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ELIZABETH II c. 19

Law Reform (Year and a Day Rule) Act 1996

1996 CHAPTER 19

An Act to abolish the "year and a day rule" and, in consequence of its abolition, to impose a restriction on the institution in certain circumstances of proceedings for a fatal offence. [17th June 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Abolition of "year and a day rule".

1. The rule known as the "year and a day rule" (that is, the rule that, for the purposes of offences involving death and of suicide, an act or omission is conclusively presumed not to have caused a person's death if more than a year and a day elapsed before he died) is abolished for all purposes.

Restriction on institution of proceedings for a fatal offence.

2.—(1) Proceedings to which this section applies may only be instituted by or with the consent of the Attorney General.

(2) This section applies to proceedings against a person for a fatal offence if—

(a) the injury alleged to have caused the death was sustained more than three years before the death occurred, or

(b) the person has previously been convicted of an offence committed in circumstances alleged to be connected with the death.

(3) In subsection (2) "fatal offence" means—

(a) murder, manslaughter, infanticide or any other offence of which one of the elements is causing a person's death, or

(b) the offence of aiding, abetting, counselling or procuring a person's suicide.

FIGURE 3.1 *The Law Reform (Year and a Day Rule) Act 1996. Reproduced with the permission of the Controller of Her Majesty's Stationery Office.*

3.3.2 THE CURRENT DEFINITION OF MURDER

After the afore mentioned modifications are taken into account, the current definition of murder can be said to be:

> an unlawful killing of a human being under the Queen's peace with malice aforethought

The revised definition of murder now needs to be examined in more detail, particularly with regard to how the courts have interpreted the words 'unlawful', 'human being' and 'malice aforethought'.

An unlawful killing

It has already been noted that, for both murder or manslaughter to be established, the killing must be unlawful, and we have seen that it is

(4) No provision that proceedings may be instituted only by or with the consent of the Director of Public Prosecutions shall apply to proceedings to which this section applies.

(5) In the application of this section to Northern Ireland—

(a) the reference in subsection (1) to the Attorney General is to the Attorney General for Northern Ireland, and

(b) the reference in subsection (4) to the Director of Public Prosecutions is to the Director of Public Prosecutions for Northern Ireland.

Short title, commencement and extent.

3.—(1) This Act may be cited as the Law Reform (Year and a Day Rule) Act 1996.

(2) Section 1 does not affect the continued application of the rule referred to in that section to a case where the act or omission (or the last of the acts or omissions) which caused the death occurred before the day on which this Act is passed.

(3) Section 2 does not come into force until the end of the period of two months beginning with the day on which this Act is passed; but that section applies to the institution of proceedings after the end of that period in any case where the death occurred during that period (as well as in any case where the death occurred after the end of that period).

(4) This Act extends to England and Wales and Northern Ireland.

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FIGURE 3.1 *continued*

possible, in rare circumstances, for a killing to be given the approval of the State and therefore be rendered lawful. If the death penalty were to be returned, a defendant convicted of murder could be lawfully killed by the process agreed upon. In other jurisdictions, various methods have been adopted, including electrocution, gassing, shooting, hanging, administering a lethal injection and even beheading.

A soldier or policeman who kills in the lawful exercise of his duty will obviously not be guilty of murder. Should he exceed the powers given to him, however, he could face criminal proceedings, as is shown in the cases of *Clegg 1995* and other soldiers in Northern Ireland who were all convicted of murder. This subject is discussed more fully in Chapter 10, where the defences of self defence and prevention of crime are explored.

For the present, it should be noted that if unreasonable force is used, these defences would fail and, if a death has occurred, a murder or manslaughter prosecution could follow.

Doctors, too, have to be careful to operate within the current state of the law and are not normally permitted to accelerate the death of a patient without the judge's permission. The doctor may wish to end the suffering of a terminally ill patient but, if he intends to kill the patient, his acts will come within the definition of murder and he could well face life imprisonment. He is accelerating the death of a human being and this is not allowed.

In *Adams 1957*, this fact was made clear to the jury by Devlin J who stated that:

> If life were cut short by weeks or months it was just as much murder as if it were cut short by years.

