MANSLAUGHTER BY UNLAWFUL ACT: THE "CONSTRUCTIVE" CRIME WHICH SERVES NO CONSTRUCTIVE PURPOSE

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Manslaughter is defined in N.S.W. as "every other punishable homicide" than murder.[1] This negative definition has provoked some disagreement over the years, and leads to some strange results in the cases. After murder and non-culpable homicides are removed,[2] the left-overs fall into two broad categories. First, those homicides which would ordinarily be murder but for some mitigating factor, such as provocation, which reduce the crime to what is usually called "voluntary" manslaughter. The second broad category is conveniently labelled "involuntary" manslaughter. Involuntary manslaughter is committed when a culpable homicide occurs in circumstances which do not make out a case of murder. For example, where the accused has no intent to kill or inflict grievous bodily harm, or there is no reckless indifference to human life.

The traditional view is that involuntary manslaughter results when a person is inadvertently killed by (1) criminal negligence, (2) intentional infliction of harm which is not grievous, or (3) an unlawful act. Thus, a punch in the abdomen which was intended to hurt, but not grievously, and unexpectedly caused death has been held to be manslaughter[3] and a punch on the jaw causing the victim to strike his head on the pavement has been held to be manslaughter.[4] Likewise, failing to provide food or medical care for a helpless dependant has been held to be manslaughter,[5] as was throwing a crate off a pier into a bathing area striking a bather.[6] As is readily seen, the common ground of all these cases is that death is unintended and inadvertent.

The object of this article is to examine the third method of involuntary manslaughter—an inadvertent killing by an unlawful act. This doctrine, which is often described as "constructive manslaughter", has its origin in another constructive crime—felony murder. Lord Coke dealt with death by unlawful act as follows:

> . . . If the act be unlawful it is murder. As if A meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow, killeth a boy that is hidden in a bush; this is murder, for that the act was unlawfull, although A had no intent to hurt the boy, nor knew of him.

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[1] S. 18(1)(b) N.S.W. Crimes Act (1900-1960).

[2] S. 18(2)(a): "No act or omission . . . for which the accused had lawful cause or excuse shall be (homicide)." S. 18(2)(b): "No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his own defence."

[3] *R.* v. *Mamote-Kulang of Tamagot* (1964) 111 C.L.R. 62.

[4] *R.* v. *Holzer* (1968) V.R. 481.

[5] *R.* v. *Instan* (1893) 17 Cox C.C. 602; (1893) 1 Q.B. 450; (1891-4) All E.R. 1213; *R.* v. *Senior* (1899) 1 Q.B. 283.

[6] *R.* v. *Franklin* (1883) 15 Cox C.C. 162.

> But if B the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.
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> So if one shoot any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium:* for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.[7]

This strong statement would, if true, eliminate the inquiry altogether, for any unlawful act leading, however unforeseen, to death, would be murder. However, Sir Michael Foster disagreed:

> If it be done in prosecution of a felonious intention it will be murder, but if the intent went no farther than to commit a bare trespass, manslaughter: though, I confess, Lord Coke seemeth to think otherwise . . . A shooteth at the poultry of B, and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention it will be barely manslaughter.[8]

From Foster's conclusion that death caused by an unlawful act will be "barely manslaughter", the cases proceed to catalogue a whole series of unlawful acts which unexpectedly cause death and are treated as manslaughter. In *Errington*[9] the defendant built a fire around a drunk to frighten him. In *Senior*[10] the defendant refused to allow his child to have medical aid because of a religious mania. In *Kwaku Mensab*[11] and *Simpson*[12] the defendant pointed a loaded gun at the victim believing it to be unloaded. In *Fenton*[13] the defendant threw stones down a mine and broke some scaffolding which subsequently collapsed on a miner. In *Larkin*[14] the defendant brandished a razor with the intent to frighten A and B fell against it and was killed.[15]

It is submitted that the bulk of the cases which have purportedly been decided on the basis of an "unlawful" act can truly be decided on the basis of intentional infliction of harm or on the basis of criminal negligence. Some cases involve both. To take one example, *Sullivan*[16] was a case where D removed the trap-stick from a cart as a prank. When the occupant returned to load the cart he was tumbled to the pavement and died. It was conceded that D did not intend any harm, and D was found guilty of manslaughter by an unlawful act. With respect, this is an unnecessary interpretation in the facts of the case. First, if D realized the danger in the situation, he can be said to be recklessly indifferent to the victim. Second, if D wilfully closed his eyes to the possibility of harm his ignorance will be discounted and he will be said to intend some harm. Thirdly, if a reasonable man in D's place would have realized he was creating a dangerous situation (but D honestly did not realize it) then D is

