**Unlawful and Dangerous: A Comparative Analysis of Unlawful Act Manslaughter in English, Australian and Canadian Law**

**Abstract**

The crime of unlawful act manslaughter (otherwise known as constructive manslaughter) exists in English and Australian common law. It is also an offence contrary to the Canadian *Criminal Code*. In all three jurisdictions the offence shares the same essential elements, including the requirements that the accused commit an act which is both unlawful and dangerous. This article will explore the case law on unlawful act manslaughter in Australia, Canada and England, focusing on the elements of an unlawful act and dangerousness, in order to identify similarities and differences in the application of the law in the three jurisdictions. Where differences are found, consideration will be given to the question whether English law should be reformulated.

**Keywords**

Homicide – Manslaughter – Unlawful act – Dangerousness

**Introduction**

In English and Australian common law,[[1]](#footnote-1) D will be guilty of manslaughterif he kills by an unlawful and dangerous act. In Canada, the equivalent offence is located in s 222(5)(a) of the *Criminal Code*, which states that ‘A person commits culpable homicide when he causes the death of a human being by means of an unlawful act’. In all three jurisdictions, the following elements must be proven to exist:

1. D must commit an unlawful act.
2. The act must be ‘dangerous’.
3. D must have intended to commit the unlawful act.
4. That act must have caused death.

The intention behind this article is to compare the law in England with that in Australia and Canada regarding the first two elements of the offence: the unlawful act requirement and the requirement of ‘dangerousness’. The purpose is to identify similarities and differences in the three jurisdictions’ application of these elements in order to suggest ways in which English law could be reformulated. Attention will be paid, *inter alia*, to the following questions: (1) Does the unlawful act have to be a *criminal* offence? (2) What is the situation if one or more elements of the unlawful act cannot be proven and/or the accused raises a defence? (3) Are there any categories of criminal offence that are excluded from the scope of the unlawful act element, for example strict liability offences, or crimes in which the fault element is satisfied by proof of negligence? (4) Can the unlawful act element be established where the accused commits an offence having failed to act? (5) Is ‘dangerousness’ assessed subjectively or objectively? (6) If it is assessed objectively, to what extent can the test be modified to take into account the characteristics of the accused?

1. **An ‘unlawful’ act**

**1.1 The need for a criminal offence**

At one time it was thought that it was sufficient if D committed a civil wrong, such as in *Fenton*,[[2]](#footnote-2) where D was convicted of manslaughter on the basis that he had committed the unlawful act of trespass to property. This approach quickly changed and the law now requires that D commit a criminal offence. In *Franklin*,[[3]](#footnote-3) the court stated that ‘The mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case.’ In *Lamb*,[[4]](#footnote-4) Sachs LJ said that ‘in the context of unlawful act manslaughter ‘it is long settled that it is not in point to consider whether an act is unlawful merely from the angle of civil liabilities’.[[5]](#footnote-5) This is also the position in Australian law. In *Burns*,[[6]](#footnote-6) French CJ said that ‘An unlawful act for the purposes of unlawful and dangerous act manslaughter is one which is a breach of the criminal law’.[[7]](#footnote-7) Canadian courts have stated that ‘the *actus reus* of unlawful act manslaughter is the *actus reus* of the predicate offence’ the use of the word ‘offence’ implying that an underlying civil wrong would fall short of the standard required.[[8]](#footnote-8)

In the English jurisprudence the criminal acts are typically assault,[[9]](#footnote-9) battery,[[10]](#footnote-10) or assault occasioning actual bodily harm.[[11]](#footnote-11) However, convictions have been obtained using the crimes of procuring miscarriage,[[12]](#footnote-12) the administration of a noxious substance,[[13]](#footnote-13) criminal damage,[[14]](#footnote-14) arson,[[15]](#footnote-15) attempted robbery,[[16]](#footnote-16) burglary,[[17]](#footnote-17) carrying an offensive weapon,[[18]](#footnote-18) administering a prescription-only medicine,[[19]](#footnote-19) affray,[[20]](#footnote-20) cruelty to a person under 16,[[21]](#footnote-21) violent disorder,[[22]](#footnote-22) theft,[[23]](#footnote-23) and endangering road users.[[24]](#footnote-24)

In the Canadian case law, the typical unlawful acts are assault and/or battery,[[25]](#footnote-25) but manslaughter is not restricted to such crimes. In *Worrall*,[[26]](#footnote-26) Watt J said that ‘In practice, the unlawful act is usually an assault, or some offence against the person of another. But it is not always and does not have to be so’.[[27]](#footnote-27) In that case, the unlawful act was trafficking in a controlled substance (specifically, heroin).[[28]](#footnote-28) The same unlawful act was the underlying offence in the leading Canadian manslaughter case, *Creighton*.[[29]](#footnote-29) A number of Canadian cases involve firearms offences, including the careless use or handling of a firearm;[[30]](#footnote-30) pointing a firearm without lawful excuse;[[31]](#footnote-31) and carrying or possession of a weapon for a purpose dangerous to the public peace*.*[[32]](#footnote-32)

One issue which is as yet underexplored in Canadian jurisprudence is the extent to which it can be said that offences involving ‘pointing’, ‘carrying’ or ‘possession’ of a firearm can be said to be causative of V’s death, but detailed consideration of this issue is beyond the scope of this article.[[33]](#footnote-33) In the context of English law, Smith has observed that the offence of carrying an offensive weapon ‘is not likely to be a very fruitful one for the purposes of proving constructive manslaughter. *Having* an offensive weapon with one is not an offence which, in itself, is likely to cause death. Generally it will be an act *done* with the weapon which causes death, though there may be exceptions where, for example, a bomb in the defendant’s possession goes off’.[[34]](#footnote-34)

In Australian case law, the unlawful act alleged in the vast majority of cases is battery.[[35]](#footnote-35) In two recent cases, however, the unlawful act was more difficult to pin down. In *D*[[36]](#footnote-36) and *Lin*,[[37]](#footnote-37) the respective victims were killed when a ‘meth lab’ operated by the respective defendants and in which the victims were working exploded. In both cases, the New South Wales Court of Criminal Appeal allowed the Crown’s appeal against the trial judge’s direction that there was no *prima facie* case of manslaughter because of the lack of an unlawful act. In both cases the appeal court said that the unlawful act was the production of prohibited drugs.[[38]](#footnote-38)

The fact that the underlying unlawful act need not be a crime against the person has troubled some commentators. Wilson has pointed out that ‘even as innocuous an offence as theft’ could support manslaughter.[[39]](#footnote-39) Mitchell has argued that ‘even the most moderate constructivists would argue that the unlawful and dangerous act should be a crime of violence in which D intentionally wrongs V so as to create a foreseeable risk of causing serious harm’.[[40]](#footnote-40) Whether ‘most’ moderate constructivists would agree with this is a moot point but it is clear that the courts in all three jurisdictions under consideration would not.

**1.2 All elements of the unlawful act must be proven**

The leading English case on this point is *Lamb*,[[41]](#footnote-41) in which D shot his best friend, V, with a Smith & Wesson revolver and was subsequently convicted of manslaughter on the basis of his having committed assault. However, the Court of Appeal quashed D’s conviction. Sachs LJ said that D’s act was not ‘unlawful in the criminal sense of that word’.[[42]](#footnote-42) Although the gun was loaded, in that there were two bullets in the five-chamber cylinder, there were no bullets in the chamber opposite the barrel. Critically, neither man appreciated that the cylinder revolved before the hammer struck the back of the mechanism. Consequently, V did not apprehend any possibility of injury being caused to himself, and therefore the *actus reus* of assault had not been performed. Nor did D possess the *mens rea*. Because D did not anticipate that the gun would fire, he did not possess the mental element of assault (intention or subjective recklessness as to causing immediate violence to be apprehended by V).

A similar outcome occurred in *Arobieke*,[[43]](#footnote-43) where D’s conviction of manslaughter, also based on assault, was quashed. V was fatally electrocuted after running across live railway lines in order to escape from D but the appeal court was not satisfied that D’s conduct in simply following V into the railway station and looking for him there constituted an assault.