The judges have relaxed the strictness of this approach in very limited circumstances. One example is where the acceleration of the time of the death is minimal. Under what is called the '*de minimus* rule', a doctor would not face criminal proceedings if he gave an injection towards the very end of a patient's life, to ease his suffering, even if it was known that this might well accelerate the death by a very small degree. In the case of *Adams*, mentioned above, Devlin J did go on to qualify the statement that he made. He added:

> But that does not mean that a doctor aiding the sick or dying has to calculate in minutes or hours, or perhaps in days or weeks, the effect on a patient's life of the medicines he administers. If the first purpose of medicine – the restoration of health – can no longer be achieved, there is still much for the doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering even if measures he takes may incidentally shorten life.

A medical practitioner may also, in very limited circumstances, cease to provide treatment or food even though in other cases liability for gross negligence could arise, as shown in Chapter 2.

In the landmark case of *Airedale National Health Trust* v *Bland 1993*, a significant exception was made. The House of Lords decided that, provided that both doctors and parents or other close relatives agreed that it was futile to continue to treat and artificially feed a patient who was in a persistent vegetative state, the court has the power to withhold further treatment. The actual case concerned 17-year-old Tony Bland, who was crushed in the terrible Hillsborough disaster and reduced to a persistent vegetative state. He was put onto a life support system but after a period of three years there was no sign that he would recover. The court gave permission to withhold further treatment but said that three conditions had to be satisfied before treatment and feeding could be withheld.

First, the parties involved had to come to court to obtain a declaration. Secondly, before this could be granted, a full investigation into the case had to be undertaken, and an opportunity given to the Official Solicitor to obtain independent medical opinions and all the material necessary for the court hearing. Lastly, the patient had to be in a persistent vegetative state with no hope of recovery.

The House of Lords decided that, if these steps were followed, the doctors would not then be liable for murder, even though the death was intended. Such action, or rather inaction, has thus been given the seal of approval by the courts.

Frenchay Healthcare NHS Trust v S 1994

In *Frenchay Healthcare NHS Trust* v *S 1994*, the 24-year old patient had taken an overdose in 1991, causing acute brain damage. Despite attempts to revive him, he remained in a persistent vegetative state and had to be fed through a nasogastric tube. This failed to be effective, so, in June 1993, an operation was performed, under which a gastronomy tube was fitted into his stomach.

In January 1994, this tube was no longer in its correct position, probably because of the patient's own movements, and a further operation would have been required to insert another tube. Instead, the consultant recommended that no further action should be taken, allowing the patient to die naturally. A declaration permitting this was obtained but the Official Solicitor, acting for the patient, stated that a full investigation had not been carried out. He also claimed that the evidence about the patient's medical condition was not as conclusive as that in the case of Bland.

The Court of Appeal allowed the declaration to stand. The court decided that there were bound to be some cases where a full investigation was simply not possible, (although this was not the situation here). The court also stated

that it would be very reluctant to doubt the reliability and good faith of the doctor without a very good reason.

It is important to realise, however, that cases such as this, where a person can be killed in a lawful way, are very limited. Euthanasia and other related deaths are not excusable in English law.

Of a human being

In the old definition, this was said to be 'any reasonable creature in *rerum natura*'. This will usually be obvious but certain points need to be addressed.

1 **The victim must be human.** A person will not commit murder or manslaughter if he kills an animal intentionally, although he may well be liable for other offences. The term 'human' would, however, cover tragic cases where the new born baby is hardly recognisable as a human being, as can occur after the mother's exposure to radiation or drug abuse. The baby might be anercephalic, i.e. without a head or brain, although a brain stem may exist. Some would argue strongly that it should not be regarded as murder if such a child were allowed to die. Current legal and medical opinion, however, appears to favour the view that any offspring of a human mother should be protected by the law, as was indicated in *Rance* v *Mid Downs Health Authority 1991.*

2 **The courts may have to decide when life actually begins.** The killing of a child still in the womb, by either the mother herself or by another person is not homicide, although the guilty party could be convicted of abortion or child destruction, (see Chapter 5). The attacker could be liable for manslaughter and perhaps even murder if the child is born alive and then dies of the injuries, an issue that is discussed below.

For the offences of murder, manslaughter or infanticide to occur, the courts have decided that the foetus must have been expelled from the mother's womb and have an independent existence, a view affirmed by the Criminal Law Revision Committee. In *Rance v Mid-Downs Health Authority* it was stated that a baby is capable of being born alive if it can breath through its own lungs.

What appears to have been settled is that a child who is injured in the womb, then born alive and who later dies of the injuries inflicted before the birth occurred does come under the category of a human being. This would make the perpetrator of the injury liable for homicide in the form of murder or manslaughter, depending on whether or not he had the intention to injure the actual foetus. This view was stated in the early case of *West 1848* and appears to have been supported by some of the *dicta* of the House of Lords in *Attorney General's Reference (No. 3 of 1994) (1996).*

The defendant had stabbed his girl friend in the stomach, despite the fact that he knew of her pregnancy. The unborn child was affected because the knife had penetrated the uterus and entered the abdomen of the foetus, although this fact was not discovered until later.

