The Contours of Involuntary Manslaughter – A Place for Unlawful Act by Omission

A number of recent developments both in the academic literature and in case law[1] have brought into focus the contours of involuntary manslaughter as its topographical features emerge more clearly from the mist that has from time to time enveloped them during recent decades. In terms of academic commentary, the article by Findlay Stark[2] in the pages of this review has performed the valuable service of demonstrating that we are looking at a picture that might be described as twin peaks, those of unlawful act and gross negligence, rather than a longer ridge including a third protuberance, "reckless manslaughter", which can now be seen to have been merely a trick of the light. Where this article will slightly differ from Stark's analysis however relates primarily to the question of whether there is any sort of gap between unlawful act manslaughter and gross negligence manslaughter into which any significant cases may fall, in particular in relation to omissions.

The lack of any gap for "reckless manslaughter"

There is little point in reiterating the clear analysis in Stark's article demonstrating that reckless manslaughter is not properly to be found in the case law and that in virtually all conceivable cases where manslaughter might be thought to be an appropriate verdict, either gross negligence or unlawful act manslaughter will be available[3]. The one possible exception in Stark's discussion seems to be exemplified by the "School Dinner

[1] Recent case law has primarily concerned gross negligence manslaughter, in particular in elucidating and applying the "truly exceptionally bad" test – see *R (Oliver) v DPP* [2016] EWHC 1771 (Admin), *Sellu* [2017] 1 Cr App R 24 (349) and *Bawa-Garba* [2016] EWCA Crim 1841. See also *Zaman* [2018] 1 Cr App R (S) 26 (177) in relation to proof of breach of duty.
[2] "Reckless manslaughter" [2017] Crim.L.R. 763
[3] See also *Blackstone's Criminal Practice 2018 para B1.36,* cited in support by Stark [2017] Crim. L.R. at n124.

example"[4] where D, responsible for preparing school meals, deliberately omits to intervene where a pupil (V) unknowingly picks up a sandwich containing pine nuts to which D knows V is allergic, D foreseeing the risk of serious injury but not of death, which occurs due to a particularly violent but rare allergic reaction.

A number of observations can be made about this example. As Stark recognises, opinions may differ as to whether this ought to be manslaughter. It is also a somewhat artificial example in that one has to suppose D is aware of a risk of serious injury (but not of death) and the risk of death would not be obvious to the reasonable person in D's shoes[5]. Given the widely publicised unpredictable effects of exposure of children to foods to which they are allergic, one might have thought that the obvious risks of allergic reaction would normally be taken to include not just the perceived risk of serious injury but also an obvious and serious risk of death. If the risk of death is said to be not obvious, and thus distinguishable on the facts from the perceived and obvious risk of serious injury, then this may persuade some that the case is not properly one of manslaughter. Certainly it would not be within gross negligence manslaughter and indeed Stark puts forward the situation as one which, being an omission, is not currently within unlawful act manslaughter either but which nevertheless ought to be caught (somehow) by manslaughter. It thus serves as a possible argument (although admittedly not his principal argument) for reforming the law by legislating for an offence of reckless manslaughter (which would cover the example), notwithstanding that he is clear such an offence cannot be said to exist at the moment. The argument that it ought to be manslaughter is partially based on the fact that there are self-evidently

[4] Stark, "Reckless manslaughter" [2017] Crim.L.R. 763 at 778
[5] Otherwise it would be caught by gross negligence manslaughter.

less culpable defendants convicted under unlawful act manslaughter, where they have committed a positive act and foresee much lower levels of bodily harm, and therefore it is unfair to leave this School Dinner case, where there is advertence to serious injury, outside manslaughter[6].

Even if one were to accept, which is perhaps not hard to do, that this case ought to be manslaughter either on consistency or other grounds, the assumption that it currently cannot be so because it is an omission is less soundly grounded than is often thought. The principal authority is *Lowe*[7] where D was convicted of an offence of wilful neglect under s 1(1) of the Children and Young Persons Act 1933 but, on appeal, this was not regarded as a sufficient basis to convict also of manslaughter. The case is regularly cited as the (pretty much lone) authority for the proposition that unlawful act manslaughter requires a positive act and that an omission will not suffice for the unlawful act (although it is has been roundly criticised[8] as an unsatisfactory decision in this respect.)