Another example is *Jennings*,[[44]](#footnote-44) where D had been convicted of manslaughter on the basis that his act of carrying an uncovered knife in the street was unlawful.[[45]](#footnote-45) However, because the knife was not an offensive weapon *per se*, it was necessary for the Crown to prove that D intended to cause injury with it, but the jury had not been directed to consider that. The Court of Appeal quashed his conviction. More recently, in *Dhaliwal*,[[46]](#footnote-46) the Court of Appeal upheld the trial judge’s ruling that there was no basis on which a reasonable jury, properly directed, could convict D of the manslaughter of his wife, V, on the basis that there was no unlawful act. The Crown’s case was that D’s abusive treatment of his wife, culminating in her suicide, involved the commission of actual and/or grievous bodily harm.[[47]](#footnote-47) However, of the three experts who testified, two were unable to identify any psychiatric illness capable of amounting to ‘bodily harm’. The Court of Appeal rejected any suggestion that psychological harm falling short of psychiatric injury was capable of falling under the 1861 Act.

As for Canadian law, Fraser CJA explained in *LaBerge*[[48]](#footnote-48) that to ‘convict an accused of unlawful act manslaughter, the Crown must first prove the *actus reus* and the *mens rea* associated with the underlying act’.[[49]](#footnote-49) In *Creighton*,[[50]](#footnote-50) McLaughlin J[[51]](#footnote-51) stressed the need for proof of ‘the *actus reus* and *mens rea* associated with the underlying act’,[[52]](#footnote-52) while Lamer CJ said that it was necessary for the Crown to prove an unlawful act and ‘that the fault requirement of the predicate offence… was in existence’.[[53]](#footnote-53)

The importance of the need to identify which unlawful act has been committed and whether all of its elements have been proven – and the problems which can arise if this is not done – is demonstrated in one Canadian and two Australian cases. In *T*,[[54]](#footnote-54)the Canadian case, D, aged 13, threw a metal snow shovel at a moving car, hitting a 14-year-old passenger (who was hanging halfway out of one of the car windows) in the head and causing his death. D was convicted of manslaughter and appealed, contending that the trial judge had simply assumed that the act was unlawful (and dangerous) without identifying which criminal offence it was, nor establishing that all of the elements had been proved. The Manitoba Court of Appeal quashed his conviction; Hamilton JA said that ‘It was essential that the Crown identify the unlawful act being relied upon and for the judge to determine whether the Crown had proved the *actus reus* and *mens rea* of that offence beyond a reasonable doubt’.[[55]](#footnote-55)

According to Roberts, discussing the position in Australia:[[56]](#footnote-56)

‘The cases make it clear that the act, for the purposes of unlawful and dangerous act manslaughter, must be unlawful in a criminal sense. This requirement necessarily involves that the act should constitute a specific offence in its own right and in order to do so it must satisfy *all* the technical elements in the definition of the offence.’

That is the theory; the practice is sometimes different. In *Pemble*,[[57]](#footnote-57) D fatally shot V, his girlfriend, in the back of the head. D claimed to have only intended to frighten her and that the rifle which he was carrying had gone off accidentally when he stumbled as he approached her from behind. He claimed that he did not know that the rifle was loaded and that it had been pointed up in the air before he stumbled. D was convicted of murder and the High Court unanimously allowed his appeal on the basis that the trial judge had misdirected the jury on the definition of murder. However, there was disagreement amongst the five judges in the High Court as to whether D had committed an unlawful act. According to Barwick CJ (with whom Windeyer J agreed), D was guilty of unlawful act manslaughter because his conduct in pointing the loaded rifle at V was an *attempted* assault.[[58]](#footnote-58) McTiernan J reached the same verdict but by a different route: he regarded D’s conduct as amounting to the statutory offence of discharging a firearm in a public place without reasonable cause.[[59]](#footnote-59) Menzies J and Owen J dissented, refusing to hold that there was an unlawful act, because V had been shot in the back of the head, and hence there was no assault.[[60]](#footnote-60)

In *Wills*,[[61]](#footnote-61) D fired a single shot from a rifle at a car in which V was sitting. The shot was fired as D approached the car from behind, or at least at an angle. The bullet passed through the rear door and the driver’s seat where V was sitting, killing him instantly. D was charged with murder but convicted of manslaughter, apparently on the basis that the firing of the gun was an assault. His appeal was dismissed. This decision was criticized by Roberts on the basis that both the trial court and the appeal court failed to examine whether the unlawful act was actually made out. Roberts contends that on these facts there was no *actus reus* of an assault, because V would have been unaware of the rifle being pointed at him and therefore would not have apprehended immediate violence.[[62]](#footnote-62)

**1.3 Need for defence(s) to be disproved**

Because of the need for an ‘unlawful’ act, the Crown must also disprove any defence(s) raised by D. In *Scarlett*,[[63]](#footnote-63) D’s conviction of manslaughter was quashed by the Court of Appeal following misdirections to the jury concerning D’s defence of ejectment. The Crown case at trial was that D, a publican, had committed an unlawful act (battery) by using excessive force when bundling V, an intoxicated customer out of the pub door and down the steps to the pavement. The Court of Appeal allowed D’s appeal on the basis that the trial judge had failed to explain to the jury that D could only be guilty of battery if the Crown proved that he used excessive force in the circumstances as he (honestly, not necessarily reasonably) believed them to be. The Canadian case of *Gunning*[[64]](#footnote-64) is similar: the Supreme Court quashed D’s conviction for killing V and ordered a retrial after the trial judge wrongly withdrew from the jury’s consideration D’s plea that he was acting in defence of property.[[65]](#footnote-65) In contrast, in the Australian case of *Fragomeli*,[[66]](#footnote-66) D’s manslaughter conviction was upheld after the appeal court rejected arguments that the trial judge had misdirected the jury on self-defence.[[67]](#footnote-67)

In *Slingsby*,[[68]](#footnote-68) V’s consent to the risk of injury precluded proof of an unlawful act. D was charged with the manslaughter of V, who had died after suffering internal cuts from which septicaemia developed and she died. The cuts occurred during sexual activity between D and V. The trial judge ruled that because V had consented to the sexual activity, the fact that V suffered unforeseen (indeed unforeseeable) injuries did not convert their consensual sexual activity into a crime.

Of course, consent may not be available as a defence depending on the context. In *Jobidon*,[[69]](#footnote-69) the Supreme Court of Canada upheld D’s conviction for manslaughter based on the unlawful act of battery. In doing so, the court held that V’s alleged ‘consent’ was not legally valid, having been given in the context of a fist-fight in the parking lot of a hotel. The Australian case of *Aidid*[[70]](#footnote-70) is very similar. D and V were fighting in the middle of a road when V was run over and killed. D’s conviction of manslaughter based on battery (or alternatively, affray) was upheld on appeal with V’s alleged consent again providing no defence to D. In another Australian case, *Stein*,[[71]](#footnote-71) D was convicted of manslaughter after gagging V during a bondage sex session, as a result of which V suffocated to death. The appeal court dismissed D’s appeal holding that the evidence showed that although V had consented to being tied up, he had not consented to being gagged. The gagging was therefore an unlawful act.[[72]](#footnote-72) Moreover, even if V had agreed to the gag, such consent would not be legally valid, given the sado-masochism context and the ‘foreseeable risk of serious injury’.[[73]](#footnote-73)

In *Sinclair*,[[74]](#footnote-74) D’s 4-year-old daughter, V, had refused to go to bed, so D shook her a couple of times and threw her down onto the bed. Unfortunately, V bounced off the bed, hit the wall and fell onto the floor. She later died and D was convicted of manslaughter (based on battery). He appealed, contending that s 43 of the *Criminal Code* provided him with a defence to battery and, therefore, to manslaughter. This section allows, *inter alia*, parents to use force ‘by way of correction toward a child’ provided that ‘the force does not exceed what is reasonable under the circumstances’. The Manitoba Court of Appeal upheld the conviction on the basis that s 43 had a ‘very narrow scope’ and could not ‘exculpate outbursts of violence against a child motivated by anger or animated by frustration’.[[75]](#footnote-75)

Where intoxication is raised as a defence (or, more accurately, in order to deny mens rea of the underlying unlawful act) then the key question is whether or not the unlawful act is one of specific or basic intent.[[76]](#footnote-76) If it is the latter, intoxication provides no defence.[[77]](#footnote-77) In *Lipman*,[[78]](#footnote-78) D had killed his girlfriend, V, whilst both were under the influence of the hallucinogenic drug LSD. D was charged with murder but convicted of manslaughter; the Court of Appeal upheld his conviction. D’s intoxication, although capable of denying the mens rea of murder (a specific intent offence), could not be used to deny the *mens rea* for the underlying unlawful act of battery (a basic intent offence). Similarly, in *O’Driscoll*,[[79]](#footnote-79) D’s manslaughter conviction, based on the unlawful act of arson, was upheld. Again, D’s intoxication could not be used to negative proof of the mens rea, arson being a crime of basic intent.

