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Reconstructing Unlawful and Dangerous Act Manslaughter

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Abstract

In the last three decades unlawful and dangerous act manslaughter has been subject to contradictory recommendations for reform. The debate has been dominated in that time by disagreement over the change of normative position, considered when attempting to justify liability for causing death in the commission of a crime with the objective risk of injury in the circumstances. The article suggests that this current definition of unlawful and dangerous act manslaughter is defensible if appropriately interpreted by the Supreme Court. The interpretation requires an intended unlawful act and the foreseeable risk of injury from a specific circumstance known to the defendant before the unlawful act.

Keywords

Unlawful and dangerous act manslaughter, change of normative position, moral luck

Introduction

Unlawful and dangerous act manslaughter has been deconstructed by judges and academics, but never reconstructed in a satisfactory form. The Court of Appeal's recent view,¹ supporting Andrew Ashworth's,² is that wide-ranging consultation and

* I thank Jeremy Horder, Barry Mitchell and David Ormerod for their comments on earlier drafts.

¹ R v JF and NE [2015] EWCA Crim 351; [2015] All ER (D) 117 (Mar) at [33] [*JF and NE*].

² A. Ashworth, 'Case Comment' [2013] 4 Crim LR 335 at 337.

legislation is the way forward. However, there have been two contradictory proposals for reform from the Law Commission in the last three decades alone. This article will suggest that the current definition, as laid down in *D.P.P. v. Newbury and Jones*,³ can be defended by the idea that the actus reus elements of the unlawful act should be intended by the defendant and that the foreseeable injury should exist before the crime.

Unlawful act manslaughter has been described as ‘illogical’,⁴ ‘unattractive’,⁵ and ‘antiquated’.⁶ It involves the attribution of criminal liability for causing death in the commission of a crime,⁷ provided there was the foreseeable risk of bodily harm, which need not be serious harm,⁸ in all the circumstances that were known to the defendant.⁹ This objective test takes no account of the defendant’s capacity to foresee what the reasonable person would have foreseen.¹⁰ Furthermore, the degree of foreseeable risk required is unclear.¹¹ The crime must be a more than minimal cause of death,¹² but need not be directed at the victim.¹³

The main criticism of unlawful act manslaughter has been its constructive nature. This is reflected in the gap between the degree of foreseeable harm required and the death caused, which has created arguments about whether the defendant should be held liable for causing a death that is so dependent on luck. This can also

³ DPP v Newbury and Jones [1977] AC 500 (HL) [*Newbury and Jones*].

⁴ R v Creamer [1966] 1 QB 72 (CCA) at 82 (Lord Parker C.J.).

⁵ R v Lowe [1973] QB 702 (CA) at 709 (Phillimore L.J.) [*Lowe*].

⁶ R v Scarlett (1994) 98 Cr App R 290 (CA) at 291 (Beldam L.J.) [*Scarlett*].

⁷ An omission is insufficient. A deliberate omission should be sufficient. See *Lowe*, above n. 5. Cf. R v Gibbons and Proctor (1918) 13 Cr App R 134 (CCA).

⁸ See *Newbury and Jones*, above n. 3.

⁹ R v Watson [1989] Crim LR 733 (CA) [*Watson*].

¹⁰ Cf. R v Creighton [1993] 3 SCR 3 (SCC) at 61 (McLachlin J.): ‘considerations of principle and policy dictate the maintenance of a single, uniform legal standard of care for such offences, subject to one exception: incapacity to appreciate the nature of the risk which the activity in question entails.’

¹¹ R v Larkin [1943] 1 All ER 217 (CCA) [*Larkin*] at 219: ‘an act which is *likely* to injure another person’. Cf. R v Carey [2006] EWCA Crim 17; [2006] All ER (D) 189 (Jan) at [31] (Dyson LJ): ‘*Church* only requires a risk of some harm resulting.’ Italics added.

¹² R v Cato [1976] 1 All ER 260 (CA).

¹³ Attorney General’s Reference (No.3 of 1994) [1998] AC 245 (HL).

be seen in the lack of a clearly foreseeable relationship between some crimes against property and the death caused. In light of the latter point, the test of dangerousness performs the task of distinguishing between a conviction for the unlawful act and a conviction for unlawful act manslaughter.

Much of the debate surrounding unlawful act manslaughter has centred on the discrepancy between the degree of harm risked and the harm actually caused by the defendant. Some have argued that this means of proving manslaughter could be justified by carrying out an act with the intent to cause bodily harm, or at least an 'attack', which involves an injurious offence against the person.¹⁴ Horder defended the idea that unlawful and dangerous act manslaughter should only be based on an act with the intent to cause bodily harm. He did this through his argument that the moral and legal justification for unlawful act manslaughter is the law's respect for 'physical integrity' and its indivisibility from the victim's 'life force'.¹⁵ This is his answer to the so-called change of normative position involved in being held responsible for the unforeseen death caused by the dangerous crime. This has been the centre ground of the debate regarding unlawful and dangerous act manslaughter in the last three decades and suggests that the defendant should be held responsible for the resultant death, even if it was unforeseen, because knowingly committing crime, or 'certain risky crimes', opens up the defendant to liability for prohibited results beyond those intended or foreseen.¹⁶ This implicates the defendant in what has been termed 'moral luck',¹⁷

¹⁴ C. M. V. Clarkson, 'Context and Culpability in Involuntary Manslaughter' in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press: Oxford, 2000) 133 at 160.