Revisiting *Lowe*

A closer examination of *Lowe* and the arguments before the court will show that the comments about omissions not being a sufficient unlawful act are effectively only *obiter dicta* and should not be taken to be authoritative and that the decision is readily explicable on a quite different basis. One also has to bear in mind that the approach of the court in *Lowe* to the meaning of "wilful" in wilful neglect, essentially treating it

[6] Stark, "Reckless manslaughter" [2017] Crim.L.R. 763 at 784

[7] *1973 QB 702*

[8] See in particular Andrew Ashworth's editorial in [1976] Crim LR 529, and again in *Ashworth, Positive Obligations in Criminal Law, p95 n56* and in *J Horder, Ashworth's Principles of Criminal Law* (Oxford:Oxford University Press) p295. See also *D.Ormerod and K Laird, Smith and Hogan's Criminal Law* 14th edn (Oxford:Oxford University Press) at 629.

only as requiring voluntariness but not as requiring any mens rea as to consequences, has also subsequently been held to be wrong in the House of Lords in *Shepphard*[9]. The nature of the statutory offence being considered as the potential unlawful act in *Lowe* was very different from the typical unlawful act offence which does require some degree of mens rea.

To fully understand what was going on in *Lowe* it is necessary to set out the facts, the offences of which D was convicted at trial and how these were dealt with on appeal. D was of low average intelligence and living with Patricia Marshall, whose intelligence was described in the case as "subnormal" and with whom he had four children, of whom one had previously been taken into care. D said he had no concerns about the health of the child until five days before its death when he had suggested to Marshall that she take it to the doctor and she said she had done so but the doctor was out although she had got some medicine. Two days later he urged her again to take it to the doctor and later in the day she said she had, although it subsequently emerged that she had not done so, being unwilling to disclose its state of health lest the child be taken from her as had happened with one of her previous children. Phillimore LJ on appeal contrasted her sentence of probation with D's sentence of imprisonment (initially five years for manslaughter) and commented[10] that "…she had set out deliberately to deceive him.." although going on to say "No doubt he was gravely to blame…").

At the trial before May J, D was charged with manslaughter and child cruelty (wilful neglect) and the jury convicted on both counts. On the wilful neglect charge, the trial

[9] [1981] AC 394
[10] [1973] QB 702, at 709

judge made references to it involving a subjective test but also referred to whether the defendant ought to have foreseen the consequences of his failure to call a doctor. On appeal it was argued for the appellant that the references to what he ought to have foreseen were inconsistent with the subjective test required by s.8 CJA 1967 and that it had to be shown that D had actually foreseen the likelihood of unnecessary suffering or injury to health. In contrast, the Crown successfully argued that there was no requirement of foresight and that if anything, the direction was unduly benevolent to the accused by referring to what he ought to have foreseen. As Phillimore LJ put it[11]

> "It did not matter what he ought to have foreseen as the possible consequences of his failure to call a doctor; the sole question was whether his failure to do so was deliberate and thereby occasioned the results referred to in section 1(1) of the Act".

This was effectively the same interpretation of wilful neglect (as Phillimore LJ himself recognised in a later passage of his judgement when discussing manslaughter) which *Reg v Senior*[12] had been taken to establish although, as was subsequently pointed out in *Sheppard*, the facts of *Senior* were significantly different in that the accused in that case was fully aware of the likely consequences of his neglect. (As Lord Diplock pointed out in *Sheppard*[13], the case of *Senior* was not really good authority for this strict liability interpretation which treated wilful as simply meaning deliberate in the sense of voluntary.)

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[11] [1973] QB 702, at 707
[12] [1899] 1 QB 283
[13] [1981] AC 394, at 407

The strict liability interpretation of wilful neglect (wrongly) applied in *Lowe* is highly significant in understanding the court's approach to the manslaughter count. The trial judge had put the manslaughter charge to the jury on two alternative bases. Firstly on the basis that he had been grossly negligent (or "reckless") and secondly on the basis that in any event, if he was guilty of wilful neglect which accelerated or caused death, that was automatically manslaughter (as had also been the case in *Senior*). The jury found that there had not been gross (or "reckless") negligence but convicted of manslaughter since they found him guilty of the statutory wilful neglect offence and therefore it automatically followed it was manslaughter. The Court of Appeal quashed the conviction for manslaughter, the following paragraph in Phillimore LJ's judgment[14] being generally taken to be the governing principle

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

A striking and significant feature of this clear distinction between act and omission is that it comes virtually at the end of the judgment and yet it is hardly referred to in the preceding analysis.