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[7] Coke, 3 Inst. 56.
[8] Foster, Crown Law (3rd Ed., 1890) at 258.
[9] *R.* v. *Errington* (1838) 2 Lewin 217; 168 E.R. 1133.
[10] *R.* v. *Senior,* supra n. 5.
[11] *R.* v. *Kwaku Mensab* (1946) A.C. 83.
[12] *R.* v. *Simpson* (1959) 76 W.N. (N.S.W.) 589.
[13] *Fenton's Case* (1830) 1 Lew C.C. 179; 168 E.R. 1004.
[14] *R.* v. *Larkin* (1942) 29 Cr. App. Rep. 18; (1943) 1 All E.R. 217.
[15] For a thorough canvass of the early history see Snelling, "*Manslaughter by Unlawful Act,*" 30 A.L.J. 382, 438.
[16] *R.* v. *Sullivan* (1836) 7 Car. & P 641; 173 E.R. 280.

liable for manslaughter, not by unlawful act, but on the ground of negligence. Finally, if D honestly had no intent to harm, and a reasonable man in D's position would not have realized the danger, then D should be found not guilty at all. If he is, then it is truly a form of "constructive manslaughter."

Judges and writers have criticized the 3 part test of involuntary manslaughter,[17] some suggesting clarification and modification in various forms. The most promising suggestions are to confine manslaughter to criminal negligence, or at most, criminal neligence and intentional harmful acts which inadvertently cause death.[18] It is submitted in this article that criminal homicide is thoroughly covered by other existing categories of murder and manslaughter, and that manslaughter by unlawful act has ceased to be a relevant category. In making this submission it is necessary to investigate the recent cases which explore this area. In doing so it is important to recognize the context in which manslaughter by unlawful act purportedly operates. First, it must be obvious that a death occurring as a result of an unlawful act is not confined to manslaughter. Some unlawful acts which cause death will be murder. Intentionally shooting someone is certainly both unlawful and murder. So is shooting into a crowd without the intent to kill anyone, but with substantial certainty that someone will nevertheless be killed. Even if the accused fervently hopes that he will not kill anyone, it will be murder.[19]

For this third basis of involuntary manslaughter to be relevant, it must cover some act or mental state which is not already proscribed. Since reckless indifference to human life will give rise to liability for murder, to have *manslaughter* by unlawful act the act must be something *less* than reckless. Likewise, since intent to kill or inflict grievous bodily harm will create liability for murder, it must be some unlawful act short of that. But an intentional infliction of some harm short of grievous bodily harm will give grounds for manslaughter in its own right,[20] without reference to the unlawfulness of it. So to be a meaningful category, manslaughter by unlawful act must be something *other than* intentional infliction of harm on the victim.

At the other end of the scale, since criminal negligence will ground liability for manslaughter in its own right, the unlawful act for manslaughter must be something *other than* negligence. A driving offence is unlawful, but if it results in a fatal accident, is the traffic offender guilty of manslaughter by unlawful act? In *Andrews* v. *D.P.P.*[21] the House of Lords rejected this idea, stressing the element of criminal negligence. Where the "unlawfulness" of an act was due to its negligent performance, then it was to be measured in negligence terms.[22] Then the House of Lords went on to examine the degree of carelessness required

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[17] See, e.g. Windeyer, J., in *R.* v. *Mamote-Kulang of Tamagot, supra* n. 3 at 83; *R.* v. *Salika* (1973) V.R. 272; Buxton, "*By Any Unlawful Act*" (1966) 82 Law Q. Rev. 174; Sparks, Note, (1965) 28 Mod. L. Rev. 600.

[18] E.g. Williams, "*Constructive Manslaughter*," (1957) Crim. L. Rev. 293; Howard, *Australian Criminal Law*, 2nd Ed., at 114-21; Cross & Jones, *An Introduction to Criminal Law*, 7th Ed., at 148-9; Smith & Hogan, *Criminal Law*, 3rd Ed., at 246-52; Butler & Mitchell, *Archbold's Pleading, Evidence and Practice in Criminal Cases*, 38th Ed., at 945, s. 2535.

[19] Williams, *Criminal Law*, 2nd Ed., at 38-40, s. 18.

[20] So long as the harm is not merely trivial. *R.* v. *Holzer*, (1968) V.R. 481 at 482, 483. Compare *R.* v. *Church*, (1966) 1 Q.B. 59; (1965) 1 All E.R. 72.

[21] *Andrews* v. *D.P.P.* (1937), A.C. 576.

[22] *Id.* at 581.

to meet the requirement of criminal negligence.[23]

Prior to the recent amendments to the Crimes Act, in New South Wales a person who committed an act which was obviously dangerous to human life was liable for murder, even if there was neither intent nor foresight of the consequences.[24] Thus it appeared that negligent conduct, which was so gross as to create a situation which could be objectively labelled obviously dangerous to human life, would amount to murder, not manslaughter by criminal negligence.[25] But the Crimes and Other Acts (Amendment) Act, 1974, has deleted the "act obviously dangerous to human life" clause from the definition of murder in New South Wales,[26] leaving us with the customary classes of mens rea for murder noted earlier; the only "constructive" murder authorized by s. 18 is felony murder. At first blush, it might appear that this amendment has the effect of reducing a killing from murder to manslaughter where one had committed an act obviously dangerous to human life. This reasoning would be sound so long as such an act was an unlawful one, and the manslaughter by unlawful act rubric was a viable form of involuntary manslaughter. But the contention here is that the only time an unlawful act will be manslaughter is when it is either intended to injure, or is sufficiently dangerous to warrant condemnation on the objective standard of criminal negligence.