The woman made a good recovery but later gave birth prematurely. The baby was born alive but died four months later. The accused was found guilty of grievous bodily harm in relation to the mother but the trial judge decided that, as a matter of law, he could not be convicted of the murder or manslaughter of the baby.

The Attorney General required the opinion of the appeal courts as to whether this statement was correct. The matter eventually reached the House of Lords. Their Lordships decided that a murder charge could not be sustained if the defendant had not intended to kill or seriously injure the foetus itself. In this case, therefore, because the intention to injure the unborn child had not been proved, it was decided that the defendant did not have the necessary *mens rea* for the murder of the baby.

Despite this conclusion, Lord Hope, in his judgement expressed the view that the fact that a child is not yet born did not prevent the actus reus for both murder and manslaughter being established.

KEY FACTS

- Murder is the most serious form of unlawful homicide. Less serious forms of homicide are voluntary and involuntary manslaughter and infanticide, which are dealt with in subsequent chapters
- The current definition of murder is the unlawful killing of a human being with malice aforethought, i.e. with intent to cause death, (express malice) or grievous bodily harm, (implied malice) (*Cunningham 1982*)
- Constructive malice has been abolished by s.1 Homicide Act 1957
- Certain killings can be lawful as, for example those sanctioned by the state or by the judges, (*Airedale NHS Trust* v *Bland 1993*), or where a full defence is possible. In other killings the charge may be reduced to manslaughter, (see Chapter 4).
- A victim is considered to be a human being when he has an existence independent of his mother. It is not certain whether he must have drawn breath, although this would be the medical view
- It appears that there could be an injury to a human being, even if this injury occurred before birth, if the baby was born alive but subsequently died (*AG's Reference [No. 3 of 1994] 1996*). It is not conclusively decided that liability for murder would arise if the accused intended to harm the foetus. It is, however, clear that the offender could be charged with involuntary manslaughter, if there had been an unlawful act against the mother, a live birth and then the subsequent death of the baby
- A victim is probably considered to be dead when he is brain dead
- The 'year and a day rule' has been abolished, Law Reform (Year and a Day Rule) Act 1996

FIGURE 3.2 *Key facts chart on murder*

against the person, in the form of murder or manslaughter.

3.5.1 ESTABLISHING THE CHAIN OF CAUSATION

There are no rules laid down by statute concerning the problems of causation; instead, various principles have been established by case law, as problem areas have come before the courts.

In most cases, it is not difficult to discover whether the defendant's conduct caused the death in question although the jury, of course, has to be convinced of this beyond reasonable doubt. In some trials, however, the defendant will be arguing that someone else caused the death, or at least contributed to it, or that the death was the victim's own fault in some way and these matters need to be explored. When ascertaining whether the defendant is the person on whom to fix liability, the courts will look at two issues:

1 Did the conduct of the accused cause the resulting harm and, if so
2 Was the defendant also liable in law?

It will be the jury's task to look at the facts of the case but when deciding on the second question, the jurors will have to apply the legal principles explained to them by the judge. Both these issues will be examined further in the following paragraphs.

3.5.2 THE FACTUAL CAUSE OF DEATH

It should first be noted that the defendant would only be criminally liable if his conduct made a significant contribution to the death.

This was not established in the case of *White 1910.*

The accused had intended to murder his mother; he had poison in a glass ready for her but she suddenly died, instead, of heart failure. The accused was liable for attempted murder but it is clear that he had not caused her death, however much he had desired it to happen. He could not, therefore, be found guilty of murder.

The 'but for' test

When deciding on the factual cause of death, the courts use the 'but for' test, i.e. but for the act of the defendant, the death would not have occurred. It can be seen in the above case that this test was not satisfied, as the mother would have died anyway; the defendant's act had made no difference to the outcome.

A more difficult case for the jury was the early case of *Dalloway 1847.* A driver of a cart was not using his reins as he proceeded along a road. A three-year-old child then ran into the path of the cart and was killed.

It could have been argued that, but for the driver travelling along this road, the child's death would not have happened. The courts required the passing of a more stringent test, i.e. had the prosecution established that, but for the driver's negligence in failing to use his reins, the death would not have happened. As the answer was 'no', the charge could not be sustained.