Thus, only where D is charged with manslaughter based on an underlying *specific* intent offence will D be able to avoid liability using intoxication; and even there only where there is no included basic intent offence. Wilson (discussing Canadian law) argues, surely correctly, that ‘if the unlawful act did not have a lesser included offence or, if the lesser included offence was also an offence of specific intention, the Crown would be unable to provide an unlawful act and the charge of unlawful act culpable homicide would fail’.[[80]](#footnote-80) However, Allen suggests that ‘it is difficult to envisage an offence of specific intent which does not necessarily encompass a lesser offence of basic intent’. [[81]](#footnote-81) Difficult yes, but not impossible; theft is a recognized unlawful act and is not only a crime of specific intent but has no included basic intent offence.

Meanwhile, in the Australian common law states, the courts have eschewed the specific/basic intent dichotomy and held that intoxication can potentially be used to negate the *mens rea* of *any* fault-based offence,[[82]](#footnote-82) potentially allowing intoxication to be used as a defence in typical manslaughter cases based on assault and/or battery.[[83]](#footnote-83) This all depends, however, on the intoxication being of such a degree as to prevent proof of *mens rea*. In *Brougham,*[[84]](#footnote-84) D was charged with murder but was acquitted after the trial judge accepted that D’s evidence of intoxication precluded proof of the specific intent required. However, he was convicted of manslaughter based on numerous assaults, to which his intoxication was not, on the facts, a defence. Sulan J said that D ‘must have forcefully hit [V] on a number of occasions. I conclude that his conduct was deliberate’.[[85]](#footnote-85)

**1.4 Strict Liability crimes as unlawful acts**

In *Andrews*,[[86]](#footnote-86) D had given V, and others, insulin injections to give them a ‘rush’. V, who was undernourished and had been drinking, died. The Court of Appeal upheld D’s manslaughter conviction, which had been based on the unlawful act of administering a prescription-only medicine.[[87]](#footnote-87) The Court rejected D’s appeal, which was based on a challenge to the trial judge’s ruling that V’s apparent consent to the injection was no defence.

This issue does not appear to have been raised before Australian courts. In Canadian law, absolute (but *not* strict) liability offences have been excluded from the scope of unlawful act manslaughter.[[88]](#footnote-88) In *Creighton*,[[89]](#footnote-89) Lamer CJ[[90]](#footnote-90) said that scope of the predicate offence ‘cannot extend to offences of absolute liability’.[[91]](#footnote-91) Similarly, McLachlin J[[92]](#footnote-92) said that ‘It is now settled that the fact that an offence depends upon a predicate offence does not render it unconstitutional, provided that the predicate offence involves a dangerous act, *is not an offence of absolute liability*, and is not unconstitutional’.[[93]](#footnote-93)

The fact that the underlying offence in *Andrews* was one a strict liability was not raised on appeal; had it been, the conviction may – indeed, it is submitted, should – have been quashed. Support for the proposition that unlawful act manslaughter requires an underlying unlawful act with a fault requirement comes from the statements by Edmund-Davies J in *Church*[[94]](#footnote-94)that ‘a degree of *mens rea* has become recognised as essential’[[95]](#footnote-95) and Sachs LJ in *Lamb*[[96]](#footnote-96) that ‘*mens rea* [is] now an essential ingredient in manslaughter’.[[97]](#footnote-97)

**1.5 Exclusion for crimes of negligence**

In *Andrews,*[[98]](#footnote-98) the House of Lords decided that crimes in which the fault element is satisfied by proof of negligence could not be used to underpin an unlawful act manslaughter charge. Lord Atkin said that there was an ‘obvious difference’ between ‘doing an unlawful act’ on one hand and ‘doing a lawful act with a degree of carelessness which the Legislature makes criminal’ on the other.[[99]](#footnote-99) This was said to be the case because otherwise every case of dangerous driving resulting in death would automatically be manslaughter. Ormerod has criticized Lord Atkin’s reasoning on the basis that the concept of ‘doing a lawful act’ in a criminal way is inherently contradictory.[[100]](#footnote-100) Simester et al have also criticized *Andrews*, describing the judgment as ‘judicial policy masquerading as a conceptually driven distinction’.[[101]](#footnote-101) Nevertheless *Andrews* is explicable on the basis that a separate head of involuntary manslaughter exists for ‘gross’ negligence and allowing convictions for unlawful act manslaughter to be based on crimes of negligence would undermine that offence.

This point was explicitly addressed in *Meeking*,[[102]](#footnote-102) where the Court of Appeal upheld a conviction of unlawful act manslaughter based on the offence of endangering road users. Toulson LJ expressed some disquiet with the fact that the underlying unlawful act was one which was ‘capable of being committed by a negligent act’ but dismissed the appeal on the ground that, had the case been prosecuted as one involving gross negligence manslaughter instead, ‘we find it impossible to conclude that the jury could have come to any other verdict than guilty’.[[103]](#footnote-103) Nevertheless, Toulson LJ said:[[104]](#footnote-104)

‘We can see a possible ground for concern if a case which was essentially one of negligence, but arguably negligence falling short of gross negligence, were prosecuted by this route as a form of unlawful act manslaughter.’

Australian law has followed a similar line. As Lloyd has put it, ‘unlawful in the doctrine of unlawful and dangerous act [manslaughter] has a special meaning. Only certain crimes are sufficiently unlawful’.[[105]](#footnote-105) In *Pullman*,[[106]](#footnote-106) the facts were not dissimilar to *Andrews*. D, whilst driving, crossed an unbroken centre-line to pass vehicles in front of him forcing a driver coming in the opposite direction to take evasive action; that driver lost control and collided with a motor cycle, killing the motorcyclist. D was charged with manslaughter based on the motor traffic regulation prohibiting the crossing of an unbroken centre-line. He was convicted but successfully appealed. Hunt CJ said that:

‘(1) An act which constitutes a breach of some statutory or regulatory prohibition does not, for that reason alone, constitute an unlawful act sufficient to found a charge of manslaughter within the category of an unlawful and dangerous act. (2) Such an act may, however, constitute such an unlawful act if it is unlawful in itself – that is, unlawful otherwise than by reason of the fact that it amounts to such a breach.’

*Pullman* was followed in *Borkowski*.[[107]](#footnote-107) Here, D was convicted of two counts of manslaughter after the car in which he was racing collided with the victims’ vehicle. The underlying criminal offence was that of taking part in a race between vehicles on a road,[[108]](#footnote-108) the maximum penalty for which is a fine. D’s convictions were quashed on appeal. Howie J said that the prosecution should not have presented the case as one of unlawful act manslaughter: ‘According to *Pullman* it was not open to charge manslaughter on this basis... [It] was unnecessary and liable to distract the sentencer from a proper assessment of the criminality of the driving by introducing the concept of an unlawful act. That was particularly so where the unlawful act is the mere breach of a traffic regulation’.[[109]](#footnote-109) However, one of the other judges in *Borkowski*, Simpson J, expressed doubts about the correctness of *Pullman*, describing the conclusions of Hunt CJ (above) as ‘extremely broad’.[[110]](#footnote-110) He said that even if the phrase ‘some statutory or regulatory prohibition’ only referred to breaches of traffic laws, he was unable to see why such a breach could not form the basis of the ‘unlawfulness’ of an act necessary for a conviction for manslaughter.[[111]](#footnote-111)

Canadian courts, meanwhile, have emphatically not followed the *Andrews / Pullman* line. As indicated above, convictions based on negligence offences, such as the careless handling or use of a firearm,[[112]](#footnote-112) are routine. Yeo has criticized this, arguing that ‘the Canadian position can be challenged on the ground that recognizing crimes based on negligence as unlawful acts confuses the fault element for unlawful act manslaughter with that for negligent manslaughter’.[[113]](#footnote-113)

**1.6 Omissions as unlawful ‘acts’**

Given that constructive manslaughter requires an unlawful and dangerous ‘act’, it logically follows that if D simply omits to act, he cannot be guilty of this form of manslaughter. At least, that is the case in English and Australian law. In *Lowe*,[[114]](#footnote-114) D had been convicted of both neglecting his child so as to cause it unnecessary suffering or injury to its health[[115]](#footnote-115) and manslaughter. However, the Court of Appeal quashed his manslaughter conviction, Phillimore J stating:[[116]](#footnote-116)

‘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 its 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.’