It should be clear that all unlawful acts are not alike. Just as some are so serious as to give rise to a conviction for murder, others are not sufficiently serious to give rise even to a conviction for manslaughter. Breach of some statute comes most readily to mind: failure to display "P" plates on an automobile when the driver has a provisional licence, or the discharge of a firearm in a national park. In either case, if a death was inadvertently caused by the automobile or the firearm it is strange to think that the offender would be liable for manslaughter automatically, with no further questions asked. But this approach was certainly applied in the early cases. It has been laid to rest by the additional requirement that the unlawful act must also be "dangerous". In *Larkin*[27] the Court of Criminal Appeal in England stated:

> Where the act which a person is engaged in performing is unlawful, then, if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently causes the death of that other person by that act, then he is guilty of manslaughter.[28]

More recently, in *Church*[29] this proposition was elaborated:

> For such a verdict inexorably to follow, the unlawful act must be such

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[23] The topic of manslaughter by criminal negligence is treated at length in a number of sources. See, e.g., citations in Watson & Purnell, *Criminal Law in New South Wales*, Vol. 1, at 54 n. 3. Different crimes may have differing standards of care which the reasonable man must meet. The one common factor is that the negligence which forms the basis of a criminal charge must go beyond the issue of mere compensation to the victim. But this is not a constant. Since manslaughter is a serious crime carrying a potentially heavy sentence the degree of criminal negligence required is very high. It is that high degree of negligence commensurate with the crime of manslaughter which is envisaged whenever reference is made to negligence in this article.

[24] S. 18(1)(a) New South Wales Crimes Act (1900-1960).

[25] *R.* v. *Pope* (1968) 1 N.S.W.R. 539. In *Pope* the Court of Criminal Appeal held that the malice requirement of s. 18(2)(a) was satisfied by the act which was obviously dangerous to human life. See also *Mraz* v. *The Queen* (1955) 93 C.L.R. 493; (1955) A.L.R. 929; 29 A.L.J.R. 617; *R.* v. *Stones* (1955) S.R. (N.S.W.) 25; 72 W.N. (N.S.W.) 465. It may be noted that this class of murder is unknown to the common law. *R.* v. *Cunningham* (1957) 2 Q.B. 396; (1957) 3 W.L.R. 76; (1957) 2 All E.R. 412; 41 Cr. App. R. 155.

[26] Crimes and Other Acts (Amendment) Act, 1974 (N.S.W.), s. 5(a).

[27] *R.* v. *Larkin*, 29 Cr. App. Rep. 18.

[28] *Id.* at 23.

[29] *R.* v. *Church* (1966) 1 Q.B. 59; (1965) 1 All E.R. 72.

> as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom albeit not serious harm.[30]

This position suggests the "act obviously dangerous to human life" test formerly applied in New South Wales. The difference is one of degree: what is the objective gravity of the risk? If it is *obviously dangerous* to human life the crime is murder; if only *some harm* is recognized then the crime is manslaughter.

Australian courts, however, have declined to follow this aspect of *Church*. In the 1968 case of *Holzer*,[31] Smith, J., endorsed the objective standard of *Church*, but instructed the jury that manslaughter by unlawful and dangerous act was committed where:—

> . . . a reasonable man in the accused's situation, striking this blow in those circumstances, would have realized that he was exposing (the victim) to an appreciable danger of some really serious injury.[32]

This position is endorsed by Menzies, J., in the High Court.[33] Clearly the reference to "a reasonable man" implies an objective test, and this objective test has received great support.[34] But it has also met with some resistence.[35] In Victoria, Scholl, J., was a strong advocate of a subjective test. In *Longley* he said:

> The assault for this purpose, must be of character such that the accused must have realized that it involved an appreciable danger of death or serious injury.[36]

Further in the case, discussing the language of the Full Court in *Turner*[37] that the act must be both unlawful and dangerous, Scholl, J. adds:

> If I may respectfully say so, I understand that to pose a subjective test, scil., 'realized by him as dangerous'.[38]

Although the objective test is criticized for mixing manslaughter by unlawful act with manslaughter by criminal negligence,[39] it is difficult to see how the suggested subjective test improves the situation. If the accused subjectively recognizes the danger and goes ahead with the act, he will verge on intent or reckless indifference (and therefore murder). And if he is not quite that callous, it is hard to see why he will not be guilty of manslaughter by intentional infliction of harm or criminal negligence.