3.5.3 THE LEGAL CAUSE OF DEATH

As mentioned earlier, the judge's task is to explain the legal principles to the jurors and they must then decide, after applying these principles to the facts with which they are presented, whether the prosecution has established the guilt of the accused beyond reasonable doubt.

After satisfying the test for factual causation, therefore, it still needs to be shown whether the defendant's act was a more than minimal cause of the death and that no intervening act had broken the chain of causation.

1 **The defendant's act must be more than a minimal cause of the death**

This expression may cause surprise. Many would argue that the defendant should only be liable if he makes a major contribution to the victim's death and, indeed, in earlier cases it was stated that the act of the accused had to be substantial. Cases like *Benge*, discussed below, support this.

The current view, however, is that liability might arise where the defendant has made more than a minute or negligible contribution to the death.

This point was confirmed in *Cato 1976*, a view which was later supported in the case of *Malcherek*, discussed below. It has been suggested that the word 'significant' should replace the word 'substantial', although in *Kinsey 1971*, it was not considered to be a misdirection by the trial judge when he stated that the contribution must merely be something more than 'a slight or trifling link'.

An example of a minimal contribution would be where two mountaineers were roped together and one fell over a cliff. If the other were to cut the rope to save himself from a similar fate, he would certainly be accelerating the death of the other mountaineer but this would only be by a fractional period of time. It would not be substantial enough to make him criminally liable for the other's death.

negligence beforehand

Similarly, a doctor administering painkilling drugs at the end of a patient's life might well accelerate the patient's death to a small degree but would also be protected.

The contribution must therefore be significant enough to contribute to the victim's death. In addition, nothing later must have occurred to break the chain of causation. This leads us on to the next point.

2 A *novus actus interveniens* must not have arisen

This means that no intervening act must have arisen to break the chain of causation leading from the defendant's act to the actual death. The defendant would be able to

Could not be attributed to poor care in Nursing Home.

given intravenously and broncho-pneumonia had set in. On the other hand, at the time of his death, the stab wounds had nearly healed.

The conviction, therefore, was quashed, Hallett J stated:

> Not only one feature but two separate and independent features of treatment were, in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death ...

The court did, however, take pains to point out that in cases where normal treatment was given, the original injury would be considered to have caused the death.

The decision in *Jordan* caused concern among members of the medical profession who felt that wrongdoers might escape liability if it could be shown that any treatment given to try to save the victim was abnormal in some way.

The doctors need not have worried. The case of Jordan was later distinguished in *Smith 1959*, although, in this case too, the treatment given left a lot to be desired.

The victim had been stabbed twice in a barrack room fight between soldiers of different regiments. While being carried to the medical reception centre, the injured man was dropped twice. When he reached his destination, the doctor on duty failed to realise the seriousness of his injuries and administered treatment which was said at the trial to be 'thoroughly bad and might well have affected his chances of recovery'. An hour later, the victim died.

The defendant was still found guilty of murder and this was upheld by the Courts-Martial Appeal Court. It was stated that provided that the original wound was still an operating and substantial cause at the time of the death, the defendant would still be liable for the death even though some other cause of death was also operating. Lord Parker went on to say:

> Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death did not result from the wound.

In the case of *Malcherek*, mentioned above, the judges of the Court of Appeal believed that the decision in *Smith* was preferable to that in *Jordan*, but decided that there was no need to make such a choice because of the different facts which indicated that *Jordan* had not been wrongly decided.

The matter was raised again in the case of *Cheshire 1991*, where the statements made in *Smith 1959*, appear to have been taken a step further.

The victim had been shot in the stomach and the leg by the accused, during an argument in a fish and chip shop. He was operated upon but later developed breathing difficulties and had to have a tracheotomy tube inserted. He died two months later. It was discovered that his windpipe had narrowed and this had caused the severe breathing difficulties that he was experiencing at the time of his death. It was argued that this was due to the negligence of the hospital when the tracheotomy tube was fitted and that this, therefore, had broken the chain of causation. The trial judge directed the jury that a *novus actus interveniens* would only have occurred if the doctors had acted recklessly and the defendant was found guilty. He appealed against his conviction.