¹⁵ J. Horder, 'Violating Physical Integrity: Manslaughter by Intentional Attack' in *Homicide and the Politics of Law Reform* (Oxford University Press: Oxford, 2012) 143.

¹⁶ J. Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 CLJ 502 at 509.

¹⁷ T. Nagel, *Moral Luck* (Cambridge University Press: Cambridge, 1979) 26: 'Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.'

which involves responsibility for an accidental death that is arguably beyond the control of the defendant.

These issues could be overcome by concentrating on the test of dangerousness, which in practice takes two forms. The first is when the unlawful act does not require recklessness as to injury, rendering the test objective. The second is when the unlawful act can be proven by recklessness as to some injury and the test is actually satisfied by the defendant's subjective risk-taking.¹⁸ In the first, unlike in the second test, there is no opportunity to avoid creating the risk of injury, unless the circumstances known before the crime is committed suggest there is the foreseeable risk of injury. This is illustrated by the following example. In the course of committing a burglary, the defendant accidentally disturbs a young child, who is sleeping upstairs in a bedroom. The child runs away from the defendant and, during this 'burglarious intrusion',¹⁹ the defendant watching the events unfold would foresee the risk of injury, but that risk of injury has already been created and cannot be avoided on the facts. If the child falls down the stairs and dies, the defendant could be convicted of unlawful and dangerous act manslaughter on the basis of a continuing unlawful act. This article will suggest that a conviction for unlawful act manslaughter should depend on the foreseeable risk of injury from the circumstances known before the commission of the crime, unless recklessness as to some injury suffices for the unlawful act. Narrowing the law to a specific and dangerous circumstance, known before the commission of a crime, would allow the defendant the opportunity to avoid a conviction for unlawful act manslaughter and lessen the impact of luck on criminal liability. The development of the case law since *Newbury and Jones* has allowed for the risk of injury to arise at any

¹⁸ See Horder, above n. 15 at 152.

¹⁹ See *Watson*, above n. 9 at 733 (Lord Lane C.J.).

time during the continuing circumstances of the crime. This change in the test of dangerousness has never been approved at the highest appellate level.

These issues could also be overcome by concentrating on the meaning of an intentional unlawful act as defined in *Newbury and Jones*. There is historical authority for a version of unlawful act manslaughter defined by an intention to cause bodily harm. Moreover, it makes no sense to interpret intentional in this context as voluntary given that *R. v. Lamb*,²⁰ approved by *Newbury and Jones*, is unclear whether an intended unlawful act or its mens rea is required. Seen in this light, unlawful and dangerous act manslaughter is not a constructive crime. It should not need proof of a crime, but an intended criminal act. Even if recklessness is enough to prove the crime, it should be insufficient for unlawful and dangerous act manslaughter. Crucially, an intention to commit the actus reus elements of the unlawful act lessens the impact of moral luck on unlawful and dangerous act manslaughter. The distinction between intention and recklessness, in terms of the relationship with luck, should depend on the idea that the reliance on luck involved in the former is inextricably bound up in (at least one of) the defendant's reasons for acting. This should be factored into his practical attitude when he intends an outcome such as bodily harm, because it is dependent on luck.

By concentrating on the test of dangerousness and the mens rea for the unlawful act, it will be seen that an unlawful act which does not require recklessness as to some injury, and an unlawful act that can be proven by recklessness as to some injury, could be justified by a different interpretation of unlawful and dangerous act manslaughter. This would address the gap between the degree of foreseeable harm

²⁰ *R v Lamb* [1967] 2 QB 981 [*Lamb*].

required and the resultant death. It would also explain the lack of a foreseeable relationship between some unlawful acts and the death caused.

The change of normative position

Before understanding why the dangerous circumstances of the unlawful act should be foreseeable before the crime has begun, and why there should be an intention to commit the actus reus elements of the unlawful act, it will be necessary to understand why the mainstream debate regarding unlawful act manslaughter and luck has failed to reach a satisfactory conclusion. The law's respect for physical integrity was meant to explain the change of normative position, which has been at the centre of the debate surrounding unlawful act manslaughter for the last three decades. John Gardner initially authored the phrase, although he later made clear that it was not a possible justification of liability for causing consequences beyond those intended or foreseen,²¹ but an attempt to make this constructive form of liability comprehensible.²² His view was that causing death, or *killing*, is the basic moral wrong: the rule of law requires notice of prospective liability, but that does not mean that the harm foreseen has to be co-extensive with the harm caused,²³ provided there is an element of notice involved, which is more efficient where the unlawful act requires intention or recklessness.²⁴ For Ashworth, however, 'fair warning of an unfair rule does not turn it into a fair rule'.²⁵

²¹ Cf. G. Hegel, *Hegel's Philosophy of Right*, S. W. Dyde tr. (George Bell & Sons: London, 1896) 115–116: 'In acting I must expose myself to misfortune; that also has a right to me, and is the manifestation of my own will.'

²² J. Gardner, 'Reply to Critics' in John Gardner (ed.), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press: Oxford, 2007) 239 at 247: 'Elsewhere, to be more exact, I have argued (against Kant) that acting with bad results (and irrespective of fault) is the basic or elementary type of moral wrongdoing.'

²³ *Ibid.* at 248.