This is also the position in Australia. According to the court in *Lane*,[[117]](#footnote-117) ‘manslaughter by unlawful and dangerous act may only be established by *proof of a specific act*’.[[118]](#footnote-118)

This automatic exclusion of omissions from the scope of unlawful act manslaughter in English law has been criticized. Horder argues that cases like *Lowe* should ‘fall squarely within’ this form of manslaughter and that this ‘manifestation of the distinction between acts and omissions is morally untenable’.[[119]](#footnote-119) Allen agrees, arguing that where neglect is ‘willful, in the sense that there is a deliberate decision not to give food or liquids or to seek medical attention [such] conduct is just as reprehensible as positive acts which are likely to cause harm. *Lowe* is a decision which clearly requires reconsideration’.[[120]](#footnote-120) On the other hand, Simester et al have pointed out that if the ruling in *Lowe* had been the other way then ‘*all* child deaths associated with willful neglect would constitute manslaughter without any necessity to demonstrate parental culpability in respect of the risk of death’.[[121]](#footnote-121) They argue that cases of ‘egregious parental neglect resulting in the death of children’ can be charged as gross negligence manslaughter,[[122]](#footnote-122) and therefore ‘the decision in *Lowe* may be welcomed’.[[123]](#footnote-123)

In Canadian law, meanwhile, a conviction for unlawful act manslaughter based on an omission is possible. In *Turner*,[[124]](#footnote-124) the defendants, a husband and wife, were charged with the manslaughter of their 3-year-old son, V. The cause of death was starvation. The autopsy report indicated that V was a ‘severely emaciated male child with an appearance consistent with malnutrition’. The case proceeded on the basis of unlawful act manslaughter with the unlawful ‘act’ being the defendants’ failure to provide the necessities of life to a child under 16.[[125]](#footnote-125) That this is a crime of omission was emphasized by the trial judge who said that ‘the death of this child was caused by the *failure* to provide him with necessaries of life. The *failure* to provide these necessaries… is a serious and a dangerous *omission* of duty’.[[126]](#footnote-126) The defendants were convicted and the appeal court dismissed their appeals. If *Lowe* is to be reconsidered, as Allen suggests, then *Turner* provides an obvious, albeit persuasive, precedent.

1. **Dangerousness**

The requirement of ‘dangerousness’ was added in order to restrict the scope of unlawful act manslaughter, which historically had been capable of commission simply on proof of an unlawful act causing death. In *Larkin*,[[127]](#footnote-127) Humphreys J said that it meant an ‘act which is likely to injure another person’.[[128]](#footnote-128) In what is now the leading English case, *Church*,[[129]](#footnote-129) Edmund Davies J explained that:[[130]](#footnote-130)

‘An unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.’

In *Attorney-General’s Reference (No.3 of 1994)*,[[131]](#footnote-131)the House of Lords clarified that an act was dangerous if (in the opinion of the sober and reasonable bystander) it exposed someone to the risk of some harm (not necessarily the person who subsequently died).[[132]](#footnote-132) The Canadian *Criminal Code* does not explicitly specify that the unlawful act must also be dangerous but the courts have accepted that it is an implicit requirement. In *Adkins*, [[133]](#footnote-133) Hutcheon JA explained why this was so:[[134]](#footnote-134)

‘I accept the proposition that the unlawful act must be such as all reasonable people would inevitably recognize must subject the other person to harm. I think that proposition to be in accord with principle and common sense. It would guard against an unjust conviction for manslaughter that could arise from a breach of a section of the *Criminal Code*, a breach that in some bizarre or unexpected way caused the death of a human being.’

The objective nature of the *Church* test was endorsed in *DPP v Newbury and Jones*,[[135]](#footnote-135) the House of Lords unanimously holding that there was no requirement that D foresee any harm, let alone death. According to Lord Salmon, ‘The test is still the objective test. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger’.[[136]](#footnote-136) That has not stopped commentators from criticising the test for setting the bar too low. In particular, Mitchell has argued that ‘one of the major functions of the criminal justice system is to provide a proportionate response to crime and criminality… Liability for manslaughter ought therefore to arise only where there is a foreseeable or foreseen risk of killing or causing at least serious (and preferably life-threatening) harm’.[[137]](#footnote-137)

**2.1 ‘Dangerous’ means the foreseeable risk of ‘some’ harm (except in Australia)**

On this point, English and Canadian law are consistent. In *Creighton*,[[138]](#footnote-138) a majority of the Supreme Court of Canada rejected an argument that the objective test for dangerousness in the context of unlawful act manslaughter was unconstitutional. In that case, McLachlin J[[139]](#footnote-139) said that ‘the test for the *mens rea* of unlawful act manslaughter in Canada, as in the United Kingdom [*sic*], is objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act’. In justifying this stance, McLachlin J drew an analogy with the thin-skull rule:[[140]](#footnote-140)

‘The thin-skull rule is a good and useful principle. It requires aggressors, once embarked on their dangerous course of conduct which may foreseeably injure others, to take responsibility for all the consequences that ensue, even to death. That is not, in my view, contrary to fundamental justice... In fact, when manslaughter is viewed in the context of the thin-skull principle, the disparity diminishes between the *mens rea* of the offence and its consequence. The law does not posit the average victim. It says the aggressor must take the victim as he finds him. Wherever there is a risk of harm, there is also a practical risk that some victims may die as a result of the harm. At this point, the test of harm and death merge.’

The *Creighton* decision has been confirmed several times subsequently by the Supreme Court[[141]](#footnote-141) and by provincial courts on countless other occasions. However, it has been criticised for setting the threshold for manslaughter liability too low. In *Creighton* itself, a minority of the Supreme Court dissented. Lamer CJ[[142]](#footnote-142) said that ‘the stigma attached to a conviction for culpable homicide, albeit culpable homicide which is not murder, to be significant enough to require, at a minimum, objective foresight of the risk of death’.[[143]](#footnote-143) More recently, Khoday has argued that ‘there is a considerable asymmetry between the stigma of culpable homicide and the label of having committed manslaughter on one hand and *mens rea* standard of objective foreseeability of the risk of bodily harm’ on the other.[[144]](#footnote-144) Likewise, Yeo has argued that the majority decision in *Creighton* ‘has led to the degree of moral culpability being pitched at too low a level to warrant conviction for what is, after all, a very serious offence’.[[145]](#footnote-145) Khoday has suggested that Canadian law would be improved by following the minority ruling in *Creighton*, i.e. by raising the threshold to ‘objective foresight of death’, arguing that this ‘would incorporate conduct of a significantly harmful nature warranting the stigma of a manslaughter conviction’.[[146]](#footnote-146)