The Court of Appeal criticised the trial judge's reference to recklessness but still upheld the conviction. The court came to this conclusion despite the fact that the immediate cause of the victim's death was due to the possible negligence of the doctors, not from the gunshot wounds inflicted by Cheshire. The court stated that this would

not excuse the defendant from liability unless the negligent treatment:

> ... was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

COMMENT

It has been shown from the many cases on this subject, that an offender is going to find it very difficult to prove that the chain of causation has been broken, even in cases where the intervening act appears to be substantial and the negligence of a third party is of a high degree. Some would argue that this view is to be commended because the victim would not have met his death or other fate if the accused had not put in motion the chain of events leading to the death. Others would argue that, in some instances, particularly those involving gross negligence by medical staff, where it is clearly shown that the original wounds are healing well, it is unjust to hold the original attacker liable for the full extent of the injuries.

KEY FACTS

- There is no legislation on this subject, only case law
- When deciding on the factual cause of death, the courts use the 'but for' test, i.e. but for the defendant's act, the death would not have happened (*Dalloway 1847, White 1910*)
- When deciding upon the legal cause of death two further issues are examined, i.e. did the act of the defendant play a significant part in causing the death of the victim? (the term significant means more than a minimal role), and has any other event occurred to break the chain of causation?
- It has been decided that an event breaking the chain of causation must be something completely unforeseeable
- It is not considered unforeseeable that the police might return the fire of a gunman (*Pagett 1983*), or that the victim might try to escape, (*Pitts 1842, Roberts 1971, Mackie 1973, DPP* v *Daley 1980,* and *Williams 1992*)
- It is also not unforeseeable that others might be involved in the death (*Benge 1849, Towers 1874*), that the victims might already have a pre-existing medical condition (*Hayward 1908*), might refuse treatment (*Holland 1841* and *Blaue 1975*) or that they themselves might aggravate their injuries (*Wall's Case 1802*)
- It is also not unforeseeable that doctors might have to switch off life support machines (*Malcherek and Steel 1981*), or refuse to operate because of the dangers involved (*McKechnie 1992*)
- Lastly, it is not unforeseeable that, on some occasions, the medical treatment might be negligently given or even be thoroughly bad (*Smith 1959, Cheshire 1991*)
- It will only be an accepted as a *novus actus interveniens* if the new act is completely independent and in itself 'so potent in causing death' that the original defendant's acts are insignificant (*Cheshire 1991*). The case of *Jordan 1956* provided an example of this but such cases are rare

FIGURE 3.3 *Key facts chart on causation*

COMMENT

The Court of Appeal obviously felt that it had no choice but to quash the conviction in Dawson because of the misdirection. It is submitted, however, that the ruling is not laying down a more general proposition that a defendant could never be liable in such a situation. It is interesting to speculate on the possible decision of the jury if the correct explanation of the law had been given. It should be remembered that the ruling in *Church* was as follows:

> 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.

It is not inconceivable that a sober and reasonable man might well have decided that waving a pickaxe, plus a gun not known at that time to be a replica, at a victim might subject that person to the risk of harm. It can be seen, however, that the direction in *Church* is strongly phrased, using the words 'inevitably' and 'must'.

KEY FACTS

- Constructive manslaughter occurs where there is an unlawful and dangerous act and, as a result the victim dies; it is also known as unlawful act manslaughter
- The *actus reus* is the death resulting from the unlawful act
- The *mens rea* will be that which is required by the unlawful act
  In the case of assault and battery, an intention to commit the assault or battery will need to be proved or *Cunningham* style recklessness, i.e. subjective recklessness. There is no requirement to prove an intention to cause the death of the victim, nor to prove recklessness that such a death might occur.
- Three elements have to be established for constructive manslaughter, an unlawful act, which is also dangerous, which has brought about the death of the victim
- The unlawful act must be a criminal wrong, not merely a civil one (*Franklin 1883*), and must be clearly established. In *Lamb 1961*, *Ariobeke 1988* and *Scarlett 1993*, it was decided, on appeal, that the alleged assaults had not been proved. In *DPP* v *Newbury and Jones* and *Cato*, however, the unlawfulness of the acts was upheld, perhaps for reasons of public policy
- The unlawful act must have been a substantial cause of the victim's death, although it need not be the only cause. Despite the dicta of the Court of Appeal in *Dalby 1982*, it now appears that the unlawful act need not be directed at the victim nor, indeed, at a human being at all (*Mitchell 1983* and *Goodfellow 1986*)
- A dangerous act is one which carries with it the risk of some harm resulting, although not necessarily serious harm (*Church 1966*)
- Whether the act is dangerous is to be assessed objectively, i.e. by the view of a sober and reasonable person (*Larkin 1943* and *Church 1966*)
- When deciding whether the act is dangerous, these sober and reasonable people will look at the situation encountered by the defendant (*Dawson 1985*), but may not accept his claim that his mistaken belief frees him from liability (*Ball 1989*). They may also expect him to become aware of the vulnerability of his victim (*Watson 1989*)