Furthermore it is not a coincidental mixture of unlawful conduct and dangerous conduct which produces manslaughter by unlawful and dangerous act. Rather, the unlawful and dangerous act doctrine is limited to cases where the act is unlawful because it is dangerous.[40] Now, if the act is a serious threat to life or body the accused may be guilty of murder depending on his intent or foresight of consequences. If the act is less dangerous then the inquiry

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[30] *Id.* (1966) 1 Q.B. 59 at 70, per Edmund Davies, J.
[31] *R.* v. *Holzer*, *supra* n. 4.
[32] *Id.* (1968) V.R. 481 at 483-4. See also *R.* v. *Longley* (1962) V.R. 137.
[33] *R.* v. *Pemble* (1971) A.L.R. 762, at 780; (1971) 45 A.L.J.R. 333, at 344; cited without comment in Watson & Purnell, *supra* n. 23, 1973 Supp. s. 108.
[34] E.g. *R.* v. *Lipman* (1970) 1 Q.B. 152; (1969) 3 All E.R. 410, per Lord Widgery.
[35] E.g. *R.* v. *Lowe* (1973) 2 W.L.R. 481; (1973) 1 All E.R. 805; *R.* v. *Parmenter* (1956) V.L.R. 312, (1956) A.L.R. 717.
[36] *R.* v. *Longley* (1962) V.R. 137, at 141.
[37] *R.* v. *Turner* (1962) V.R. 30.
[38] *R.* v. *Longley* (1962) V.R. 137, at 142.
[39] ". . . which it seems better to me to keep separate, even though both definitions may in some cases be satisfied by the same conduct on the part of the accused." *Ibid.*
[40] Howard, *supra* n. 18, p. 119; *R.* v. *Church*, *supra* n. 20.

must be whether D intended to harm the victim, or whether he was criminally negligent. If there is no intent, then the measure must be negligence. If D's conduct is not so unreasonable in this "dangerous" situation as to make him liable for manslaughter on the ground of criminal negligence (measured objectively), then there is no call to find him guilty of manslaughter on some lesser basis. To do so would be to subvert the whole idea of *Andrews*. To be an unlawful and dangerous act today, it must be unlawful because it is dangerous. Therefore the defendant's act must be dangerous. If it is thought to be dangerous to a reasonable and sober man in the defendant's position, then surely that defendant is guilty of manslaughter by criminal negligence. If it is dangerous and known to be so by the defendant (the subjective test) then he has intended to inflict some harm on the occupant for he cannot close his eyes to this prospect once he is said to recognize it.

In the 1967 case of *Lamb*[41] the requirement of the unlawful act was explained by Sachs, L.J., as at the very least a criminal assault. In that case two boys were playing with a revolver and D pointed it at V's head in jest—both boys thinking the hammer to be on an empty chamber. There could not be manslaughter by unlawful act because—in the absence of intent to frighten V—there was no technical assault and therefore no unlawful act. Intent was an essential element in assault, and D in actual fact had no such intent.

> Another way of putting it is that mens rea, being now an essential ingredient in manslaughter (compare *Andrews* and *Church*) could not in the present case be established . . . except by proving that element of intent without which there can be no assault.[42]

If the test put forward in *Lamb*, that the act alleged to be unlawful must at least constitute an assault, were to be applied in a case like *Sullivan*,[43] it would appear that an inconsistent result would follow. For to be an assault there must be some intent, yet in *Sullivan* the court felt there was no intent at all. This situation is exactly the position which the court was faced with in *Lamb* and concluded that manslaughter by unlawful act could not be sustained in that case. Applying that test to the facts of *Sullivan* it would seem that there are only three possible results: (1) D is guilty of manslaughter because he intended some harm, if only by wilfully closing his eyes to the possibilities; (2) D is guilty of manslaughter by criminal negligence because he did an act which a reasonable and sober man in his position would have realized posed a really serious potential danger; (3) D is not guilty of manslaughter at all. It is submitted, furthermore, that these are the three choices open to courts in all cases of involuntary manslaughter, and that there is no logical reason to consider an alternative choice of manslaughter by unlawful and dangerous act.

Take three examples of situations which might be traditionally dealt with under the unlawful and dangerous act rubric. First, a dull inoffensive chap who throws a firecracker in the middle of a football crowd intending only to celebrate a good try. If someone is killed when he recoils from the explosion and falls over a railing, or strikes his head on a concrete seat, surely the thrower is at least guilty of manslaughter. If his conduct is measured subjectively, he had no intention at all and will neither be guilty of murder nor manslaughter on an intentional basis. If unlawful and dangerous act requires

[41] *R.* v. *Lamb* (1967) 2 Q.B. 981; (1967) 2 All E.R. 1282.
[42] *Id.* (1967) 2 Q.B. 981, at 988.
[43] *R.* v. *Sullivan*, *supra* n. 16.

the defendant's recognition of the danger (per *Lowe* and *Longley*) then that category will not be of any use in this case. But, if his conduct is measured objectively he will surely be guilty of manslaughter by criminal negligence. There is simply no need to fall back on unlawful and dangerous act, even though the facts clearly fit into that category if dangerousness is measured objectively.