<u>The principal arguments in *Lowe*</u>

[14] [1973] QB 702, at 709

The argument of counsel (Bell QC) for the appellant had instead opened on a completely different tack as follows[15];

> *Reg. v. Senior* [1899] 1 Q.B. 283 is not good law since *Andrews v. Director of Public Prosecutions* [1937] A.C. 576 . Therefore, if the defendant was guilty of wilful neglect, the jury had to find reckless negligence before convicting him of manslaughter.

The point about *Andrews v DPP*, which was reiterated several times in counsel's argument, was of course that commission of the statutory offence of dangerous driving did not automatically result in manslaughter but required proof of the higher degree of negligence required at common law. Therefore the principle in *Senior* (that commission of the statutory offence of wilful neglect resulting in death was automatically manslaughter) also now had to be modified and thus in the absence of gross (reckless) negligence, Lowe could not be guilty.

Rougier QC for the Crown responded to this by saying[16]

Andrews v. Director of Public Prosecutions [1937] A.C. 576 has nothing to do with this appeal. Negligence is not the same as neglect and still less the same as wilful neglect. In *Reg. v. Buck and Buck* (1960) 44 Cr.App.R. 213 death resulted from an illegal abortion, and that was manslaughter.

As was recognised in *Sheppard* [fn], negligence and neglect are indeed two different concepts but Phillimore LJ at this point in the argument interjected to say

[15] [1973] QB 702, 703-704
[16] [1973] QB 702, at 705

> I find it difficult to distinguish between negligence and neglect.

His Lordship's difficulty in this respect evidently continued when he came to draft his judgment in which he clearly equated negligence with neglect and accepted counsel's argument for the appellant, based on *Andrews v DPP*, as follows[17].

> Mr. Bell's answer is that the decision in *Reg. v. Senior* cannot be regarded as good law in the light of the unanimous decision of the House of Lords in *Andrews v. Director of Public Prosecutions* [1937] A.C. 576 . True, that case involved motor manslaughter *as a result of neglect*, but the speech of Lord Atkin is in the widest terms and is clearly intended to apply to *every case of manslaughter by neglect.(emphasis added)*

The judgement then goes on to quote extensively from *Andrews v DPP* to the effect that in such cases (i.e. cases of manslaughter by negligence/neglect) the criminal standard of gross (or reckless) negligence has to be proved. Immediately following the quotation from *Andrews v DPP*, Phillimore LJ then says[18]

> Now in the present case the jury negatived recklessness. How then can mere neglect, albeit wilful, amount to manslaughter? This court feels that there is something inherently unattractive in a theory of constructive manslaughter. It seems strange that an omission which is wilful solely in the sense that it is not inadvertent and the consequences of which are not in fact foreseen by the person who is neglectful should, if death results, automatically give rise to an indeterminate sentence instead of the maximum of two years which would otherwise be the limit imposed.

[17] [1973] QB 702, at 708
[18] [1973] QB 702, at 709

The judgement could perfectly logically have stopped there at the culmination of the analysis of, and acceptance of, the principal argument in the case (that the automatic manslaughter rule from *Senior* could not stand following *Andrews v DPP*). Whilst it is respectfully submitted that his Lordship was wrong to equate negligence with neglect and therefore *Andrews v DPP* was arguably not directly in point, the broader point on which he is surely correct (which is effectively articulated when he refers to an omission "which is wilful solely in the sense that it is not inadvertent and the consequences of which are not in fact foreseen") is as follows; if an offence does not even require negligence and is effectively one of strict liability (as wilful neglect had been interpreted in this case) there is even less warrant (taking a broader view of the logic of *Andrews v DPP*) for its commission automatically resulting in manslaughter in the absence of proof of gross negligence[19].