FIGURE 5.1 *Key facts chart on constructive manslaughter*

burglary. In the event, the defendant's conviction was quashed because it could not be satisfactorily established that the burglary had caused the heart attack or the entry of the police workmen afterwards. The dicta of the Court of Appeal, however, could ensure that liability can be imposed in future.

activity

While waiting on the edge of the platform for a train to take them to college, Bill and Ben started to argue loudly about the merits of two pop groups currently in the charts. Their heated discussion turned into anger and they began to throw punches at each other. Bill's second punch sent Ben reeling. He was pushed against Daisy, who fell in front of the incoming train and was killed.

Advise Bill, who has been charged with the manslaughter of Daisy.

5.3 MANSLAUGHTER BY GROSS NEGLIGENCE

In the preceding paragraphs, we have been looking at defendants who have committed criminal acts that have resulted in a death. There may also be other situations in which it is felt that the defendant should face a manslaughter charge, even though he may not have been involved in any criminal activity. Under this second form of involuntary manslaughter he may be charged because his behaviour has been so grossly negligent that it has brought about the death of another person.

In *Adomako 1994*, Lord Mackay decided that liability for this type of manslaughter will arise where the jury decides that:

> having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.

- The *actus reus* of the offence is the death which has resulted from the negligent act
- The *mens rea* of the offence is the defendant's grossly negligent behaviour

Manslaughter by gross negligence has had a chequered history and, before the above case, it seemed to have virtually disappeared and to have overtaken by reckless manslaughter. The position now appears to have come full circle and there is serious doubt as to whether reckless manslaughter continues to exist. In *Adomako*, it was firmly decided by the House of Lords that the gross negligence test is the correct one to use in all cases where a duty of care has been broken. It may also be the test to use for all cases of manslaughter where there is no unlawful act.

5.3.1 THE DEVELOPMENT OF GROSS NEGLIGENCE MANSLAUGHTER

The leading cases on gross negligence-manslaughter are *Bateman 1925*, *Andrews 1934* and *Adomako 1994*.

In *Bateman 1925*, the accused took away part of a woman's uterus during childbirth and did not remove her to hospital until five days later, where she subsequently died. Bateman's conviction for manslaughter was quashed because it was felt that he had been carrying out normal procedures which were approved of by the medical profession. The procedure itself had been at fault.

The Court of Appeal stated that manslaughter by gross negligence should not be found lightly. It would only arise where:

> 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 punishment.

In *Andrews* v *DPP 1937* the defendant was charged with manslaughter after a pedestrian was killed by his dangerous driving. Andrews had been sent by his employers to help when a corporation bus broke down. On his way to the scene, he had driven over the speed limit, had overtaken a car and, while well over on the other side of the road, had struck a pedestrian. The victim was carried along the road on the bonnet of the defendant's van, then thrown from this and run over. The defendant did not stop. He was later convicted of manslaughter but appealed.

The House of Lords stated that manslaughter caused by bad driving was to be treated in the same way as other cases of homicide caused by the defendant's negligence, and went on to state that a person would only be criminally liable if his behaviour was very bad. Their Lordships laid down the following test:

> Simple lack of care which will constitute civil liability is not enough. For the purposes of the criminal law there are degrees of negligence and a very high degree of negligence is required to be proved.

The appeal had been based on a possible misdirection by the trial judge and their Lordships admitted that some parts of his summing up was open to criticism. On balance, however, they felt that there had been a proper direction about the high degree of negligence that needed to be established for this type of manslaughter and the conviction was upheld.

5.3.2 THE RISE OF RECKLESS MANSLAUGHTER

The development of gross negligence manslaughter came to a halt for a while after the case of *Seymour 1983*. In this case, the House of Lords followed the cases of *Caldwell* and *Lawrence*, mentioned in Chapter 2 and decided that this type of involuntary manslaughter should be redefined as reckless manslaughter.

In *Seymour 1983*, the defendant and his woman friend had quarrelled and her car and his lorry had been involved in a collision. The woman got out of her car and went towards the accused. The latter then drove his lorry at the car, claiming that he only intended to push it away but the woman was crushed between the lorry and her own vehicle. She died later of her injuries and the defendant was found guilty of manslaughter. The House of Lords stated that the ingredients for causing death by reckless driving (now replaced by dangerous driving), and the type of involuntary manslaughter which did not come within the definition of constructive manslaughter, were identical. From this case, and later cases modifying the principle to some extent, it appeared that criminal liability would arise if the defendant's conduct caused an obvious and serious risk of some personal injury and, as a result, someone died.