²⁴ J. Gardner, 'Introduction *by John Gardner*' in H. L. A. Hart, *Punishment and Responsibility, Essays in the Philosophy of Law*, 2nd edn (Oxford University Press: Oxford, 2008) xiii at xlv.

²⁵ A. Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 *New Crim L Rev* 232 at 247.

From this perspective, the harm contemplated and that caused should always correspond, through intended or risked consequences,²⁶ even if the risk was only foreseeable and was not actually foreseen.²⁷ Some have suggested that this could be determined by statistics, but acknowledge that this is a matter of common experience.²⁸ In this way, moral luck would not play a part in the criminal law.

The change of normative position had involved the argument that an intended crime justifies liability for a resultant unforeseen death, subject to certain limitations: seemingly, that it was a crime of violence; and that the death was not seen as disproportionate in some way to the degree of bodily harm intended.²⁹ But this was criticised by Ashworth on the grounds that the argument was reliant on the normative value of intention, which had not been fully justified,³⁰ that those crimes of violence were liable to extension on policy grounds,³¹ and that proportionality was a vague concept.³² As a response, Horder reconceived his approach to entail the law's respect for victims' physical integrity, which was said to be inseparable from their 'life force', provided that actual bodily harm was intended as an end or a means to an end.³³ It is clear, therefore, that intention remains a significant part of this possible justification for a change of normative position.

One argument which supports Horder's approach is that the bad luck involved in, for example, one-punch manslaughter, is not unrelated to the defendant's culpability. This can be seen as a matter of death being 'strictly' foreseeable,³⁴ or as

²⁶ *Ibid.* at 236.

²⁷ V. Tadros, *Criminal Responsibility* (Oxford University Press: Oxford, 2005) 95.

²⁸ B. Mitchell, 'Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence of One-punch Killers' (2008) 72 *J Crim L* 537 at 542. Cf. Ashworth, above n. 25 at 252.

²⁹ J. Horder, 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113(Jan) *LQR* 95, 96.

³⁰ Above n. 25 at 255.

³¹ *Ibid.* at 244.

³² *Ibid.* at 252.

³³ Above n. 15.

³⁴ B. Mitchell, 'More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-punch Killer' [2009] *Crim LR* 502 at 503.

the defendant having brought about his own, related, luck; the luck is not random in the sense that it would be if the defendant had set out to cause a different kind of crime from that caused.³⁵ Furthermore, there is a distinction between intrinsic and extrinsic luck.³⁶ Namely, intrinsic luck changes D's normative position because the defendant's culpable actions brought about the bad luck, making them relevant to D's moral luck; extrinsic luck demonstrates no foreseeable relationship between the defendant's culpability and the bad luck caused. However, this argument can be made out on the basis of intention or recklessness.

Some consider that intrinsic luck has wider implications for the rule of law arguments discussed by Gardner and Ashworth. Provided the rationale for unlawful act manslaughter is at least partly based on intrinsic luck, it can be argued that the defendant has been given *fair* warning of liability for the accidental death: the unlawful *and dangerous* act is not only a means of putting the defendant on notice of impending liability, but indicates to the defendant that the act is wrong because it can cause death.³⁷ Another question remains, however, regarding the defendant's capacity not only to recognise that risk but to avoid it. If there is an opportunity to avoid the commission of an unlawful and dangerous act then, to some extent, the focus of the debate has been misplaced. On the basis that there is a risk of death every time there is the risk of injury,³⁸ some traction could be gained in concentrating on the defendant's ability to foresee and avoid creating the risk, which can be controlled, rather than the subsequent result of creating the risk, which cannot.

³⁵ A. P. Simester et al., *Simester and Sullivan's Criminal Law, Theory and Doctrine*, 5th edn (Hart Publishing: Oxford and Portland, Oregon, 2013) 197–198.

³⁶ B. Williams, *Moral Luck* (Cambridge University Press: Cambridge, 1981) 25–26.

³⁷ See A. P. Simester et al., above n. 35 at 200.

³⁸ Cf. *Creighton*, above n. 10 at 52 (McLachlin J.): 'Wherever there is a risk of harm, there is also a practical risk that some victims may die as a result of the harm.'

The foreseeable risk of injury from a specific circumstance known to the defendant before the unlawful act

A defendant's ability to foresee the risk of injury would not explain how culpability is derived from dangerousness, even if the objective test took account of the defendant's capacity to recognise the risk and required the relevant risk to be a likely risk of injury in the circumstances. This is because culpability is based on creating the risk of injury, which is different from the risk eventuating. When that risk arises in the course of an unlawful act, the bystander might recognise that the risk has been created, but whether it eventuates is a matter of chance and by this time, moreover, the risk-creation cannot be avoided. This is not an issue for unlawful acts that can be proven by recklessness as to some injury, because dangerousness is supplanted by the defendant's subjective recognition of the risk involved, which means there is an opportunity to avoid the risk-creation at the appropriate time. It is an issue, however, for unlawful acts that do not require recklessness as to some injury, which can be addressed by accepting that unlawful and dangerous acts are only dangerous by virtue of specific circumstances. Moreover, in order to avoid the risk-creation, those circumstances should be foreseeable before the unlawful and dangerous act is committed. Only by ensuring that the unlawful and dangerous act can be foreseen and avoided is it fair to hold the defendant liable for the death caused. Without a specific foreseeable and avoidable risk manslaughter is unfair. This can be seen by comparing unlawful and dangerous acts.

