trying to kill a terminally ill cancer patient with an overdose of drugs. The defence claimed that the overdose was "a ghastly mistake".

The jury decided by a majority verdict that Dr John Douglas Carr, 59, was not guilty of attempted murder in having administered the overdose, given to 63-year-old Ronald Mawson.

Mars-Jones: law to the end

In his summing-up, Mars-Jones told the jury that the patient did not want to die, and even if he did, killing him would have been illegal. "However gravely ill a man may be, however near his death he is, he is entitled in our law to every hour, nay every minute of life that God has granted him.

"That hour or hours may be the most precious and most important hours of a man's life. There may be business to transact, gifts to be given, forgivenesses to be said, attitudes to be expressed, farewells to be made, 101 bits of unfinished business which have to be concluded."

During the 14-day hearing the prosecution alleged that Carr had given the cancer patient 1,000 milligrams instead of 150 milligrams of the drug phenobarbitone to "let him die with dignity".

After the jury, seemingly determined not to brand the doctor as a criminal, returned its verdict yesterday, the judge refused to grant costs to the defence.

Carr said later through his solicitor: "I have tried to serve at all times the best interests of my patients."

The jury's verdict came two days after it was revealed by the biographer Francis Watson that in 1936 a fatal dose of morphia and cocaine was given to George V to bring about a "brief final scene".

Those revelations, along with the Leeds case, add urgency to a current review by the British Medical Association of the guidelines it issues to doctors on euthanasia. A working party, set up at the request of delegates at the association's annual meeting earlier this year, is expected to report by next March.

The existing guidelines are acknowledged by the BMA to need clarification. They emphasise the profession's "total abhorrence" of compulsory euthanasia, in which someone's life is terminated either against his will or without his being able to consent. But voluntary euthanasia does have followers, the guidelines state.

Dignity in death, page 26

Source. Circa 1987-1988 The Times

Cancer emotive Judge directed guilty verdict.

Jury emotional verdict.

Source - Harris - C1950

Thus, where a person dies as the result of a felonious operation performed by the accused, it is murder if the accused must as a reasonable man have contemplated that death or grievous bodily harm likely to cause death was likely to result, but manslaughter if he could not as a reasonable man have contemplated either of these consequences (*u*).

(3) If a man kills an officer of justice, either civil or criminal, in the legal execution of his duty, or any person acting in aid of him, or any private person lawfully acting as an officer of justice, three points must be considered in determining whether the offence is murder: "the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for if an officer is killed in attempting to execute a writ . . . against a wrong person . . . or if a private person interferes and acts in a case where he has no authority by law to do so; or if the defendant had no knowledge of the officer's business, or if the intention with which a private person interferes, and the officer or private person is resisted and killed, the killing will be manslaughter only" (*w*).

The killing will, moreover, be murder only if violence is used to prevent arrest or effect an escape or a rescue, not if it occurs accidentally in the course of a struggle with the officer or private person (*x*).

D. **Manslaughter.**—The offence of manslaughter includes all felonious homicide not amounting to murder. It may be divided into three classes:

(1) Where the death is the unintended result of an unlawful act *not* amounting to a felony.

(2) Where the death is caused by criminal negligence.

(3) Where the death is occasioned under provocation.

Infanticide is also punishable as manslaughter (*y*).

(1) The first class of manslaughter includes cases where the death was the result of an act which is in itself unlawful, *e.g.*,

(*u*) *R.* v. *Whitmarsh*, 62 J. P. 711; *R.* v. *Lumley*, 22 Cox 635. So also, where A feloniously fired at B in circumstances which would have made the killing of B manslaughter, but by accident killed C, whom he did not intend to hit at all, it was held only manslaughter: *R.* v. *Gross*, 23 Cox 455.

(*w*) Arch. 924.