Conclusions on *Lowe*

Unfortunately, having accepted the principal argument of the appellant (effectively, no *mens rea*) as to why *Senior*, in the light of *Andrews v DPP*, could no longer stand, his Lordship (unnecessarily) added the paragraph already quoted above about the clear distinction between act and omission. The reason for doing so is probably to be found in the very last almost throw away submission of counsel for the appellant[20], replying to the Crown's mention of cases on unlawful act manslaughter, that

[19] See commentary on *Andrews* [2003] Crim. L.R. 477 (D.C. Ormerod) making the same point in relation to the unfortunate use of a strict liability offence under s 67 of the Medicines Act 1968 (on the facts administering insulin with consent) as the unlawful act. The case was primarily concerned with whether consent was a defence (it was not) and the much more appropriate potential unlawful act of administering a noxious thing under s.23 OAPA 1861 was left to lie on the file.
[20] [1973] QB 702, at 706

> *Reg. v. Church* [1966] 1 Q.B. 59 (throwing a woman into a river), *Rex v. Larkin [1943] K.B. 174* (an attack with a razor) and *Reg. v. Buck and Buck,* 44 Cr.App.R. 213 (criminal abortion) have no application to this case, which is a failure to do something.

The most obvious response to this would have been to say that they were all cases where the unlawful act was one under the OAPA 1861 and not a strict liability offence but having already expressed his view that there is something unattractive in constructive manslaughter, Phillimore LJ simply adopted the distinction between act and omission uncritically as a further reason for quashing the manslaughter conviction. Given the main arguments in the case and fact that the conviction had been based on the particular rule in *Senior* relating to the statutory (then strict liability) offence of wilful neglect, rather than the more general unlawful and dangerous act doctrine which was still being clarified at the time in other cases such as *Church, Lamb*[21] and subsequent cases, the comments about the distinction between act and omission can clearly be regarded as obiter.

Furthermore, there is no warrant for treating these comments as authoritatively deciding that an omission can never be the basis of unlawful act manslaughter. It will be recalled that the paragraph quoted above contrasting act and omission concludes with the following sentence;

> If, however, I omit to do something with the result that it suffers injury to health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate.

[21] [1967] 2 QB 981

That manslaughter is not an *inevitable* consequence is clearly correct (once one has ditched the automatic *Senior* rule), especially on facts such as those in *Lowe* where the omission is merely voluntary but where there was at the time no requirement in law, and no finding by the jury, of any further mens rea as to consequences. Such mens rea (of the unlawful act, see *Lamb*) is normally a requirement of unlawful act manslaughter and that is the real reason why Lowe was not guilty. If the omission is not just deliberate but *advertent* i.e. the potential consequence of serious harm (or even, in principle, *some* harm), is known to D then, assuming he or she has a duty to act as in the School Dinner example[22], there is no reason why the commission by omission (under common law principles) of an offence under the OAPA 1861 should not be the basis for unlawful act manslaughter, notwithstanding that criminal omissions under statute should not inevitably or automatically be so.

Phillimore LJ's instincts were undoubtedly correct in that to convict *Lowe* of manslaughter on the basis of a statutory offence not requiring (as interpreted at the time) any *mens rea* would have been to push constructive crime too far[23]. However there was

[22] The example is not at all difficult to bring into the category of situations where there is a clear duty to take reasonable steps to prevent the child eating the sandwich since the dangerous situation – see *Miller* [1983] 2 AC 161 - has been created by the defendant in preparing the sandwich containing the potentially dangerous pine nuts without a clear indication of its contents. Furthermore, D has a duty by reason of his or her position of responsibility for providing the children's meals.

[23] *Andrews* [2003] Crim. L.R. 477 as has been seen, has been rightly criticised on this ground. *Meeking* [2012] 1 WLR 3349 is another case where the unlawful act doctrine has been too broadly applied to a statutory offence (s.22A(1)(b) RTA 1988) although at least in that case some degree of *mens rea* was required – an intention to interfere with the vehicle – although effectively the offence was one of negligence as to the danger involved where "it would be obvious to a reasonable person that to do so would be dangerous." Toulson LJ, in upholding the conviction for unlawful act manslaughter, commented that if the prosecution had taken "the more natural approach of presenting the case as one of gross negligence manslaughter" on the facts of the case it would be "impossible to conclude that the jury could have come to any other verdict than guilty". His lordship also expressed "a possible ground for concern if a case which was essentially one of negligence, but arguably negligence falling short of gross negligence, were prosecuted by this route as form of unlawful act manslaughter." [at para14]

no real reason (or arguably intent) to completely exclude omissions from unlawful act manslaughter and in so far as his judgment has been interpreted as doing so it might be said to be a case of throwing the baby out with the bathwater.