Second, the example propounded by Smith and Hogan[44] of the person who discards a banana peel on the footpath. It is unlawful under the litter laws, and if it is a well-used public footpath, it is dangerous. Therefore, the authors conclude, it will be manslaughter by unlawful and dangerous act if someone slips on the banana peel and is killed in the fall. However, if it is a remote footpath the act ceases to be dangerous, then the litterbug will be not guilty of manslaughter if someone slips and is killed in the fall. This result would be capricious and, it is respectfully submitted, would not result under the unlawful and dangerous act doctrine. For if the act must be in the nature of an assault[45] then an unlawful and dangerous act has simply not been committed. Further, if the act must be unlawful because it is dangerous, then the act of littering is not even "unlawful" for purposes of manslaughter, though it is clearly an offence against the litter laws. It is conceivable that the act could result in a manslaughter conviction in the public footpath case, though not in the remote footpath case, but only on the grounds of criminal negligence, and it would be an extreme case indeed to find a person criminally negligent on these facts. But if that were so found, then the result would cease to be capricious; it is precisely because the reasonable man would have foreseen the risk in the well-travelled area that his conduct falls below the standard demanded.[46]

Finally, consider the example put by Howard[47] of D threatening V with a gun which D believes to be unloaded, and has taken all care to see that the weapon is not loaded, but nevertheless is loaded. If the gun discharges and V is killed, it is said the unlawful and dangerous act doctrine applies and D is guilty of manslaughter. Since a gun is such a dangerous instrument, it is hard to imagine an argument which would negative negligence,[48] but if such an argument could be made out, it is absurd to have liability anyway, on what must be, ex hypothesi, a lesser mens rea—that of unlawful and dangerous act. If the liability of D in this example is to be measured by negligence (or recklessness) standards, then there is no room for any other ground of liability, and to try to make room for such a ground is to confuse the area. The confusion of centuries is finally being cleared away and involuntary manslaughter being brought into the two camps of intended harm and negligence, there is no need to keep searching for a third camp where one does not exist.

It must be noted that the overlap between criminal negligence and unlawful and dangerous act is founded on some authority. *Andrews* does not purport to do away with manslaughter by unlawful act altogether; rather it only does away with it where it is unlawful because it is negligent. It leaves untouched

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[44] Smith and Hogan, *supra* n. 18, 2nd Ed. at 221 (omitted from 3rd Ed.).
[45] *R.* v. *Lamb*, *supra* n. 41.
[46] Compare *Bolton* v. *Stone*, (1951) A.C. 850; (1951) 1 All E.R. 1078.
[47] Howard, *supra* n. 18 at 119.
[48] Compare *R.* v. *Lamb*, supra n. 41.

the concept of unlawful acts which are not based on negligence.[49] This does mean, however, that where negligence is an issue, it will not matter whether the conduct of the accused was otherwise lawful or unlawful. In the 1883 case of *Franklin*,[50] Field, J., recognized that negligence is wholly irrelevant if the doctrine of unlawful act applied. In that famous Brighton Pier case, he refused to send the case to the jury on the grounds of unlawful act, restricting the inquiry to whether the accused was negligent or not. It may be instructive to note that the jury found negligence and therefore manslaughter without the aid of this debatable doctrine. A few years after *Andrews*, the English Court of Criminal Appeals made the same observation as did Field, J. Negligence relates to lawful activities and does not need the additional factor of illegality. If the activity is lawful and criminally negligent, it will be manslaughter. If it is unlawful and dangerous, said the court, it will be manslaughter regardless of whether or not it is negligent.[51] It follows that if it is criminally negligent it will be manslaughter on that ground, regardless of whether it is lawful or unlawful conduct, and that if the act is dangerous, it will most certainly be negligent.

But applying this analysis to the facts of *Andrews*, can it not be said that Andrews was performing an unlawful and dangerous act in the manner of his driving? If so, then it would appear that the criminal negligence debate in that case was unnecessary and that the saving clause inserted by Lord Atkin has enveloped the exception. The most reasonable reconciliation of these views, it is submitted, is that where "dangerous" is in question it is measured on a negligence scale. Thus, the inquiry will be as to whether the accused's conduct was criminally negligent, taking into consideration the risk of the conduct in the attendant circumstances. Furthermore, it is submitted that to go beyond negligence and inquire whether—independently—the act is unlawful and dangerous, is to cut the heart out of *Andrews*. If it is found that the accused was *not* criminally negligent, but is nevertheless guilty of manslaughter because he did an unlawful and dangerous act would be to impose liability for a lesser degree of culpability than criminal negligence, the precise situation rejected by the House of Lords.