(*x*) *Ibid.*

(*y*) See *post*, p. 259.

any assault or unlawful exercise of force so that there is an *absence of excuse*, but where death or serious bodily harm was not actually or presumptively intended so that there was an *absence of malice*. Example:

(i) A schoolmaster beats a boy so immoderately that he dies. This is at least manslaughter, and might be murder if the acts of the prisoner were such as according to common knowledge would cause death or grievous bodily harm (*z*).

(ii) A mother attempts to correct a child with a small piece of iron, but accidentally hits and kills another child. "If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and kills him, it is manslaughter . . . and if the child at whom the blow was aimed had been struck and had died it would have been manslaughter" (*a*).

(iii) A kills B in a prize fight. A blow struck in a prize fight is an assault; A therefore is guilty of manslaughter (*b*).

(iv) A was a sheriff's officer in possession of goods taken in execution. B and C, the owners of the goods, with the intent of getting A out of possession, made him drunk and then forced him into a cab and drove him about for two hours. As a consequence of the drink and shaking in the cab, A died. *Held*, B and C were guilty of manslaughter (*c*).

(v) A uses illegal violence in a football match and causes the death of B. A is guilty of manslaughter, and the fact that the act causing death was permitted by the rules of the game is no defence (*d*).

(2) *Negligence.*—Death caused by negligence is manslaughter when the circumstances were such that the accused person was under a duty of taking care to prevent or avoid causing harm (*e*), and he has been guilty, not merely of an error in judgment, but

(*z*) *R.* v. *Hopley*, 2 F. & F. 202; see also *R.* v. *Cheeseman*, 7 C. & P. 454.

(*a*) *R.* v. *Conner*, 7 C. & P. 438.

(*b*) See *R.* v. *Coney*, 8 Q. B. D. 530; 51 L. J. M. C. 66.

(*c*) *R.* v. *Packard*, 1 C. & M. 236.

(*d*) *R.* v. *Bradshaw*, 14 Cox 83.

(*e*) *R.* v. *Shepherd*, L. & C. 147; 31 L. J. M. C. 102.

of such negligence as constitutes criminal misconduct deserving of punishment (*f*). " 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 before the felony [of manslaughter] is established " (*g*).

It must be noted that the same act may constitute murder or manslaughter, according to the circumstances and the state of mind or knowledge of the party. Thus, A exposes and deserts her child, which dies as a result of the exposure; the offence is murder if she left the child " in such a situation that to all reasonable apprehension she must have been aware the child must die ", but manslaughter if " there were circumstances that would make it likely that the child would be found by someone else and its life preserved " (*h*). So also in the case of *R.* v. *Packard* (*i*) the offence would have been murder if " the prisoners knew that the liquors were likely to cause death ". The difference between malice and negligence is that in the first case the consequences were or must be presumed to have been contemplated, and therefore intended; in the second case, the consequences were presumably not contemplated, and the *mens rea* consists in the indifference to the probability of harm.

Manslaughter by negligence may occur in many classes of cases, of which the following are important instances—

(i) Whenever a person holds himself out as and acts in the capacity of a medical man or in any similar capacity which requires special *skill* or *care*, he is bound to have competent *skill* and to exercise proper *care*, and if his patient dies, as a result of his criminal negligence arising from gross lack of skill or lack of care, he is guilty of manslaughter (*k*).

So also when a person is in charge of any ship, train, engine or machinery, it is manslaughter if death results from any criminal misconduct on his part due to incompetence or negligence (*l*).

(*f*) *R.* v. *Bateman*, 19 Cr. App. R. 8; *Andrews* v. *Director of Public Prosecutions*, [1937] A. C., at p. 583; 106 L. J. K. B. 376.
(*g*) [1937] A. C., at p. 583.
(*h*) *R.* v. *Walters*, 1 C. & M. 164.
(*i*) 1 C. & M. 236.
(*k*) *R.* v. *Williamson*, 3 C. & P. 365; *R.* v. *Bateman* (*ubi supra*).
(*l*) *R.* v. *Haines*, 2 C. & K. 368; *R.* v. *Lowe*, 3 C. & K. 123; *R.* v. *Elliott*, 16 Cox C. C. 710.