In summary, it is contended that in the light of the arguments before the court and indeed the reasoning of the Court of Appeal itself, *Lowe* does not totally preclude liability for unlawful act manslaughter based on an omission but is rather a reminder that statutory crimes interpreted as imposing strict liability (as well as crimes of negligence under *Andrews v DPP*) should not be a sufficient basis for the unlawful act.[24] Putting it another way, if *Andrews v DPP* lays down a rule that unlawful act manslaughter does not apply to acts which are only criminal because negligently performed, the same rule logically ought to apply to conduct which is only criminal because prohibited by statute and where not even negligence is required. Thus the School Dinner example (and others along the same lines) can be brought within the unlawful act doctrine properly understood, without having to resort to the creation of (subjective) reckless manslaughter.

Conclusions

Any supposed difficulties in relation to culpable omissions causing death should therefore not be taken as a reason for extending manslaughter to a separate head of recklessness since unlawful act manslaughter can extend to omissions in appropriate situations if the case of *Lowe* is properly understood, interpreted and distinguished. As

[24] A frequently debated (and contested) theoretical explanation for unlawful act manslaughter has been the "change of normative position" that a defendant makes when choosing to commit an unlawful act involving *mens rea.* Absent any significant advertent *mens rea* for the unlawful act, even the "moderate constructivism", sceptically discussed by Andrew Ashworth in Chapter 5 of *Positive Obligations In Criminal Law*, (2013) (Hart Publishing) becomes difficult to sustain.

has been noted, Stark does not regard the omissions example as central to his view that a separate head or offence of reckless manslaughter (in addition to the existing unlawful act and gross negligence varieties) should be introduced through statutory reform with consequent benefits, as he sees it, in terms of labelling, sentencing and overall fairness. Whether those benefits would accrue is a larger question than can be adequately addressed in this article but one can certainly envisage some countervailing difficulties arising from reckless manslaughter that we do not currently have to deal with – such as those arising from the evaluative question for the jury of whether the perceived degree of risk[25] was a justifiable one to take which may be no less problematic than the question of whether negligence is sufficiently gross under the current law[26]. There are also potential issues relating to jury unanimity[27] if there are three rather than two heads of involuntary manslaughter. As was noted by the Law Commission at para 3.57 of its 2006 Report[28] "[t]he term 'reckless' has an unhappy history in the context of homicide … we now believe that the law of homicide is better off without it." The essential point however of this article has been to show that it is at

[25] If in a case similar to *Alliston*, discussed by Freer [2018] Crim LR 612, there were to be evidence that the risks of which D was aware included serious injury, would and should that be a case of manslaughter given there is no arguable justification for taking the risk? The jury rejected a charge of unlawful act manslaughter on the facts and it is questionable whether reckless manslaughter should be available if the case is not considered by the prosecution to be bad enough for gross negligence.

[26] It is sometimes argued that reckless manslaughter must be the head of manslaughter relied on in alternative verdicts where the prosecution fail to prove the intention required for murder by malice aforethought since the jury are not specifically told to consider whether in such a case there is an unlawful act. Neither however are they asked to consider whether D realised there was a risk of serious injury or death which was unjustifiable in the circumstances to run. The natural assumption in these cases is that there is an unlawful act although no doubt it should be open to D to raise the issue that absent malice aforethought, his act was not unlawful. It is difficult however, as Stark's article shows, to envisage situations where D is reckless but there is no unlawful act.

[27] See Taylor, Jury Unanimity in Homicide, 2001 Crim LR 283 and H H Judge David Clark, Jury Unanimity – A Practitioner's Problem, 2001 Crim LR 301. The Law Commission also devoted an Appendix to the problem in their Consultation Paper No 177 (2005), *A New Homicide Act for England and Wales* (Appendix H) where at H1 they said it was a question on which "the law must speak with clarity if, following the reform of the law of murder or homicide, more verdicts to choose between become available to the jury."

[28] Law Commission Report No. 304 (2006), *Murder Manslaughter and Infanticide*

least not needed to deal with cases of unlawful act by omission which, notwithstanding *Lowe,* can quite properly be brought within the unlawful act head of manslaughter.