The 1970 Court of Appeal decision of *R.* v. *Lipman*[52] is difficult to accept because this interaction between dangerousness and negligence is not recognized. There D killed a girl while on an L.S.D. "trip" and the jury convicted him of manslaughter. The appeal was restricted to the jury instruction on unlawful and dangerous act. Widgery, L.J., rejected the notion that a specific intent is necessary, but then held that where:

> . . . the acts complained of were obviously likely to cause harm to the victim (and did, in fact, kill her) no acquittal was possible . . .[53]

Thus the objective test is supported, but it seems that the judge is substituted for the jury in determining the gravity of the risk. In the same judgment doubt is cast on whether mens rea is essential to involuntary manslaughter,[54] which suggests that *Lipman* is a decision which truly embraces the concept of con-

[49] *Andrews* v. *D.P.P.*, *supra*, (1937) A.C. 576 at 581, 585, *per* Lord Atkin. See Smith and Hogan, *supra* n. 18, 3rd Ed. at 247-48.
[50] *R.* v. *Franklin*, supra n. 6.
[51] *R.* v. *Larkin*, *supra* n. 14.
[52] *R.* v. *Lipman*, (1970) 1 Q.B. 152.
[53] *Id.* at 159.
[54] *Ibid.*

structive manslaughter. This position has been criticized in England,[55] one Australian judge has already refused to follow it,[56] and it may prove to be an anomaly.[57]

The High Court was recently faced with a similar problem in the case of *Pemble*.[58] There the accused shot his girlfriend with a sawed off rifle outside a hotel in Darwin. The case was tried on the basis that if D intended to kill or grievously injure the victim he was guilty of murder, but that if he only intended to frighten her with an unloaded gun he was guilty of manslaughter. The jury apparently rejected this simple distinction and asked for further instructions on murder by reckless indifference after which they returned a verdict of murder. On appeal the conviction was reversed, the High Court unanimously agreeing that the jury direction concerning reckless indifference was inadequate. Three of the High Court judges thereafter substituted a verdict of manslaughter rather than order a new trial. Barwick, C.J., and McTiernan, J., based this on the unlawful and dangerous act doctrine, while Windeyer, J., apparently based it on the criminal negligence doctrine. Menzies, J., and Owen, J., dissented from the substituted verdict.

In the course of their judgments, all of Their Honours discussed the unlawful and dangerous act doctrine. It is submitted that the judgment of Menzies, J., is most in accord with the authorities and with reality, but that even he overlaps negligence with unlawful act. After approving the observations of Smith, J., in *Longley* he quotes the same judge at some length from *Holzer*.[59] Thus Menzies, J., falls squarely in line with *Lamb* and rejects both the subjective test of dangerousness and the extention to slight harm suggested by *Church*.

> If an accused person is to be convicted of involuntary manslaughter by reason of a killing in the course of doing an unlawful act, the jury must, upon a proper direction, find that the accused was doing an unlawful act. Unlawfulness cannot simply be assumed. In this case it is by no means certain that, until a point had been reached that the girl was frightened by what the accused was doing, the accused committed an assault.[60]

Barwick, C.J. and McTiernan, J., on the other hand, refer to the obvious unlawfulness of D's act, coupled with the danger of brandishing a loaded gun, and conclude that the jury would have found D guilty of manslaughter on the unlawful and dangerous act doctrine. It is respectfully submitted that the basis of unlawfulnes cited—attempted assault[61] and breach of a Northern Territory ordinance prohibiting the discharge of a firearm in a public place[62]—overlook the interrelationship between the illegality and the dangerousness which is required.[63] Further, as is pointed out by Owen, J., and Menzies, J., the jury was not instructed on this point and it is essentially an issue for jury determination.

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[55] Butler & Mitchell, *supra* n. 18 at 944, s. 2535; Smith and Hogan, *supra n.* 18 3rd Ed. at 249. See also Glazebrook, "*Constructive Manslaughter and the Threshold Tort*", 28 *Camb. L.J.* 21, Hooker (1969) *Crim. L. Rev.* 546, Orchard (1970) *Crim. L. Rev.* 211 and Buxton (1970) *Annual Survey of Commonwealth Law* 134.

[56] *R.* v. *Haywood* (1971) V.R. 755 (Crockett, J.).

[57] *Cf. R.* v. *Lowe* (1973) 1 All E.R. 805, at 809.

[58] *R.* v. *Pemble*, *supra* n. 33.

[59] *Id.*, (1971) A.L.R. 762, at 780.

[60] *Ibid.*

[61] *Id.* at 772, *per* Barwick, C.J.

[62] *Id.* at 776, *per* McTiernan, J.

[63] *Supra*, see text accompanying n. 41.