For example, on the facts of *Arobieke*,³⁹ D assaulted V by following him to a railway station and searching for him on a train.⁴⁰ In attempting to escape V crossed

³⁹ R v Arobieke [1988] Crim LR 314 (CA).

⁴⁰ The force V apprehended was insufficiently imminent according to the law at the time and the manslaughter conviction was quashed. Cf. R v Ireland, Burstow [1998] AC 147 (HL).

a live track and was electrocuted. The unlawful act, on the basis that there was an assault, became dangerous, but a bystander would not have reasonably foreseen the injury and it was V's conduct that created the risk of injury in the circumstances. This might suffice as a legal cause of the death, as V's conduct could be seen as non-voluntary,⁴¹ but by the time a bystander would have recognised the risk of injury, from crossing the track, it was too late to avoid it. The relevant risk had already been created. The assault can be said to be a continuing unlawful act, which became dangerous, as the apprehension of unlawful personal violence might have been the cause of the victim's conduct. Contrast this with *Lewis*,⁴² where D had assaulted V by chasing him into oncoming traffic. The ground of appeal was based on causation, but the conviction was upheld by the Court of Appeal.⁴³ The assault was held to be dangerous in the circumstances and this would have been obvious to a bystander, as it had been to several witnesses who saw D chase V into and across the road. Before the risk of injury was created by that criminal act, it would have been obvious that it would create the risk of some harm. Although an assault is not inherently dangerous, this was an unlawful and dangerous act that was foreseeable and avoidable before it began.

The leading case of *Newbury and Jones* was ostensibly based on an unlawful and dangerous act of criminal damage, although the act was not identified by the House of Lords. The defendants had thrown part of a paving stone from a bridge as a train was about to reach them. It broke a window on the train and killed the guard. This

⁴¹ R v Kennedy (No.2) [2007] UKHL 38; [2008] 1 AC 269 [*Kennedy*]. It is clear from this judgment that the first question, where V's conduct is concerned, is whether a voluntary act has broken the chain of causation. This conduct can be seen as non-voluntary, from apprehension of the battery, but not reasonably foreseeable.

⁴² R v Lewis [2010] EWCA Crim 151.

⁴³ The chain of causation was not broken by the victim's conduct, because it was held to have been reasonably foreseeable. Cf. R v Williams [1992] 2 All ER 183 (CA).

act was dangerous in the circumstances, inasmuch as it created the risk of injury to anyone on the train. It can be seen as dangerous before the unlawful act of criminal damage had been committed. There was, therefore, an opportunity for the fifteen-year-old boys to avoid creating the relevant risk, assuming that they had the capacity to recognise the risk. This can be compared with *JF and NE*, where the appellants, who had been fourteen-and-a-half and sixteen years old at the time, set fire to a duvet in the unlit basement of a derelict building, causing the death of a homeless person from the inhalation of carbon monoxide created by the acrid smoke of a nearby tyre in under five minutes. One of the defendants seemingly lacked the capacity to recognise the risk of injury from the arson: evidence was adduced that he had the mental age of a six-year-old. Moreover, on the facts, there was no opportunity to avoid the risk-creation. From the perspective of a bystander, before the fire was started, there was no risk of injury to anyone in the known circumstances. It was only once the fire had spread to the tyre and caused the smoke to fill the basement that an adult might have recognised the risk of injury to someone; by that time the risk had already been created and could not be avoided. It might be argued that arson is an inherently dangerous crime,⁴⁴ but it is submitted that the Court of Appeal's approach to foreseeability in cases of unlawful and dangerous act manslaughter is wrong: dangerousness depends on specific circumstances.⁴⁵

In *Watson*, a burglar broke into a home in which a frail and elderly person lived. The victim subsequently died of a heart attack and the conviction was quashed on the grounds of lack of causation. The Court of Appeal held that 'the appellant's unlawful

⁴⁴ Cf. Horder, above n. 15 at 143: 'killing by intentionally attacking V's physical integrity is ... not to make an implicit claim that attacks on physical integrity are more dangerous to life than attacks on property. That may be a false claim, for example, in cases of arson.'

⁴⁵ Cf. *R v M(J)* [2012] EWCA Crim 2293; [2013] 1 WLR 1083 (Lord Judge C.J.) at 1089: 'a requirement that the bystander must appreciate the "sort" of injury which might occur undermines the "some" harm principle explained in *R v Church*'.

act comprised the whole of the burglarious intrusion'.⁴⁶ But the significant issue, in *Watson*, is that the creation of risk could not have been avoided. The crime was not dangerous in the circumstances known beforehand. By the time the risk was foreseeable to a bystander, it had already been created. Even if the bystander was imbued with the defendant's knowledge it would not have helped: Watson did not know of the victim's frailty and age until it was too late. Therefore, if there was nothing in the circumstances to indicate that the occupant would be frail and elderly, Watson could not have avoided a manslaughter conviction by avoiding an unlawful *and dangerous* act. By way of comparison, in *Bristow*, the unlawful act was conspiracy to burgle.⁴⁷ The burglars had targeted some vehicles to steal and the evidence suggested that the deceased was run over in his attempt to intervene. The Crown relied on the fact that the workshop, from which a vehicle was stolen, was close to the farmhouse in which the deceased lived. It was said that the 'burglary would involve the use of heavy vehicles ... at night [which] would have to manoeuvre in a confined space.'⁴⁸ Counsel for the appellants argued that the trial 'judge had been wrong to focus on the risk of harm prior to the burglary',⁴⁹ and that 'the offence did not become dangerous until a car began to be driven dangerously'.⁵⁰ Treacy, L.J., held that there:

was a clear possibility of intervention by someone living in the residential part of the farm, and the circumstances were such that a jury could find that a risk of danger of causing some injury was created.⁵¹

⁴⁶ Above n. 9. The defendants abused the victim verbally, which could have been an assault.