(ii) Whenever any person does an act which without ordinary precautions is or may be dangerous to human life he is bound to employ reasonable precautions in doing it (*m*). Accordingly, if death results from his criminal misconduct in failing to take precautions he is guilty of manslaughter. Thus—

(α) A, B, and C, without taking any precautions to avoid danger, practise rifle shooting in a field near roads and houses with a rifle which carries a mile. A shot fired by one of them kills a boy in a garden 400 yards distant—A, B, and C may all be found guilty of manslaughter (*n*).

(β) A turns out a horse which he knows to be vicious on a common across which are much frequented public footpaths. The horse kicks and kills a child on or near one of these paths. A may be found guilty of manslaughter (*o*).

(γ) A, a near-sighted man, drives a horse and cart at night at an excessive speed, without having proper control of his horse, and thereby causes the death of B, a foot-passenger. A may be found guilty of manslaughter (*p*). And he may be found guilty although he may have repeatedly called to B to get out of the way if, from the rapidity of the driving or any other cause, *e.g.*, intoxication, deafness, or any physical infirmity, B could not get out of the way in time (*q*). Nor is it any defence that B was negligent and that his negligence *contributed* to his death (*r*).

By **s. 34** of the **Road Traffic Act, 1934,** a person who is indicted for manslaughter in connection with the driving of a *motor car* may be found guilty of reckless or dangerous driving which, under **s. 11** of the **Road Traffic Act, 1930,** is an offence punishable by fine and imprisonment. In *Andrews* v. *Director of Public Prosecutions* (*s*) the appellant was convicted of manslaughter by the dangerous driving of a motor car. At the trial the Judge told the jury (1) that, if they thought that the appellant drove recklessly or dangerously but that the death of the person killed was not due to this, they might convict him of dangerous driving, but that (2) if they thought that the death was due

(*m*) *R.* v. *Salmon*, 6 Q. B. D., at p. 83.
(*n*) *R.* v. *Salmon*, 6 Q. B. D. 79. See also *R.* v. *Roberts*, 28 Cr. App. R. 102 (manslaughter through the dangerous handling of a rifle).
(*o*) *R.* v. *Dant*, L. & C. 567.
(*p*) *R.* v. *Grout*, 6 C. & P. 269.
(*q*) *R.* v. *Walker*, 1 C. & P. 320.
(*r*) *R.* v. *Swindall*, 2 C. & K. 230; *R.* v. *Longbottom*, 3 Cox 439.
(*s*) [1937] A. C. 576; 106 L. J. K. B. 370.

(1) An intention to do an unlawful act, or unlawfully to omit to act[14], being grossly negligent whether any personal injury, however slight, be caused.

(2) An intention to do any act, or to omit to act where there is a duty to do so, being grossly negligent whether death (or at least grievous bodily harm) be caused.

(3) An intention to do any act, being reckless whether any personal injury be caused.

(4) An intention to escape from lawful arrest.

Categories (1) and (2) are firmly established; categories (3) and (4) are, as will appear, based on rather slender authority.

1 Intention to do an unlawful act, being grossly negligent as to personal injury

(1) *Constructive Manslaughter.*—Coke laid it down that an intention to commit any unlawful act was a sufficient *mens rea* for murder[15] so that if D shot at P's hen with intent to kill it and accidentally killed P, this was murder, "for the act was unlawful". This savage doctrine was criticised by HOLT, C.J.,[16] and by the time Foster wrote his *Crown Law*,[17] it appears to have been modified by the proviso that the unlawful act must be a felony. Thus, if D shot at the hen intending to steal it, the killing of P was murder;

> "but if it was done wantonly and without that intention it will be barely manslaughter."