If it is considered desirable to substitute a manslaughter verdict rather than send the case back for a retrial, it seems that the basis put forth by Windeyer, J., is preferable. After a reference to unlawful and dangerous act[64] His Honour said he "cannot conceive that any jury could honestly say it was not (grossly negligent)."[65] With respect, it seems that this analysis is much more acceptable than the unlawful and dangerous act analysis. If it is considered morally certain that the jury found D guilty of murder on the ground of either intent or reckless indifference, then it is unnecessary to inquire as to unlawful and dangerous act at all. If intentional then surely D, at the least, intended to inflict some harm on the girl. If reckless, then surely he was criminally negligent. This latter point is reinforced by the reasons the trial court directions were found to be in error—they failed to distinguish the mental requirement of foresight or advertance which is essential for reckless indifference. But in so doing, His Honour intermixed reckless indifference with criminal negligence. Since the jury found D guilty, they must at least have found criminal negligence, and this, then, should be the basis for the substituted verdict if one must be substituted.

This view is reinforced by the formulation in *Larkin*,[66] followed in *Creamer*,[67] and is accepted in New South Wales[68] and Victoria.[69] The Victorian case of *Holzer*[70] is an example of another unnecessary overlap—this time between unlawful act and intentional infliction of some harm. In *Holzer* the defendant struck the victim a blow on the jaw and the victim died when his head struck the pavement. Smith, J., held that the accused was guilty of manslaughter if he committed the offence of battery

> . . . and the beating or other application of force was done with the intention of inflicting on the deceased some physical injury not merely of a trivial or negligible character, or . . . with the intention of inflicting pain . . . which is not merely trivial or negligible.[71]

But he also held that the accused could be convicted of manslaughter under the doctrine of unlawful dangerous act, which unlawful act must consist of a breach of the criminal law, in circumstances which

> must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury.[72]

The overlap is demonstrated more dramatically in His Honour's instruction to the jury. He told the jury that there were three elements necessary for the accused to be convicted of manslaughter: (1) an unlawful assault and battery by D on V; (2) death resulting from D's blow, and (3) the assault and battery being delivered by D with the intention of doing some physical injury not merely trivial or negligible. But, he added, instead of this third element being intentional infliction of serious harm, it could be supplied by the blow

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[64] *R.* v. *Pemble* (1971) A.L.R. 762, at 783.
[65] *Id.* at 784.
[66] *R.* v. *Larkin*, *supra* n. 14.
[67] *R.* v. *Creamer* (1966) 1 Q.B. 72; (1965) 3 All E.R. 257.
[68] *R.* v. *Simpson*, *supra* n. 12.
[69] *R.* v. *Turner*, *supra* n. 37; *R.* v. *Longley*, *supra* n. 32.
[70] *R.* v. *Holzer* (1968) V.R. 481.
[71] *Id.* at 482.
[72] *Ibid.*

being a dangerous act as considered by the reasonable man in the accused's situation.

> You will see that this alternative method of proving manslaughter does not call for proof of any particular intention on the part of the accused. It looks instead at what a reasonable man in his situation would have realized . . . [I]n this alternative way of establishing manslaughter, as proof of any intent to injure is not called for, the law formulates the test by reference to really serious injury, whereas in the first way of constituting manslaughter, . . . where intent to injure is proved, it is sufficient for the Crown to prove an intention to do some physical injury which may be minor, although it must not be merely trivial or negligible.[73]

From this analysis it appears that unlawfulness is an element of both forms of manslaughter, but that one form requires intention while the other requires only objective dangerousness. But surely objective dangerousness is really what criminal negligence is all about. Indeed, Howard comments that on the view of Smith, J., manslaughter by unlawful and dangerous act becomes "indistinguishable from manslaughter by criminal negligence."[74] What is more, this view leads to confusion because it is formulated as one part of a three part test, the first part of which is an unlawful assault and battery, thus mixing negligence with unlawfulness, the very thing that we have been trying to avoid since *Andrews*.

The authors of two leading English textbooks have merged in part the unlawful and dangerous act category with one of the remaining two bases of involuntary manslaughter.[75] It is submitted that—at least in Australia—neither of these is necessary. To define manslaughter as any unlawful act done with gross negligence as to the possibility of any harm happening (following *Church*) is unacceptable in Australia[76] and also combines unlawful act with negligence, the very thing which *Andrews* is trying to avoid.[77] On the other hand, to define manslaughter as death caused "by an unlawful act done with the intention of causing physical harm, or alarm . . ."[78] is to engage in duplication. A voluntary act which is intended to cause harm or alarm in the victim is an unlawful assault. The addition of "alarm" to the class of "harm" intended is a helpful recognition of the realities of assault situations, but beyond that it seems unnecessary to require past intention. It should be noted, furthermore, that both of these definitions ignore the corollary element of dangerousness. It is submitted that this is valid insofar as dangerousness is measured by criminal negligence,[79] but where this is not recognised it is a backward step in the evolution of the concept.