⁴⁷ R v Bristow (Terrence) & Ors [2013] EWCA Crim 1540; [2013] All ER (D) 109 (Sep) at [10] (Treacy L.J.) [*Bristow*]. This placed emphasis on the circumstances known beforehand.

⁴⁸ *Ibid.* at [7] (Treacy L.J.).

⁴⁹ *Ibid.* at [26] (Treacy L.J.).

⁵⁰ *Ibid.* at [27] (Treacy L.J.).

⁵¹ *Ibid.* at [30].

Specifically, his Lordship thought that this was:

not a case like *Dawson* or *Watson* where the circumstances demonstrating the risk of harm to the occupier of property did not arise until a point during the burglary or at all.⁵²

In *R. v. Dawson*, it was noted that the bystander has the same knowledge as the defendant watching the events unfold and no more.⁵³ The objective person is no more able to avoid the risk of injury arising from circumstances beyond their control, after the unlawful act has begun, than the defendant is. It was recognised, in *Bristow*, that unlawful act manslaughter is committed 'in circumstances rendering it a dangerous act'.⁵⁴ It can be argued that these circumstances should always be foreseeable before the unlawful and dangerous act is committed. This represents an extension of J.C. Smith's view that the reasonable bystander cannot be seen as 'having come on the scene at the moment of the fatal act with no knowledge of any earlier events.'⁵⁵ Furthermore, Ashworth has noted similar implications for negligence.⁵⁶ In *Bristow* the risk of injury was created by the dangerous circumstances but was foreseeable and avoidable before it happened.

⁵² *Ibid.* at [34].

⁵³ *R v Dawson* (1985) Cr App R 150 (CA) at 157 (Watkins L.J.) [*Dawson*].

⁵⁴ Above n. 47 at [32] (Treacy L.J.).

⁵⁵ J. C. Smith, 'Case Comment' [1989] Crim LR 730 at 732.

⁵⁶ A. Ashworth, *Principles of Criminal Law*, 5th edn (Oxford University Press: Oxford, 2006) 193: 'The enquiry into capacity and opportunity necessitated by negligence liability widens the time-frame of the criminal law, giving precedence to the doctrine of prior fault over the principle of contemporaneity.'

An intended unlawful act

Newbury and Jones relied on *Church*,⁵⁷ which in turn had relied on *Larkin* for its definition of unlawful and dangerous act manslaughter. The court in *Larkin* relied on:

propositions of law ... to be found in many old cases, and ... summed up quite accurately in ARCHBOLD'S CRIMINAL PLEADING, 30th Edn., at pp. 900-903, where the authorities are given.⁵⁸

Archbold notes, however, under 'seeming exceptions ... to the above rule',⁵⁹ where manslaughter is discussed:

Where an act ... itself lawful is at the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party ... used such a degree of caution as to make it improbable that any danger or injury should arise from it to others.⁶⁰

Under the same section, and immediately afterwards, it reads: 'Where a dangerous and unlawful act is done, even in sport, if death results it is manslaughter: e.g. ... *Fenton*'.⁶¹ The implications of these two statements are: (a) that a dangerous act involves a probable risk of injury; and (b) that *R v. Fenton* involved a risk of probable

⁵⁷ *R v Church* [1966] 1 QB 59 (CCA) [*Church*].

⁵⁸ Above n. 11.

⁵⁹ J. F. Archbold, R. E. Ross & M. Turner, *A Summary of the Law relative to Pleading and Evidence in Criminal Cases*, 30th edn (Sweet & Maxwell: London, 1938) 902.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

injury.⁶² There is reason to argue, therefore, that dangerousness was not imposed on unlawful act manslaughter in *Larkin*.

The presumption that a person intended the natural and probable consequences of his or her actions meant that there was nothing to choose between intention and a voluntary act when *Fenton* was decided. A review of historical sources tends to suggest that there was at least a version of unlawful act manslaughter defined by an act intended to cause injury.⁶³

An example of manslaughter by an act intended to cause injury is *Matthew Kelly*,⁶⁴ which was said to disclose ‘a clear case of manslaughter’⁶⁵ and involved evidence:

that the prisoner struck with his fist, and that the deceased fell from the blow upon the piece of brick, and that the fall upon the brick was the cause of the death.⁶⁶

This variety of unlawful act manslaughter was separately acknowledged in Russell’s treatise for practitioners:

any one [sic] who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstances of the nature of the

⁶² *Fenton’s and Others’ Case* (1830) 1 Lewin 179; 168 ER 1004 [*Fenton*].

⁶³ See Horder, above n. 15 at 140–141. Horder argued that this evolved into unlawful and dangerous act manslaughter.

⁶⁴ *R v Matthew Kelly* (1825) 1 Mood 113; 168 ER 1206.

⁶⁵ *Ibid.* at 113.