Meanwhile, the threshold in Australian common law is set higher than in both England and Canada (although not as high as the *Creighton* minority, Khoday and Mitchell would like to set it). In Australia, the Crown must prove that ‘all sober and reasonable people’ would have foreseen the risk of ‘serious’ harm, as opposed to ‘some’ harm. In *Wilson*,[[147]](#footnote-147) a majority of the High Court of Australia declared that ‘an appreciable risk of serious injury is required in the case of manslaughter by an unlawful and dangerous act’.[[148]](#footnote-148) The majority approved an earlier decision of the Supreme Court of Victoria in *Holzer*.[[149]](#footnote-149) In that case, the court explicitly departed from *Church*, whereas other Australian state courts had followed the English Court of Criminal Appeal. Recognising the need to resolve the conflict in the authorities, the High Court in *Wilson* preferred *Holzer*. The majority in *Wilson* said that ‘there are good reasons why the test in *Holzer* should be preferred... One is the development of the law towards a closer correlation between moral culpability and legal responsibility. Another is that the scope of constructive crime should be confined to what is truly unavoidable’.[[150]](#footnote-150) *Wilson* was approved by a majority of the same court in *Lavender*[[151]](#footnote-151) and in *Burns*.[[152]](#footnote-152)

The decision in *Wilson* has also attracted academic support. O’Reilly, for example, states that the ‘more progressive majority judgment’ is ‘to be preferred’ because ‘it recognizes a moral obligation to deal justly with the accused’,[[153]](#footnote-153) whereas the ‘conservative minority judgment… is an outdated and blinkered moral vision. A rigid determination that such cases [as *Wilson*] should constitute manslaughter is a simplistic consideration of the moral issues at hand’.[[154]](#footnote-154) Similarly, Yeo contends that the majority’s decision to restrict ‘the scope of constructive crime’ was ‘desirable’.[[155]](#footnote-155)

In *Fragomeli*,[[156]](#footnote-156) it was held that the *Wilson* test is a minimum threshold. D appealed his conviction for manslaughter contending that, because his act actually created an appreciable risk of *death*, he should either have been convicted of murder or acquitted altogether (on the basis of self-defence). White J rejected that argument holding that *Wilson* did ‘not indicate that an act involving a risk of *greater* injury could not be sufficient for the offence, only that an act carrying with it a risk of less than serious injury would not be sufficient’.[[157]](#footnote-157) In *Burns*,[[158]](#footnote-158) the High Court of Australia held that there had to be evidence capable of supporting a finding that the act was dangerous, in the *Wilson* sense; whether there was sufficient evidence being a question of law for the trial judge. In *Burns*, D had supplied methadone to V who subsequently died. The trial judge directed the jury that if that supply was dangerous and caused V’s death (which would be the case if D actually injected V with the drug), then she could be convicted of manslaughter. D’s conviction was quashed; the High Court held that there was nothing in the evidence to support the proposition that the supply of a prescription quantity of methadone to an adult person of ordinary capacity could be characterised as carrying with it an ‘appreciable risk of serious injury’.

Meanwhile, the minority of the High Court of Australia in *Wilson* approved the *Church* test. Brennan, Deane and Dawson JJ stated that ‘we are unable to see why, in assessing an act as dangerous, it is necessary to disregard the risk of any injury which does not fall within the category of grievous bodily harm’.[[159]](#footnote-159)

The legislature in Victoria has also taken steps to modify the *Wilson* test in that state. Section 4A of the Crimes Act 1958[[160]](#footnote-160) provides that ‘A single punch or strike is to be taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act’.[[161]](#footnote-161)

**2.2 ‘Some harm’**

According to the *Church* test, V must be subjected to the risk of ‘some harm’. Fundamentally this is a question of fact for the jury, although there is a minimum legal threshold. In *Dawson*,[[162]](#footnote-162) Watkins LJ said that ‘harm means physical harm’[[163]](#footnote-163) although it included ‘injury to the person through the operation of shock emanating from fright’.[[164]](#footnote-164) This was confirmed in *Carey & Others*.[[165]](#footnote-165) Dyson LJ distinguished between ‘emotional upset, which is not physical harm, and shock, which is’.[[166]](#footnote-166)

In *M and M*,[[167]](#footnote-167) the Court of Appeal emphasised that the *Church* test simply required the jury to decide whether D’s unlawful act exposed V to the risk of ‘some’ harm. There was no requirement that the ‘sober and reasonable’ bystander had to have foreseen the ‘sort’ or ‘type’ of harm to which V was, in fact, exposed. Canadian law is the same on this point.[[168]](#footnote-168) In *Worrall*,[[169]](#footnote-169) Watt J said that the ‘fault element in unlawful act manslaughter is objective foreseeability of the risk of bodily harm…. Provided a reasonable person in an accused’s circumstances would foresee a risk of bodily harm of the nature described, *though not necessarily the precise form that occurred*, the required mental element has been established’.[[170]](#footnote-170)

**2.3 Knowledge ascribed to the ‘sober and reasonable’ bystander**

English courts approach the *Church* test by asking whether a hypothetical ‘sober and reasonable’ bystander, who happened to be watching the unlawful act, would regard the act as dangerous. Although the test is essentially objective, the bystander shares any knowledge acquired by D both *prior to* and *during* the unlawful act. An example of the former situation is *Ball*,[[171]](#footnote-171) in which D’s conduct in grabbing a handful of cartridges from the pocket of his overalls, which D knew contained a mixture of live and blank ammunition, loading his shotgun, and firing it at V, was objectively dangerous. Smith agreed that the sober and reasonable man ‘cannot be treated as having come on the scene at the moment of the fatal act with no knowledge of any earlier events. His knowledge must surely include awareness of the preparatory acts done by the defendant’.[[172]](#footnote-172)

An example of the latter situation is *Watson*,[[173]](#footnote-173) in which V, an 87-year-old man, awakened by the sound of breaking glass during the night, discovered D burgling his house. D verbally abused V and then left but V died of a heart attack 90 minutes later. D pleaded guilty to burglary and was also convicted of manslaughter. The Court of Appeal allowed D’s appeal against the latter conviction (on causation grounds) but was satisfied that the jury were entitled to find that the burglary was dangerous. Lord Lane CJ stated that ‘the jury were entitled to ascribe to the bystander the knowledge which [D] gained during the whole of his stay in the house… The unlawful act in the present circumstances comprised the whole of the burglarious intrusion . . . That being so, D (and therefore the bystander) during the course of the unlawful act must have become aware of [V]’s frailty and approximate age.’[[174]](#footnote-174)

Similar reasoning was adopted in *Bristow and others*.[[175]](#footnote-175) Treacy LJ said that ‘whilst burglary of itself is not a dangerous crime, a particular burglary may be dangerous because of the circumstances surrounding its commission’.[[176]](#footnote-176) V was run over and killed by the defendants as they attempted to escape down a single-track road past V’s home with stolen vehicles from V’s car repair business. The Court of Appeal upheld their convictions for manslaughter, holding that the burglary was dangerous because a ‘reasonable bystander would… recognise the risk of some harm being caused to a person intervening at night, in the dark, in a relatively confined space, where powerful vehicles were involved, and there was only one route of escape’.[[177]](#footnote-177)

# The leading Australian case on this point is *Cornelissen*.[[178]](#footnote-178) During an altercation, D punched V, causing him to collapse. V later died and D was convicted of manslaughter. He appealed, contending *inter alia* that the trial judge had misdirected the jury on the meaning of dangerousness. According to the majority in *Wilson*, whether or not an act was dangerous is decided by reference to ‘a reasonable person *in the accused’s position*’. However, the direction given to the jury omitted the italicised words. The appeal court quashed D’s conviction; James J said that the omission of the words ‘in the accused’s position’ was ‘significant’ and rendered the convictions unsafe.[[179]](#footnote-179) Specifically, the jury should have been directed to decide whether or not D realised that V had been ‘staggering’ (as some of the Crown witnesses claimed) before the fatal punch.[[180]](#footnote-180)

These cases must be should be contrasted with that in *Dawson*.[[181]](#footnote-181) D and another man carried out an attempted robbery of a petrol station while masked and armed with pickaxe handles and replica guns. The attendant, V, was 60 years old. He had a heart condition and died of a heart attack. The Court of Appeal held D’s unlawful act was not dangerous – neither D nor the ‘sober and reasonable’ bystander would have been aware of V’s condition.