This was the doctrine of constructive murder which survived until the Homicide Act 1957. From Foster's time there existed a twin doctrine of constructive manslaughter; that any death caused while in the course of committing an unlawful act, other than a felony, was manslaughter. An act was unlawful for this purpose even if it was only a tort, so that the only *mens rea* which needed to be proved was an intention to commit the tort.

Thus, in *Fenton*[18] D threw stones down a mine and broke some scaffolding with the result that a corf being lowered into the mine overturned and P was killed. TINDAL, C.J., told the jury that D's act was a trespass and the only question was whether it caused P's death.

Even in the nineteenth century, this doctrine was not accepted without reservation by the judges. A notable refusal to follow it is the direction of FIELD, J., in *Franklin*.[19] D, while walking on Brighton pier

> "took up a good sized box from the refreshment stall on the pier and threw it into the sea."

The box struck P and killed him. The prosecution urged that, quite apart from the question of negligence, it was sufficient to show that the death was caused by an unlawful act—the tort against the refreshment stallkeeper; and relied on

[14] But in *Lowe* (below, p. 247) it was held, distinguishing unlawful acts, that an unlawful omission causing death was not manslaughter.
[15] 3 Inst. 56. See Turner, M.A.C.L., 195 at 212 *et seq.* for a discussion of the historical development.
[16] *Keat* (1697), Comb, 406 at p. 409.
[17] (1762)—see p. 258.
[18] (1830), 1 Lew 179.
[19] (1883), 15 Cox C.C. 163.

Fenton. FIELD, J. (with whom MATHEW, J., agreed) held that the case must go to the jury "on the broad ground of negligence". Expressing his abhorrence of constructive crime, the judge asserted that

> "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."[20]

One *nisi prius* ruling, however, could not undermine so well-established a doctrine; and in 1899 it was held in *Senior*[1] that, if D was guilty of the statutory offence[2] of wilfully neglecting a child in a manner likely to cause injury to its health and the child died because of the wilful neglect, that was manslaughter. It was no answer that D was an affectionate parent and acted as he did from religious motives.[3] On essentially similar facts, in *Lowe*,[4] the Court of Appeal declined to follow *Senior*, holding it inconsistent with *Andrews*[5] which applies to "every case of manslaughter by neglect." *Andrews* was held to require "recklessness", whereas D was guilty of "wilful neglect" because he deliberately omitted to call a doctor, even if he neither foresaw, nor even ought to have foreseen, the possible consequences. The decision does not affect the law as to killing by an unlawful act, as distinct from an omission: and it appears to have been decided as if it fell within the following paragraph, "neglect" being wrongly equated with "negligence."

(2) *Acts which are "unlawful" only because negligently performed.*—It follows from the well-established rule[6] that negligence sufficient to found civil liability is not necessarily enough for criminal guilt, that death caused in the course of committing the tort of negligence is not necessarily manslaughter. But the limitation goes further than this: there are degrees of negligence which are *criminally* punishable which are yet not sufficient to found a charge of manslaughter. If, then, the unlawfulness, whether civil or criminal, of the act arises solely from the negligent manner in which it is performed, death caused by the act will not necessarily be manslaughter. This follows from the decision of the House of Lords in *Andrews* v. *Director of Public Prosecutions*.[6]

In that case DU PARCQ, J., told the jury that if D killed P in the course of committing an offence against s. 11 of the Road Traffic Act 1930 he was guilty of manslaughter. Lord ATKIN (who clearly regarded dangerous driving as a crime of negligence)[7] said that, if the summing up had rested there, there would have been misdirection:

> "There can be no doubt that this section covers driving with such a high degree of negligence as that, if death were caused, the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public, and cause death, and yet not be guilty of manslaughter."[8]

This case has been accepted in some quarters[9] as destroying the doctrine of constructive manslaughter. It is, unfortunately, by no means certain that it