⁶⁶ *Ibid.* at 113–114.

instrument used, and the manner of using it, as calculated to produce great bodily harm or not.⁶⁷

Thomas Starkie, in dissenting from the Criminal Law Commissioners' recommendation that manslaughter by negligence could cover intentional violence unlikely to kill,⁶⁸ recognised manslaughter by an act intended to cause injury as law,⁶⁹ relying on Foster's definition.⁷⁰ In evidence to the Select Committee on the Homicide Law Amendment Bill 1874, Bramwell, B., acknowledged manslaughter by an act intended to cause injury as a separate means of proving unlawful act manslaughter, describing it as 'slight violence which no man would expect would kill'.⁷¹ By the end of the nineteenth century, Stephen defined it separately, in the same way as Foster.⁷² In *Doherty*,⁷³ the prisoner was indicted for murder and the direction in which Doherty shot was disputed. Stephen, J., directed the jury that, in the event of a manslaughter conviction, they specify 'manslaughter by violence wilfully inflicted, or by culpable negligence'.⁷⁴ By the beginning of the twentieth century, Kenny acknowledged that unlawful act manslaughter could be independently proven as follows:

⁶⁷ W. M. Oldnall Russell, *A Treatise on Crimes and Misdemeanors*, Vol. 1 (Joseph Butterworth and Son and J Cooke: London, 1819) 756.

⁶⁸ H. M. Commissioners on Criminal Law, *Second Report of Her Majesty's Commissioners for Revising and Consolidating the Criminal Law* (W. Clowes and Sons: London, 1846) 32.

⁶⁹ *Ibid.* at 56.

⁷⁰ *Ibid.* (Thomas Starkie): 'if one give another a box on the ear, or strike with a stick, or other weapon not likely to kill, and unluckily and against his intention kills, it is manslaughter.—Foster, *Disc. II.*, ch. 5, ss. 1-2; and ch. 1, ss. 1-2'.

⁷¹ The House of Commons, *Special Report from the Select Committee on Homicide Law Amendment Bill*; together with the proceedings of the committee, minutes of evidence, and appendix (The House of Commons: London, 1874) 29.

⁷² J. F. Stephen, *A History of the Criminal Law of England*, Vol.3 (Macmillan and Co: London, 1883) 56: 'As the law now stands, if a man stabs another with intent to do him grievous bodily harm, and in fact kills him, he is guilty of murder. If he intentionally strikes him a blow with his fist or with a small stick with no intention to inflict any great harm, and happens to kill him, he is guilty of manslaughter.'

⁷³ *R v Doherty* (1887) 16 Cox CC 306.

⁷⁴ *Ibid.* at 309.

Where some trivial blow is struck, with the intention of producing mere momentary pain, but death unexpectedly results from it, then, if it is an unlawful blow, the striker will be guilty of manslaughter.⁷⁵

In the light of these sources, it is arguable that the interpretation of the authorities relied on in *Larkin* was not the only possible interpretation and, as Sir Richard Buxton has argued, there was a version of manslaughter defined by an act intended to cause injury.⁷⁶ Therefore Lord Salmon, in *Newbury and Jones*, was correct to approve of *Lamb* as an authority for a 'guilty mind'.⁷⁷ His Lordship's decision that the defendant need only show 'an intention to do the acts which constitute the crime' is not completely reflective of unlawful act manslaughter as it had been understood.⁷⁸ As unlawful act manslaughter seems to have been defined as a voluntary, unlawful, and dangerous act, or an act intended to cause injury, which caused death,⁷⁹ it is open to the Supreme Court to interpret unlawful and dangerous act manslaughter as requiring an intended, unlawful, and dangerous act causing death.

There are arguments based on the rule of law and the normative value of intention for relying on an intended, unlawful, and dangerous act rather than simply an intentional one, or one in which the unlawful and dangerous act was committed recklessly. This authority depends on intention as an end or a means to an end. First, it could not be clearer to the defendant that there is the risk of conviction for a crime when the criminal threshold is deliberately crossed and, in combination with a

⁷⁵ C. S. Kenny, *Outlines of Criminal Law* (Cambridge University Press: Cambridge, 1902) 115.

⁷⁶ R. Buxton, 'By Any Unlawful Act' (1966) 82 LQR 174.

⁷⁷ Above n. 3 at 509. See *Lamb*, above n. 20 at 988 (Sachs L.J.): 'mens rea ... could not in the present case be established ... except by proving that element of intent without which there can be no assault.'

⁷⁸ *Ibid.*

⁷⁹ Cf. *Wilson v R* [1992] HCA 31; 174 CLR 313 (AustLII) at [50] (Mason C.J., Toohey, Gaudron and McHugh J.J.): 'Adoption of the test in *Holzer* applying to manslaughter by an unlawful and dangerous act and abolition of battery manslaughter do not create a gap in the law.'

foreseeable risk of injury at that moment, there is sufficient notice that the defendant may be convicted of a crime caused by the risk of injury. This, for some, would not be any more compelling than Gardner's rule of law argument in relation to due notice. Second, however, the intended commission of the actus reus elements of a criminal act makes the defendant dependent on luck, at least in bringing about the result elements intended. In association with the foreseeable risk of injury at that moment, it is reasonable to argue that the defendant has a different relationship with luck because of intention. Therefore, the consequences involved in throwing a stone at a greenhouse with the intention of breaking the window can fairly be attributed to the defendant who causes the death of someone known to be kneeling close by.⁸⁰ If the defendant broke the window by voluntarily or recklessly throwing the stone, there was no dependence on luck.