A similar outcome was achieved in *Carey and others*.[[182]](#footnote-182) V, a 15-year-old girl, had run away from the three defendants after being punched and threatened with further violence, but had collapsed after running about 100 metres and died of an undiagnosed heart complaint aggravated by the running. The defendants were convicted of affray and manslaughter but their manslaughter convictions were quashed on appeal. Dyson LJ held that the count of unlawful act manslaughter should have been withdrawn from the jury as the only physical harm to V (a single punch) did not cause her death.[[183]](#footnote-183) Although there were other threats of violence in the course of the affray they were not dangerous, inasmuch as a reasonable person would not have foreseen their causing any physical harm to V.[[184]](#footnote-184)

**2.4 The objective nature of the *Church* test**

The ‘sober and reasonable’ person created by the *Church* test is a purely objective creature, sharing none of the accused’s characteristics. His/her Canadian equivalent is likewise characterless. This has the advantage of simplicity but is susceptible to challenge on the grounds of potential unfairness, particularly by those who may not have the ability to foresee consequences to the same extent as the paradigm ‘reasonable’ person. Indeed, the *status quo* was recently challenged in *F & E*.[[185]](#footnote-185) The case involved two teenage defendants who had killed V after starting a fire in a derelict building in which V was squatting. F, aged 14½, and E, aged 16, appealed their manslaughter convictions, submitting that the test of dangerousness should be modified to take into account their ages and, in the case of the F, his mental capacity (he had a low IQ and poor reasoning skills). The Court of Appeal disagreed and upheld their convictions. Lord Thomas LJ said that it has ‘been established since at least 1943 that in determining whether the act was dangerous, the test is objective’.[[186]](#footnote-186)

**2.5 The semi-objective nature of the *Wilson* test**

In Australia, meanwhile, arguments similar to those in *F & E* have gained more traction. In *DPP v T.Y*.,[[187]](#footnote-187) where D was four months shy of his 15th birthday, Bell J accepted that the reasonable person should be the same age as D:[[188]](#footnote-188)

‘Subjecting children to an adult standard, when we know children have a lesser capacity for realisation of appreciable risk than adults, would widen the gap between moral culpability and legal responsibility to its maximum. Taking the age of a child into account when applying the dangerousness test brings the two more closely together and is more consistent with the evolution of the law of homicide.’

Other Australian cases have, at least until recently, refused to endow the reasonable person with other characteristics of D. In *Wills,*[[189]](#footnote-189) Lush J said that ‘the lawfulness of the act is determined by considerations extraneous to the subjective state’ of the accused.[[190]](#footnote-190) He explained that if the test for dangerousness were ‘to be regarded as including the ephemeral emotional and mental conditions of [D], the test begins to take on a subjective appearance. If it were extended to matters relating for instance, to alcohol and drugs, it would in my opinion become clearly subjective’.[[191]](#footnote-191) In *T.Y.*, Bell J said that ‘the objective test precludes the idiosyncrasies of an alleged wrongdoer from being taken into account’[[192]](#footnote-192) and in *Besim,*[[193]](#footnote-193) Redlich J emphasized that the dangerousness test in Australia took account of ‘the physical circumstances’ of D and ‘the nature of the act performed’ by D, but not ‘emotions, passions or the mental state of the accused’.[[194]](#footnote-194)

However, the most recent case distinguished *Wills* by putting ‘objectively ascertainable’ attributes that affected D’s ability to appreciate the consequences of his actions into the same category as D’s age. In *Thomas*,[[195]](#footnote-195) it was undisputed that D had killed his adoptive mother. The question for Hulme J was whether the reasonable person could be invested with D’s psychiatric condition. After the killing, D had been assessed by a clinical neuropsychologist and forensic psychologist, who found that he had a ‘moderate intellectual disability’, features of which included extremely limited attention, extremely poor information processing speed and impaired conceptual reasoning abilities. Hulme J decided that D’s disability *was* attributable to the reasonable person, being an ‘objectively ascertainable attribute’, with ‘nothing transient or ephemeral about it’.[[196]](#footnote-196) Hulme J justified this decision on a similar ground to that used by Bell J in *T.Y*.:[[197]](#footnote-197)

‘[D’s] intellectual capacity is so far removed from that of the vast majority of people in the community that it strikes me as patently unfair to require him and his actions to be judged by standards that he could never hope to emulate… To my mind, to judge the actions of a person who has an intellectual capacity in the bottom 0.1% of the population by the standards of the vast majority of citizens is to widen the gap between moral culpability and legal responsibility to a point that is simply unacceptable.’

This begs the question whether English law should follow suit. It is submitted not. The introduction of characteristics into the reasonable bystander test risks repeating the seemingly endless litigation that eventually proved fatal for the defence of provocation.[[198]](#footnote-198)

1. **Conclusions**

This article has compared English, Australian and Canadian law on unlawful act manslaughter in order to identify similarities and differences and to identify possible reforms for English Law. In all three jurisdictions there is consensus that the unlawful act element must be a criminal offence. The offence should be identified by the Crown and all the elements therein (*actus reus* and *mens rea*) proven beyond reasonable doubt. Any valid defence(s) raised should also be disproven. Where the jurisdictions differ is whether the following should be capable of supplying the unlawful act: (i) crimes in which the fault element is satisfied on proof of negligence, (ii) strict liability offences, (iii) omissions. Under Australian and English law, none are capable of supplying the unlawful act.[[199]](#footnote-199) In Canadian law, however, all three are capable of doing so. Should English law follow the Canadian lead? It is submitted the answer should be ‘no’ for crimes of negligence (in order to avoid undermining the offence of gross negligence manslaughter) and for strict liability offences. However, there is a strong case to be made for overruling *Lowe*[[200]](#footnote-200) and following the Canadian precedent of *Turner*[[201]](#footnote-201) instead, on the basis that there is no moral difference between an unlawful and dangerous act which kills and an unlawful and dangerous omission which kills.

On the dangerousness element, all three jurisdictions impose an objective test involving the appreciation of danger by a reasonable bystander. Beyond that, English and Canadian law is in agreement that the test involves foreseeability by the characterless bystander of ‘some’ harm,[[202]](#footnote-202) but Australian law differs in two respects: (i) the test there involves foreseeability of ‘serious’ harm,[[203]](#footnote-203) and the reasonable bystander is invested with the defendant’s age and other ‘objectively ascertainable’ attributes. Should English law this time follow the Australian lead? It is submitted not. The introduction of characteristics into the reasonably bystander test would risk repeating the seemingly endless litigation that eventually proved fatal for the defence of provocation. Finally, the threshold for dangerousness in Anglo-Canadian law may be relatively low vis-à-vis Australia but it is not too low and can be justified using the reasons given by McLachlin J (as she then was) in *Creighton*. The fact that the Victorian legislature have recently amended the Crimes Act 1958,[[204]](#footnote-204) confirming that the ‘one punch’ killer acts both unlawfully and dangerously, suggests that English law should resist a move in the opposite direction.