[20] *Ibid.*, at p. 165.
[1] [1899] 1 Q.B. 823. (C.C.R.)
[2] See now Children and Young Persons Act 1933, s. 1 (1).
[3] The court added *obiter* that they thought this a case in which "an indictment for gross and culpable neglect could be supported at common law."
[4] [1973] 1 All E.R. 805.
[5] Below, pp. 252–256.
[6] [1937] A.C. 576; [1937] 2 All E.R. 552.
[7] See above, p. 74; below, p. 371.
[8] [1937] A.C. at p. 584; [1937] 2 All E.R. at pp. 556, 557.
[9] Stephen's *Digest* at 222; Russell at 591 *et seq.*

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goes so far. Lord ATKIN expressly distinguished[10] between acts which are unlawful because of the negligent manner in which they are performed and acts which are unlawful for some other reason:

> "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."

His Lordship's next sentence implies that killing in the course of unlawful acts generally *is* manslaughter:

> "If it were otherwise a man who killed another while driving without due care and attention would *ex necessitate* commit manslaughter."

This passage has been severely criticised[11] and it is certainly unhappily phrased. ". . . doing a lawful act with a degree of carelessness which the legislature makes criminal" is a contradiction in terms, for the act so done is plainly not a lawful act. But the distinction evidently intended, *viz.*, between acts which are unlawful because of negligent performance and acts which are unlawful for some other reason, is at least intelligible and, in view of the established distinction between civil and criminal negligence, a necessary limitation.

(3) *Modern Developments.*—The doctrine has been further qualified by *Church*[12] where the Court of Criminal Appeal held that it is wrong to direct a jury that to cause death by any unlawful act in relation to a human being is necessarily manslaughter.

> "For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."[13]

Whether an act is unlawful or not depends on the intention with which it is done.[14] So there is a subjective element. But the question whether "all sober and reasonable people"—not the accused—would recognise, is objective. It was argued in *Lipman*[15] that the effect of section 8 of the Criminal Justice Act 1967 was to turn this second, objective, element into a subjective one so that, henceforth, it must be proved that the *accused* foresaw the risk of some harm. This argument was rejected:

> ". . . the flaw lies in the assumption that *Church* introduced a new element of intent or foreseeability into this type of manslaughter . . . The development relates to the type of act from which a charge of manslaughter may result, not in the intention (real or assumed) of the prisoner . . ."[16]

This is in accordance with the view of section 8 expounded above[17] (though inconsistent with the Court's application of the section to murder[18]). The

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[10] [1937] A.C. at p. 585; [1937] 2 All E.R. at p. 557.
[11] Turner, M.A.C.L. at 238.
[12] [1966] 1 Q.B. 59; [1965] 2 All E.R. 72. See also *Creamer*, [1966] 1 Q.B. 72 at p. 82; [1965] 3 All E.R. 257 at p. 262: "A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended."
[13] At p. 70
[14] See *Lamb*, [1967] 2 Q.B. 981; [1967] 2 All E.R. 1282 below, p. 251.
[15] [1970] 1 Q.B. 152, above, p. 37.
[16] At p. 159.
[17] P. 58.
[18] *Wallett*, [1968] 2 Q.B. 367; [1968] 2 All E.R. 296; above, p. 229.

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imprisonment, it seems unimportant as a practical matter whether it amounts to the further offence of manslaughter. Perhaps, however, some significance is attached to fixing D with criminal responsibility for the death. At all events, prosecutions for manslaughter in such cases have been brought in the past and may continue in the future. There is no doubt that D intends to do an unlawful act where the facts show that he is guilty of an offence under s. 58 of the Offences against the Person Act. The question now is whether any reasonable man would have foreseen the risk of some harm resulting. Clearly there is if the operation was conducted negligently; but suppose that D took all proper care and performed the operation with skill. Could he argue that he reasonably expected benefit and not harm to result to the woman from the operation? Probably not. The physical act done to the woman, being forbidden by law and being an act to which she cannot lawfully consent, seems necessarily to amount to "harm" for legal purposes. Thus it seems probable that death caused in the course of attempting to procure an illegal abortion will continue necessarily to amount to manslaughter.