For many instances of unlawful and dangerous act manslaughter the intention to cause bodily harm renders the objective test of dangerousness unnecessary, because the defendant recognises and creates the risk of some harm. It is, in fact, his aim or purpose or at least a means to that end. There is, therefore, no difficulty with avoiding the risk-creation. On the contrary, the defendant consciously creates the risk of injury. The only issue is the gap between the degree of harm intended and that caused. In relation to one-punch manslaughter, the defendant's conduct might reveal an intention to cause ABH, which can fulfil the test of dangerousness. The defendant has brought about the bad luck, by committing a crime with the risk of some harm and the bad luck is intrinsic to that action. The intended action displays an attitude of

⁸⁰ D. Ormerod and K. Laird, Smith, Hogan, and Ormerod's Criminal Law, 15th edn (Oxford University Press: Oxford, 2018) 570. Cf. *Larkin*, above n. 11. There should surely be the risk of injury to 'another person', even if the unlawful act does not need to be directed at the deceased.

'pursuit',⁸¹ which is a cognitive and affective state of mind that reveals dependence on luck, without which the defendant would fail to bring about the intended degree of harm and which leads to the bad luck associated with the accidental death. This represents an extension of Duff's distinction between endangerments and attacks, the latter of which Horder relies on for the interest in physical integrity involved in his 'pure' version of unlawful act manslaughter.⁸²

The significance of an attack, according to Duff, lies in the 'practical hostility towards the interest at which it is directed'.⁸³ This builds on the idea that 'the non-occurrence of the harm marks the failure of the enterprise.'⁸⁴ This is clearly not the case with endangerment where, although the defendant could be said to be practically indifferent in the sense that his conduct does not display the kind of respect for the reasons against acting that it should, the defendant could plausibly claim to be relieved that his exposure of the interest to the risk of harm for whatever reason did not eventuate in harm.⁸⁵ This draws an apparent distinction in the criminal law between, on the one hand, risk-taking such as recklessness and, on the other, intention. The intention to harm means the defendant has his own reason for acting and that this is wrong: he believes that by attacking the interest he will cause harm (and this is at least one reason for which he acts).⁸⁶ On this basis, the luck involved in an attack is integral to the attack and, therefore, to the defendant's culpability. This luck is not simply intrinsic, it is inextricably bound up in (at least one of) the defendant's reasons for acting and should be factored into his practical attitude when he pursues an outcome

⁸¹ A. Kenny, *Freewill and Responsibility* (Routledge and Kegan Paul Ltd: London, Henley and Boston, 1978) 46.

⁸² Above n. 15 at 141.

⁸³ R. A. Duff, *Answering for Crime* (Hart Publishing: Oxford, 2007) 151.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

that is dependent on luck. Therefore, the defendant does not simply bring the bad luck on himself. There is a clear difference between an unlucky result that is caused by his culpable actions and one which is also the outcome of reliance on luck.

Duff's attack or endangerment distinction has been criticised by Kimberly Kessler Ferzan, for whom this distinction is a difference in degree and not in kind, especially as Duff included an intention to expose to a risk in his understanding of an attack, which she identifies as an extreme version of indifference.⁸⁷ An intention to expose to a risk is, by its nature, not dependent on luck to bring about a result. As was acknowledged above, an intended attack includes the creation of a risk, but it is not simply on a spectrum of recklessness or 'unjustifiably imposing risks for the attainment of some possible end'.⁸⁸

Reform

In its most recent recommendation, the Law Commission defined 'criminal act manslaughter' as:

'killing another person (a) through the commission of a criminal act intended by the defendant to cause injury, or (b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury'.⁸⁹

There was some doubt whether intention or subjective recklessness as to injury was required for unlawful act manslaughter, before its rejection in *Newbury and Jones*.⁹⁰

⁸⁷ Kimberly Kessler Ferzan, 'The Structure of Criminal Law' (2009) 28 CJ Ethics 223 at 235.

⁸⁸ *Ibid.* at 231.

⁸⁹ Law Commission, *Murder, Manslaughter and Infanticide*, Cm 304 (2006) para. 1.38.

⁹⁰ Above n. 3 at 507 (Lord Salmon): 'Lord Denning M.R.'s judgment [in *Gray v Barr* (1971) 2 QB 554] ... has been so understood by some judges, but I doubt whether he intended that it should be. If he did, then I am afraid that I cannot agree with him.'

Furthermore, a serious risk was not meant to denote a likely risk.⁹¹ This is in line with the degree of risk involved in establishing recklessness more generally.⁹² There is nothing wrong, however, with an objective risk of injury, provided that risk is a serious and obvious one, which takes account of capacity to some extent, as with the objective test for gross negligence manslaughter.⁹³ A likely risk can be seen as reasonably foreseeable if it is not impossible for the defendant to recognise the risk. *Newbury and Jones* was decided on the basis of the risk foreseeable to all sober and reasonable people. This confirmed the test approved in *Church*. The courts should assess the foreseeable risk of injury from circumstances known to the defendant before the crime began, because the risk from these circumstances might have been foreseeable to the defendant and, crucially, because the defendant could therefore have avoided committing an unlawful *and dangerous* act. If, however, the specific circumstance that renders the crime dangerous does not exist and is not foreseeable until the crime has begun, conviction of unlawful and dangerous act manslaughter can be a matter of luck. Therefore, in following *Newbury and Jones*, dangerousness should be ascertained before the defendant committed the unlawful act.