The elimination of the unlawful and dangerous act category finds support in a 1973 English case, *R.* v. *Lowe*[80] which may be compared with a 1955 Victorian case. In the Australian case of *Terry*[81] the accused was charged with murder of a 19-month-old child by excessive corporal punishment. Sholl, J.,

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[73] *Id.* at 484.
[74] Howard, *supra* n. 18 at 120.
[75] Smith and Hogan, *supra* n. 18, 3rd Ed. at 246; Cross and Jones, *supra* n. 18 at 148.
[76] *Supra*, see text accompanying n. 31.
[77] *Supra*, see text accompanying n. 21.
[78] Cross and Jones, *supra* n. 18 6th Edition at 139. Note that this language is omitted from the 7th Edition cited earlier. This is apparently to accord more nearly with *R.* v. *Church*, *supra*.
[79] E.g. Cross and Jones, *supra* n. 18 7th Edition, at 148, citing *Church*.
[80] *R.* v. *Lowe*, *supra* n. 35.
[81] *R.* v. *Terry* (1955) V.L.R. 114.

directed the jury that if there were not a case of murder by recklessness, then D would still be guilty of manslaughter because

> If death results from a blow or blows which was or were unlawful but not intended either to cause death or inflict serious bodily harm, that is manslaughter.[82]

This appears to be stating the unlawful and dangerous act principle, rather than the intentional infliction of harm rule, although it is not entirely clear.[83] In *Terry*, there is no need whatsoever to introduce the idea of unlawful and dangerous act; D has clearly intended to inflict some harm. If D claimed he was intending no harm at all, we would characterize this as a wilful ignorance case and imply intent.

In the recent English case of *Lowe*,[84] the accused was alleged to have neglected his baby daughter by failing to call a doctor when she became ill. After ten days of illness the infant died of dehydration and grave emaciation. On the appeal from a conviction of wilful neglect and manslaughter, the Court of Criminal Appeals upheld the conviction for wilful neglect, but quashed the manslaughter conviction.

> It seems strange that an omission which is wilful solely in the sense that it is not inadvertent, the consequences of which are not in fact foreseen by the person who is neglectful should, if death results, automatically give rise to (manslaughter).[85]

The court found a "clear distinction" between acts and omissions and then said:

> . . . 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.[86]

This decision squarely conflicts with earlier decisions which held that wilful neglect, being an offence and therefore unlawful, would form the mens rea for manslaughter by unlawful act.[87] The trial court instruction to the jury in *Lowe* to this effect was disapproved by the Court of Criminal Appeal, Phillimore, L.J., expressing the view that "This court feels that there is something inherently unattractive in a theory of constructive manslaughter."[88]

Thus, the court in *Lowe* rejects the objective test of unlawful and dangerous act, thereby requiring the prosecution to show either an intent to harm, or criminal negligence with respect to such harm. This view is entirely consistent with Sholl, J.'s view, as expressed repeatedly in the Victorian decisions,[89] and which Howard characterizes as leaving no room for the unlawful and dangerous act doctrine between reckless indifference (which grounds liability for murder) and criminal negligence (which grounds liability for manslaughter).[90] If *Lowe* is adopted by other English courts, it is possible that the Australian and English positions may coalesce, although the objective-

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[82] *Id.* at 116.
[83] Surely this lack of clarity is itself evidence of the overlap.
[84] *Supra* n. 35.
[85] *Id.*, (1973) 1 All E.R. 805, at 809.
[86] *Ibid.*
[87] *R.* v. *Senior*, *supra* n. 5; *R.* v. *Watson and Watson* (1959) 43 Cr. App. R. 111.
[88] *R.* v. *Lowe*, (1973) 1 All E.R. 805 at p. 809.
[89] Catalogued in *R.* v. *Longley*, (1962) V.R. 137 at 141.
[90] Howard, *supra* n. 18 at 120.

subjective dilemma remains unresolved.

In short, if we concentrate our inquiry on the dangerous character of the act in question it becomes clear that an act which is unlawful because it is dangerous must either be intended to inflict some harm or negligent. If it is intended to inflict harm it will give rise to liability for involuntary manslaughter when death results. If it is negligent the accused's conduct should be measured in criminal negligence terms to decide whether it is manslaughter when death results. The intentional infliction of harm principle is a subjective one: did the accused intend some more than trivial harm? The negligence principle is an objective one: would a reasonable man in the accused's position have recognized the risk and acted as he did? Anything which does not fall into one of these clear categories ought not to be criminal homicide at all. If a third category of involuntary manslaughter is created, outside these first two, it is surely constructive. The unlawful and dangerous act principle must be either objective or subjective, and once it is thus identified it must be completely redundant when considered alongside the two basic principles. Recognition of this would effectively do away with the "constructive" manslaughter which has been so long deplored. At the same time it would do no offence to the community protection sought by the criminal law. Instead it would accord more with what might be recognized by "all sober and reasonable people."