2 Killing by Gross Negligence

The question here is whether an act causing death which is not otherwise unlawful can amount to manslaughter because of the grossly negligent manner in which it was committed. Whether gross negligence is, and whether it ought to be, a ground of liability for manslaughter, are both matters on which opinions differ. Whether negligence *should* be a ground of liability has been discussed above.[18] Whether it *does* ground liability for manslaughter requires consideration here. It is well settled that the ordinary negligence which will suffice for civil liability is not enough and the argument of some writers that degrees of negligence do not exist, if accepted, would render further discussion pointless. This argument, however, as has been seen,[19] depends on the notion that negligence is a state of mind; whereas, in law, it would seem that negligence is *conduct* which fails to measure up to a required standard; and it is quite clear that there are degrees of such failure.

(i) *Is negligence a ground of liability?*—To answer this question the cases relied upon[20] as authority for the proposition that negligence does not ground liability for manslaughter must be examined.

A much-cited case is that of *Finney*.[21] D, an attendant at a lunatic asylum, told P, a lunatic whom he had bathed, to get out of the bath. P was able to understand what was said to him, but he did not, on this occasion, do as he was told. D's attention was distracted by a question from the attendant at the next bath; he put his hand on the hot tap in mistake for the cold one and projected a stream of scalding water over P and killed him. LUSH, J., told the jury:[22]

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[18] p. 61.
[19] Above, p. 61.
[20] By Turner in M.A.C.L. 216; and see Russell, Vol. 1, 43 *et seq.*, 592 *et seq.*, Kenny, *Outlines*, 183; Hall, *General Principles*, 122 *et seq.*
[21] (1874), 12 Cox C.C. 625.
[22] *Ibid.*, at p. 626.

charge, rejected the test of "reckless disregard for life" as appropriate to murder:

> ". . . a more satisfactory way of indicating to a jury the high degree of negligence necessary . . . is to relate it to the risk or likelihood of substantial personal injury resulting from it . . .
>
> If . . . any reasonable driver, endowed with ordinary road sense and in full possession of his faculties, would realise, if he thought at all, that by driving in the manner which occasioned the fatality he was, without lawful excuse, incurring in a high degree, the risk of causing substantial personal injury to others, the crime of manslaughter appears to be clearly established."

In *Lamb*,[9] which is discussed above, the Court of Appeal said, obiter,

> ". . . it would, of course, have been fully open to a jury, if properly directed, to find the accused guilty, because they considered his view as to there being no danger was formed in a criminally negligent way."

Thus, D might have been guilty although he had no foresight of any injury whatsoever and though he had no intention of doing anything unlawful.

(ii) *The definition of "gross negligence"*.—Matters of degree always present difficulties of definition, and "gross negligence" is no exception. The best-known attempt is that of Lord HEWART in *Bateman*:[10]

> "In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete'. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment."

This passage has been criticised[11] on the grounds that (i) it is circular in that it tells the jury to convict if they think that D is guilty of a crime and (ii) it leaves a question of law to the jury. These criticisms are well founded; yet, if we are to have a crime based on a certain degree of negligence, no other test is possible—the jury must say whether the negligence is bad enough to attract criminal liability. The "*Bateman* test" has the virtue that it draws attention to the fact that there exists civil liability for less degrees of negligence and that criminal liability should be reserved for gross aberrations.

Bateman received general approval from Lord ATKIN in *Andrews*, though he noted its circular nature[12] and it seems to be accepted as an authoritative statement.