There are arguments for including capacity in the interpretation of dangerousness, when recklessness as to injury does not suffice for the unlawful act. This is because the objective form of dangerousness, as with other objective forms of liability, has been seen as including the defendant's capacity to recognise risks, at least to some extent. The inclusion of the defendant's conditions, which render it

⁹¹ Above n. 90 at para. 3.40: 'more than insignificant or remote'.

⁹² R v Brady [2006] EWCA Crim 2413; [2006] All ER (D) 239 (Oct) at [15] (Hallett L.J.): 'it is, in our view, simply unarguable that, as a matter of law, since G a trial judge is bound to qualify the word "risk" by the words "obvious and significant"'.

⁹³ R v Rudling [2016] EWCA Crim 741 at [39] (Sir Brian Leveson P.): 'the risk must be serious; and the risk must be obvious.' Cf. R v S [2015] EWCA Crim 558; [2015] All ER (D) 341 (Mar) at [20] (Cranston J.): 'a reasonable and prudent person of the applicant's *age and experience*'. Italics added.

impossible for the defendant to recognise the risk, does not make the test of dangerousness redundant, but it does explain why the defendant cannot foresee what the sober and reasonable person would foresee. It means that the defendant has a fair opportunity to avoid a conviction for unlawful and dangerous act manslaughter. It is also necessary, with a view to taking that opportunity, that the defendant has the physical and mental capacity to recognise the risk as dangerous and to avoid it.⁹⁴ If it is *impossible* for defendants to foresee and avoid the risk-creation, which 'all sober and reasonable people would *inevitably* recognise',⁹⁵ then they should not be held liable for it. In *JF and NE*, it was surely impossible for a defendant with the mental age of a six-year-old to recognise the risk of bodily harm involved in the circumstances. Mental or physical incapacity to recognise a risk could include an illiterate defendant who, for example, cannot read a warning on a bottle of nitroglycerine, provided he is not responsible for his illiteracy causing harm.⁹⁶

Conclusion

It has become clear that by determining dangerousness before the unlawful act begins, whether that be through an inherently dangerous crime, for which recklessness as to some injury suffices, or a crime that is dangerous because of its circumstances, the relationship between the death caused and the unlawful act intended can be defended. If there is a change to the norm, in the change of normative position, it is found in the due notice given by the specific risk of injury before the criminal threshold is crossed, in combination with the change in relationship to luck

⁹⁴ H. L. A. Hart, *Punishment and Responsibility, Essays in the Philosophy of Law* in John Gardner (ed.), 2nd edn (Oxford University Press, Oxford 2008) 154: 'If our conditions of liability are invariant and not flexible, i.e. if they are not adjusted to the capacities of the accused, then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard.'

⁹⁵ See *Church*, above n. 57 at 70 (Edmund Davies J.). Italics added.

⁹⁶ See *Creighton*, above n. 10 at 69 (McLachlin J.).

brought about by an intended unlawful act. This addresses the moral luck element involved in the gap between the risk of bodily harm and the resultant death. The luck is extrinsic when the unlawful act is not inherently dangerous, but the foreseeable risk of injury, before the unlawful act is committed, renders it intrinsic to the unlawful act. It is arguable that an intended unlawful and dangerous act makes the luck inextricable. As long as the unlawful act is dangerous before it begins, the defendant has a fair opportunity to avoid committing an unlawful *and dangerous* act. If the defendant fails to take that opportunity it is appropriate and fair to convict of manslaughter for causing death by an intended unlawful act. This supports the change of normative position, but not by closing the gap between the risk of injury and the death caused. Moreover, raising the degree of harm risked to serious injury opens up questions about whether one-punch manslaughter would fall within manslaughter.⁹⁷

Unlawful and dangerous act manslaughter could be defended if the Supreme Court interpreted the current law appropriately. *Newbury and Jones* could be seen as requiring an intended unlawful act, given that no crime was identified. It is this, or simply a voluntary act, that is most readily aligned with the judgment of the House of Lords and the latter does not make sense with the approval of *Lamb*. Furthermore, earlier case law suggests that an intended unlawful act is a tenable interpretation. The *Larkin*, *Church*, and *Newbury and Jones* line of cases could easily be viewed as requiring a likely risk of some harm. There is nothing in *Newbury and Jones* to suggest that, although the test of dangerousness is objective, it should not take account of those characteristics of the defendant that make it impossible to recognise the risk of injury. The idea that the foreseeable risk of injury need not be based on a specific

⁹⁷ Cf. Crimes Act 1958, s. 4A(2) as inserted by the Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014 (No.72 of 2014) s. 3: 'A single punch or strike is taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act.'

known circumstance is doubtful, because appellate decisions that the risk of injury could arise from the continuing circumstances of the unlawful act only gained momentum subsequent to *Newbury and Jones*.

The controversy around unlawful and dangerous act manslaughter is misplaced. The debate regarding the change of normative position should not focus on the gap between the harm risked and harm caused, but on the foreseeable risk of injury from a specific circumstance known to the defendant before the unlawful act is committed with intent. The debate has not been addressed by the normative value of injuring with intent, or by the due notice of crossing the criminal threshold, but by a combination of them. The Supreme Court should interpret the law accordingly.