The Privy Council supported this approach in the case of *Kong Cheuk Kwan 1985*, a case concerning the collision of two hydrofoils near Hong Kong, and denied that a separate category of manslaughter by gross negligence was still appropriate.

By 1993, therefore, it appeared that the concept of gross negligence manslaughter had given way to *Caldwell*-style reckless manslaughter. Enough doubts remained, however, to make it inevitable that the matter would be reopened.

5.3.3 THE RE-EMERGENCE OF GROSS NEGLIGENCE MANSLAUGHTER

This occurred in the case of *Prentice & Others 1994*, when the Court of Appeal resurrected manslaughter by gross negligence for cases where there was a breach of duty of care by the defendant.

In *Prentice & Others*, three separate appeals were heard together by the Court of Appeal to decide on the correct test to be used in involuntary manslaughter cases, other than those of constructive manslaughter. These three appeals concerned the cases of *Prentice and Sullman*, *Holloway* and *Adomako*, and only in the last case was the conviction upheld.

The case of *Prentice and Sullman* concerned two junior hospital doctors. Prentice, the most inexperienced, had wrongly injected a drug directly into the spine of a patient suffering from leukaemia. This very serious error was compounded by the wrong action being taken when the mistake was discovered. This resulted in damage to the patient's brain and spinal cord and ultimately caused his death.

Prentice had been supervised by Sullman and had assumed that the latter was overseeing of the whole procedure. Sullman, on the other hand, believed that he was only supervising the actual injection.

The trial judge had felt bound by the case of *Seymour* and had therefore directed the jury on the lines of *Caldwell*-style recklessness. There was an obvious and serious risk of harm and the patient had died, so the defendants were found guilty.

In the second appeal of *Holloway*, a qualified and experienced electrician had installed a new domestic central heating system and afterwards family members began to get electric shocks. The electrician checked his work and found no faults in the wiring but, when the trouble continued, he made arrangements to replace the heating programmer. Before this new part could be obtained, a member of the family received a fatal electric shock.

It was discovered that some of the wires were 'live' and that the circuit breaker, which should have afforded protection, was ineffective. The electrician was charged with manslaughter and found guilty after the judge, as in *Prentice*, directed the jury on the lines of reckless manslaughter.

In both cases, the Court of Appeal quashed the convictions, stating that the correct test to use in these cases, where a duty of care was owed to the victim, was not that of recklessness but that of gross negligence manslaughter.

In *Adomako 1995*, the last of the three cases, the manslaughter conviction was upheld. The defendant was an anaesthetist in a hospital who had been left in sole charge after the senior anaesthetist was called away. Adomako had failed to notice that a tube leading from the patient to the ventilator had become disconnected. When the alarm sounded, his first thought was that the machine itself was faulty and he therefore took the wrong action. By the time the mistake was discovered, the patient had died.

Rather surprisingly in this case, the jury had been directed on the issue of gross negligence, rather than recklessness, despite the fact that gross negligence manslaughter was currently in decline. The defendant was convicted by a majority of ten to one. Adomako based his appeal on the issue that the jury should have been directed with regard to recklessness.

The Court of Appeal was satisfied that the jury had, in fact, been properly directed and upheld the conviction for manslaughter. A duty of care had been owed (in this case by the anaesthetist to the patient), and this duty had been broken by the high degree of negligence of the defendant.

As stated earlier, the Court of Appeal looked at these three appeals together to decide on the correct test to use in such cases. Lord Taylor, the former Lord Chief Justice, decided that manslaughter by gross negligence should be revived and should be classed as the proper test to use in all cases where a breach of duty had arisen. He decided that only cases of motor manslaughter should be treated differently, where the test of reckless manslaughter (*Caldwell*

KEY FACTS

- This form of manslaughter is to be used in all cases where there is no unlawful act but where a death has arisen because of the high degree of negligence of the defendant (*Adomako 1994*)
- The cases of *Bateman 1925* and *Andrews 1937* on gross negligent manslaughter have been specifically approved by the House of Lords
- Reckless manslaughter, in the form of the detailed direction in *Lawrence 1982*, seems to have disappeared and should no longer be used
- The *actus reus* of gross negligence manslaughter is a death arising from the negligent act of the accused
- The *mens rea* is the gross negligence of the accused
- The jury will decide this, after considering whether, having regard to the risk of death involved, the defendant's conduct was so bad that it should be classed as criminal
- At present, the maximum punishment for this type of involuntary manslaughter is life imprisonment

FIGURE 5.2 *Key facts chart on gross negligence manslaughter*

activity

1 In *Adomako*, Lord Mackay made the following comment: 'I entirely agree with the view that the circumstances to which a charge of involuntary manslaughter may apply are so various that it is unwise to attempt to categorise or detail specimen directions.'