(iii) *What consequence must be foreseeable?*—Negligence does not exist in the abstract. It must be negligence as to some particular consequence; that is, it must appear that a reasonable man in the position of D would have foreseen a particular kind of consequence as likely to occur from the conduct in question. Williams suggests that the negligence required for manslaughter is negligence as to death and not as an injury short of death. If negligence as to any degree of

[9] [1967] 2 Q.B. 981 at p. 980; [1967] 2 All E.R. 1282 at p. 1285, above, p. 251.
[10] (1925), 19 Cr. App. Rep. 8 at p. 11.
[11] By Turner, M.A.C.L. 211; Russell, 592–594; Turner, M.A.C.L. 210, 211.
[12] [1937] A.C. 583; [1937] 2 All E.R. at p. 556; and see the Court of Criminal Appeal, [1937] W.N. 69.

injury would suffice, then this head of manslaughter would swallow the head first considered, and it would be irrelevant whether the act was unlawful (apart from negligence) or not. The very fact that the "unlawful act" doctrine exists suggests that negligence as to some greater degree of harm is necessary to establish liability for manslaughter by gross negligence. Williams's example is:

> "D by gross negligence bumps into P; P falls against Q who is secretly carrying explosives, and P is blown up. This is not manslaughter in D for his negligence was only as to the bumping."[13]

D has done an unlawful act to P—a negligent battery is a tort—but he did not *intend* to do an unlawful act so as to attract the operation of the unlawful act doctrine. While it seems to be clear that an intentional slight injury to the person entails liability for manslaughter[14] if death results, and a reckless injury *may* do so,[15] it would surely be going too far to extend this principle to negligent injuries. A negligent injury should be enough only where death (or, at the very least, grievous bodily harm) was foreseeable.[16]

3 Intention to do any Act, being Reckless whether any Personal Injury be Caused

According to SALMON, L.J. in *Gray* v. *Barr*:—[17]

> "To do a lawful act which injures another with a reckless disregard whether or not it injures another is also manslaughter."

Ascending a narrow staircase carrying a loaded gun with the safety catch off, and using it to threaten, as D was, looks like an assault; so this may have been *obiter*; but possibly the threat was not sufficiently immediate. The act was obviously dangerous and, as SALMON, L.J. said, it afforded strong evidence of recklessness. Clearly he had subjective recklessness and not gross negligence in mind.

Authority for this variety of *mens rea* is not very extensive. It is, of course, supported by the general principle that the criminal law equates intention and recklessness and by the recent case of *Pike*.[18] There D administered carbon tetrachloride (C.T.C.) to his mistress for the purpose of increasing sexual satisfaction. He had done this to women over a number of years with no apparent ill-effects except temporary loss of consciousness but, on this occasion, it caused P's death. HILBERY, J., directed that he was guilty if he knew that inhaling C.T.C. would expose P to the danger of physical harm and yet recklessly caused or allowed her to inhale it and the Court of Criminal Appeal held that this was a

[13] C.L.G.P. at 111. Williams points out that it is no longer held in the law of tort that negligence as to one consequence makes the defendant liable as to a completely different consequence: *The Wagon Mound*, [1961] A.C. 388; [1961] 1 All E.R. 404. But it is now clear that it is still the law that the negligent tortfeasor takes the victim of personal injuries as he finds him and negligence as to some slight injury may entail liability for death if that is caused: *Smith* v. *Leech Brain & Co. Ltd.*, [1962] 2 Q.B. 405; [1961] 3 All E.R. 1159; *Warren* v. *Scruttons, Ltd.*, [1962] 1 Lloyd's Rep. 497. Yet it does not follow that, because this may be the right rule in tort, it should also be followed in crime.
[14] Above, p. 250.
[15] *infra*.
[16] It is not a crime to cause *non-fatal* injuries by gross negligence. It seems illogical to make liability depend on the fact of death and not on the nature of the negligence. But this lack of logic runs through the whole of manslaughter.
[17] [1971] 2 All E.R. at p. 961; above, pp. 36, 249.
[18] [1961] Crim. L.R. 114; affirmed, [1961] Crim. L.R. 547.