1. The common law states are New South Wales, South Australia and Victoria [↑](#footnote-ref-1)
2. [1830] 1 Lew CC 179 [↑](#footnote-ref-2)
3. (1883) 15 Cox CC 163 [↑](#footnote-ref-3)
4. [1967] 2 QB 981 [↑](#footnote-ref-4)
5. *Ibid.* at p.988 [↑](#footnote-ref-5)
6. [2012] HCA 35, High Court of Australia [↑](#footnote-ref-6)
7. *Ibid.* at [8] [↑](#footnote-ref-7)
8. See e.g. *T* [2006] 7 WWR 102; 199 CCC (3d) 551; 31 CR (6th) 187; 195 Man R (2d) 89, Manitoba Court of Appeal at [5] [↑](#footnote-ref-8)
9. *Larkin* [1943] KB 174; *Lamb* [1967] 2 QB 981; *Pagett* (1983) 76 Cr. App. R. 279; *Arobieke* [1988] Crim LR 314; *Ball* [1989] Crim LR 730; *Lewis* [2010] EWCA Crim151 [↑](#footnote-ref-9)
10. *Church* [1966] 1 QB 59; *Lipman* [1970] 1 QB 152; *Mallet* [1972] Crim LR 260; *Pagett*; *Le Brun* [1992] QB 61, [1991] 3 WLR 653; *Scarlett* [1993] 4 All ER 629; *Coleman* (1992) 95 Cr App R 159; *Attorney-General’s Reference (No.3 of 1994)* [1998] AC 245; *Miah* [2005] EWCA Crim 1798; *Furby* [2005] EWCA Crim 3147; *Lynch* [2015] EWCA Crim 1130 [↑](#footnote-ref-10)
11. *Mitchell* [1983] QB 741 [↑](#footnote-ref-11)
12. Contrary to s 58, Offences Against the Person Act 1861 (hereinafter OAPA 1861). See *Buck & Buck* (1960) 44 Cr. App. R. 213; *Creamer* [1966] 1 QB 72 [↑](#footnote-ref-12)
13. Contrary to s 23, OAPA 1861. See *Cato* [1976] 1 All ER 260 [↑](#footnote-ref-13)
14. *DPP v Newbury and Jones* [1977] AC 500. The House of Lords did not actually identify criminal damage as the unlawful act; rather, “It has been generally assumed that the unlawful act was criminal damage to property” (Reed, A & Fitzpatrick, B, *Criminal Law* 4th ed (2009), Sweet & Maxwell at p.363) [↑](#footnote-ref-14)
15. *O’Driscoll* (1977) 65 Cr. App. R. 50; *Goodfellow* [1986] Crim LR 468; *Willoughby* [2004] EWCA Crim 3365, [2005] 1 WLR 1880; *F & E* [2015] EWCA Crim 351, [2015] 2 Cr App R 5 [↑](#footnote-ref-15)
16. *Dawson* (1985) 81 Cr App R 150 [↑](#footnote-ref-16)
17. *Watson* [1989] 2 All ER 865; *Bristow and others* [2013] EWCA Crim 1540, [2014] Crim LR 457 [↑](#footnote-ref-17)
18. Contrary to s 1, Prevention of Crimes Act 1953. See *Jennings* [1990] Crim LR 588 [↑](#footnote-ref-18)
19. Contrary to s 58, Medicines Act 1968. See *Andrews* [2002] EWCA Crim 3021 [↑](#footnote-ref-19)
20. *Carey and others* [2006] EWCA Crim 17; *M & M* [2012] EWCA Crim 2293, [2013] 1 WLR 1083 [↑](#footnote-ref-20)
21. Contrary to s 1, Children and Young Persons Act 1933. See *Gay* [2006] EWCA Crim 820 [↑](#footnote-ref-21)
22. *Johnston* [2007] EWCA Crim 3133 [↑](#footnote-ref-22)
23. *Willett* [2010] EWCA Crim 1620, [2011] Crim LR 65 [↑](#footnote-ref-23)
24. Contrary to s 22A(1)(b), Road Traffic Act 1988 (as amended). See *Meeking* [2012] EWCA Crim 641, [2012] 1 WLR 3349 [↑](#footnote-ref-24)
25. *Smithers* [1978] 1 SCR 506, Supreme Court; *LaBerge* 1995 ABCA 196, Court of Appeal of Alberta; *Shanks* (1996) 4 CR (5th) 79, Court of Appeal for Ontario; *Gunning* [2005] 1 SCR 627, Supreme Court; *Richer* (2005) 192 CCC (3d) 366, British Columbia Court of Appeal; *Couperthwaite* (2006) 203 Man R (2d) 261, Court of Queen’s Bench of Manitoba; *R v Sinclair* (2008) 225 Man R (2d) 167, Manitoba Court of Appeal; *Holloway* (2014) 308 CCC (3d) 145, Court of Appeal of Alberta [↑](#footnote-ref-25)
26. *Worrall* (2004) 189 CCC (3d) 79; 19 CR (6th) 213, Ontario Superior Court of Justice [↑](#footnote-ref-26)
27. *Ibid*. at [9] [↑](#footnote-ref-27)
28. Contrary to s 5(1) of the Controlled Drugs & Substances Act 1996 [↑](#footnote-ref-28)
29. [1993] 3 SCR 3; (1993) 105 DLR (4th) 632, Supreme Court of Canada. In that case D was convicted of manslaughter based on the offence of trafficking contrary to s 4(1) of the Narcotic Control Act 1961. That statute was repealed and replaced by the Controlled Drugs & Substances Act 1996. [↑](#footnote-ref-29)
30. Contrary to s 86(1) of the *Criminal Code*. See e.g. *Pettigrew* (1990) 56 CCC (3d) 390, British Columbia Court of Appeal; *Gosset* [1993] 3 SCR 76, Supreme Court; *Tataryn* 2001 BCCA 406, British Columbia Court of Appeal; *McMath* 2013 BCSC 2434, Supreme Court of British Columbia [↑](#footnote-ref-30)
31. Contrary to s 87 of the *Criminal Code*. See e.g. *Tennant & Naccarato* (1975) 23 CCC (2d) 80, Ontario Court of Appeal; *Adkins* (1987) 39 CCC (3d) 346, British Columbia Court of Appeal [↑](#footnote-ref-31)
32. Contrary to s 88 of the *Criminal Code*. See e.g. *Tennant & Naccarato*; *Adkins* [↑](#footnote-ref-32)
33. For discussion of causation in the context of unlawful act manslaughter see inter alia Ormerod, D & Fortson, R, *Drug Suppliers as Manslaughterers (Again)* [2005] Crim LR 819; Cherkassky, L, *Kennedy and Unlawful Act Manslaughter: An Unorthodox Application of the Doctrine of Causation* (2008) 72 J Crim L 387; Hughes, D, *Drug Administration: The Reinstatement of Causation Principles* (2008) 72 J Crim L 353; Miles, J, *Black Letter Law, With a Hint of Grey* (2008) 67 CLJ 17; O’Doherty, S, *Unlawful Act Manslaughter and Causation* (2010) 174 CL & J 549; Baker, D, *Omissions Liability for Homicide Offences: Reconciling R v Kennedy with R v Evans* (2010) 74 J Crim L 310 [↑](#footnote-ref-33)
34. Commentary on *Jennings* [1990] Crim LR 588 at p.589. Emphasis added [↑](#footnote-ref-34)
35. *Holzer* [1968] VR 481, Supreme Court of Victoria; *Wilson* (1992) 174 CLR 313, High Court of Australia; *Besim* [2004] VSC 169; (2004) 148 A Crim R 28, Supreme Court of Victoria*; Cornelissen* [2004] NSWCCA 449, New South Wales Court of Criminal Appeal; *Klamo* (2008) 18 VR 644, [2008] VSCA 75, Court of Appeal of Victoria*; Aidid* (2010) 25 VR 593, Court of Appeal of Victoria; *Ford* [2016] SASC 112, Supreme Court of South Australia [↑](#footnote-ref-35)
36. [2015] NSWCCA 114, New South Wales Court of Criminal Appeal [↑](#footnote-ref-36)
37. [2016] NSWCCA 51, New South Wales Court of Criminal Appeal [↑](#footnote-ref-37)
38. In *Lin,* where the explosion was allegedly caused by the ignition of a ring burner, Simpson JA said that ‘the ignition of a ring burner in the course of, or for the preparation of, the manufacture of a prohibited drug, is a criminal act. No argument was advanced to contradict that proposition. It is in accord with the conclusion of this Court in *D*. The act of ignition in those circumstances was an unlawful act.’ [↑](#footnote-ref-38)
39. Wilson, W, *Criminal Law* 4th ed (2011), Longman, at p.387 [↑](#footnote-ref-39)
40. Mitchell, B, *More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-Punch Killer* [2009] Crim LR 502 at p.504 [↑](#footnote-ref-40)
41. [1967] 2 QB 981 [↑](#footnote-ref-41)
42. *Ibid.* at p.988 [↑](#footnote-ref-42)
43. [1988] Crim LR 314 [↑](#footnote-ref-43)
44. [1990] Crim LR 588 [↑](#footnote-ref-44)
45. Contrary to s 1 of the Prevention of Crime Act 1953 [↑](#footnote-ref-45)
46. [2006] EWCA Crim 1139 [↑](#footnote-ref-46)
47. Contrary to ss 47 and 20, OAPA 1861, respectively [↑](#footnote-ref-47)