In group discussion or in essay form, discuss whether this is the correct approach for the law to take or whether you feel that it puts too much responsibility onto the jury.

2 Bonnie was the director of a company running weekend adventure courses in Snowdonia. She was left short-staffed after two of her experienced guides had taken up positions elsewhere. After criticising the lack of instruction being given on basic safety procedures. Bonnie then engaged two teenagers on a part-time basis, hoping that they would gain experience 'on the job'.

Thelma and Louise were among those attending a course on a very cold weekend in November. They were sent off to climb Mount Snowdon, in the company of one of the new part-timers. Bonnie had been informed about the likelihood of adverse weather conditions but had ignored them, hoping that the reports were an exaggeration. In fact, the temperature dropped sharply and it started to snow. Thelma, who was only wearing ordinary trainers, slipped and fell down a crevasse. She was roped to Louise but the latter managed to cut the rope just before she, too, would have been pulled over.

Discuss the possible liability of Bonnie and Louise.

5.4 REFORM OF THE LAW ON INVOLUNTARY MANSLAUGHTER

The state of the law on involuntary manslaughter has been widely criticised over the years. Some have argued that constructive manslaughter

is unfair to the accused and should be reformed or abolished together; Professor Smith, for example, declared in the Criminal Law Review in 1986, when discussing the case of *Goodfellow*, that the law in this area was in 'a discreditable state of uncertainty'. Other commentators have disapproved of the constant changes regarding reckless and gross negligence manslaughter.

The Law Commission considered the matter and published a report on the subject (Law Com. No. 237, Involuntary Manslaughter 1996.) It recommended the complete abolition of constructive manslaughter and suggested modifications to the law on gross negligence manslaughter.

In more detail, the Commission suggested the creation of two new offences, that of reckless killing and killing by gross carelessness.

Reckless killing would be committed where the accused is aware of a risk that his conduct will cause death or serious injury and it is considered unreasonable for him to have taken that risk. When considering the latter, all the circumstances known or believed by him to exist will be taken into account.

The maximum sentence for this would be life imprisonment.

The second new offence would be killing by gross carelessness. Unfortunately for the student, the wording is rather complicated. The offence will be committed where a person's careless conduct has caused a death and it would have been obvious to a reasonable person in the defendant's position that this would happen. The defendant will only be liable if he was capable of appreciating such a risk and it is established either that his conduct had fallen far below the standard expected or that he had intended by his conduct to cause injury or was aware of the risk that this might occur.

This offence is not considered so blameworthy as that of reckless killing and this is reflected in a maximum sentence of ten years.

COMMENT

The proposed abolition of unlawful act manslaughter is no surprise and is a logical step forward. In earlier times, an unlawful act causing death would have resulted in a murder charge. This came to be seen as unjust where there was obviously no intention to kill or cause serious injury to the victim. Taken further, it could be argued that, in similar circumstances, a person should not face a manslaughter charge either. Others would argue that those who are guilty of unlawful or grossly negligent acts should incur criminal liability to deter others. It remains to be seen whether the new offences, if ever enacted, will afford this. If the unlawful act is considered a manifestly reckless way to act, the defendant could be charged with the new offence of reckless manslaughter. It should be remembered, however, that a more subjective approach is taken here when establishing possible liability so there are bound to be people who would not be found guilty under reckless killing who would have been liable for constructive manslaughter.

It is also interesting to note that the Law Commission proposes to revive the concept of recklessness with regard to homicide, after its recent curtailment by the House of Lords, although this is similar in form to *Cunningham* recklessness, and subjective in approach, a move which brings the new offence in line with other offences against the person.

With regard to the second offence, the change from the word 'negligence' to that of 'carelessness' shows an intention to move away from civil law concepts of liability which, some have argued, have no place in criminal law. It will also solve the problem of having to establish whether a duty of care exists. Under the new offence, the defendant will be *prima facie* liable if the conduct causing the death falls far below that which is expected and he knows this.