48. 1995 ABCA 196, Court of Appeal of Alberta [↑](#footnote-ref-48)
49. *Ibid.* at [12] [↑](#footnote-ref-49)
50. [1993] 3 SCR 3, Supreme Court of Canada [↑](#footnote-ref-50)
51. As she then was [↑](#footnote-ref-51)
52. [1993] 3 SCR 3, at p.42 [↑](#footnote-ref-52)
53. *Ibid.* at p.25 [↑](#footnote-ref-53)
54. [2006] 7 WWR 102; 199 CCC (3d) 551; 31 CR (6th) 187; 195 Man R (2d) 89, Manitoba Court of Appeal [↑](#footnote-ref-54)
55. *Ibid.* at [19] [↑](#footnote-ref-55)
56. Roberts, G, *Unlawful and Dangerous Act Manslaughter: R v Wills* (1984) 10(4) Monash University Law Review 228 at p.228; emphasis added [↑](#footnote-ref-56)
57. [1971] HCA 20; (1971) 124 CLR 107, High Court of Australia [↑](#footnote-ref-57)
58. *Ibid.* at [30] [↑](#footnote-ref-58)
59. Contrary to s 75(1A) of the Police & Police Offences Ordinance 1923 of the Northern Territory. McTiernan J said that ‘the accused committed an act, resulting in the death of the deceased, which was punishable under this provision of the Ordinance. It was therefore an unlawful act’. *Ibid.* at [3] [↑](#footnote-ref-59)
60. [1971] HCA 20, at [17] (Menzies J) and [2] (Owen J) [↑](#footnote-ref-60)
61. [1983] 2 VR 201, Supreme Court of Victoria [↑](#footnote-ref-61)
62. Roberts, G, *op. cit.* at p.230 [↑](#footnote-ref-62)
63. [1993] 4 All ER 629 [↑](#footnote-ref-63)
64. [2005] 1 SCR 627, Supreme Court of Canada [↑](#footnote-ref-64)
65. D had been charged with second degree murder with unlawful act manslaughter as an alternative. He had been convicted of murder but the Supreme Court accepted that the trial judge, by (i) directing the jury that D’s handling of his shotgun was, in law, the offence of careless use a of a firearm and (ii) withdrawing the defence of property from the jury’s consideration, had ‘usurped the exclusive domain of the jury’. Absent the misdirections, the jury may have acquitted of murder and convicted of manslaughter instead or they may have acquitted on all counts. [↑](#footnote-ref-65)
66. [2008] SASC 96, South Australia Court of Criminal Appeal [↑](#footnote-ref-66)
67. See also *Schaffer* (2005) 13 VR 337; (2005) 159 A Crim R 101, Victoria Court of Appeal, at [88] [↑](#footnote-ref-67)
68. [1995] Crim LR 570 [↑](#footnote-ref-68)
69. [1991] 2 SCR 714, Supreme Court of Canada [↑](#footnote-ref-69)
70. (2010) 25 VR 593, Court of Appeal of Victoria [↑](#footnote-ref-70)
71. (2007) 18 VR 376, (2007) 179 A Crim R 360, Court of Appeal of Victoria [↑](#footnote-ref-71)
72. *Ibid.* at [18] [↑](#footnote-ref-72)
73. *Ibid.* at [22]. Here the Victoria Court of Appeal relied on *Brown* [1994] 1 AC 212 and *Emmett* [1999] EWCA Crim 1710 [↑](#footnote-ref-73)
74. (2008) 225 Man R (2d) 167, Manitoba Court of Appeal [↑](#footnote-ref-74)
75. *Ibid.* at [33] [↑](#footnote-ref-75)
76. This dichotomy is recognized in English and Canadian common law but not in Australia [↑](#footnote-ref-76)
77. *Bratty v Attorney-General for Northern Ireland* [1963] AC 386; *DPP v Majewski* [1977] AC 443 [↑](#footnote-ref-77)
78. [1970] 1 QB 152; [1969] 3 WLR 819 [↑](#footnote-ref-78)
79. (1977) 65 Cr. App. R. 50 [↑](#footnote-ref-79)
80. Wilson, L C, *Too Many Manslaughters* (2007) 52 Crim LQ 433 at pp.458-459 [↑](#footnote-ref-80)
81. Allen, M J, *Textbook on Criminal Law*, 13th edition (2015), Oxford University Press at p. 360 [↑](#footnote-ref-81)
82. *O’Connor* [1980] HCA 17, (1980) 146 CLR 64, High Court of Australia; *Bedi* (1993) 61 SASR 269, Supreme Court of South Australia [↑](#footnote-ref-82)
83. The *O’Connor* ruling has, however, been limited by state legislation. Section 428D of the Crimes Act 1900 (New South Wales) (as amended) restores the *Bratty / Majewski* principle in that State. It provides that: ‘In determining whether a person had the *mens rea* for an offence other than an offence of specific intent, evidence that a person was intoxicated at the time of the relevant conduct (a) if the intoxication was self-induced cannot be taken into account’. Section 268(2) of the Criminal Law Consolidation Act 1935 (South Australia) (as amended) states that ‘ If the objective elements of an alleged offence are established against [D] but [D’s] consciousness was (or may have been) impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, [D] is nevertheless to be convicted of the offence if [D] would, if his or her conduct had been voluntary and intended, have been guilty of the offence. Example - A, whose consciousness is impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, beats B up and B dies of the injuries. In this case, A could be convicted of manslaughter but not of murder (because A is taken to have intended to do the act that results in death but not the death). ‘ [↑](#footnote-ref-83)
84. [2014] SASC 196, Supreme Court of South Australia [↑](#footnote-ref-84)
85. *Ibid.* at [225] [↑](#footnote-ref-85)
86. [2002] EWCA Crim 3021; [2003] Crim LR 477 [↑](#footnote-ref-86)
87. Contrary to s 58(2)(b) of the Medicines Act 1968 [↑](#footnote-ref-87)
88. In Canadian jurisprudence, an ‘absolute liability’ offence is one for which no *mens rea* is required to be proven and for which no due diligence or reasonable care defence is available. A ‘strict liability’ offence, on the other hand, does not necessarily require proof of *mens rea* for every element of the *actus reus* and permits a due diligence / reasonable care defence – see *Sault Ste. Marie* [1978] 2 SCR 1299, Supreme Court of Canada [↑](#footnote-ref-88)
89. [1993] 3 SCR 3, Supreme Court of Canada [↑](#footnote-ref-89)
90. With whom Sopinka, Iacobucci and Major JJ agreed [↑](#footnote-ref-90)
91. [1993] 3 SCR 3 at [25] [↑](#footnote-ref-91)
92. As she then was. L’Heureux-Dubé, Gonthier and Cory JJ agreed. La Forest J gave a concurring judgment [↑](#footnote-ref-92)
93. [1993] 3 SCR 3at [42]. Emphasis added [↑](#footnote-ref-93)
94. [1966] 1 QB 59 [↑](#footnote-ref-94)
95. *Ibid.* at p.70 [↑](#footnote-ref-95)
96. [1967] 2 QB 981 [↑](#footnote-ref-96)
97. *Ibid.* at p.988 [↑](#footnote-ref-97)
98. [1937 AC 576 [↑](#footnote-ref-98)
99. *Ibid.* at p.585 [↑](#footnote-ref-99)
100. Ormerod, D, *Smith & Hogan’s Criminal Law*, 14th edition (2015), Oxford University Press, at p.628 [↑](#footnote-ref-100)
101. Simester, A P et al, *Simester & Sullivan’s Criminal Law: Theory and Doctrine*, 6th edition (2016), Hart Publishing at p.411 [↑](#footnote-ref-101)
102. [2012] EWCA Crim 641, [2012] 1 WLR 3349 [↑](#footnote-ref-102)
103. *Ibid.* at [14] [↑](#footnote-ref-103)
104. *Loc cit* [↑](#footnote-ref-104)
105. Lloyd, C, *R v Wilson* (case note) (1993) 15 Adelaide Law Review 123, at p. 127 [↑](#footnote-ref-105)
106. (1991) 25 NSWLR 89; (1991) 58 A Crim R 222, New South Wales Court of Criminal Appeal [↑](#footnote-ref-106)
107. [2009] NSWCCA 102; (2009) 195 A Crim R 1, New South Wales Court of Criminal Appeal [↑](#footnote-ref-107)
108. Contrary to s 40(1) of the Road Transport (Safety and Traffic Management) Act 1999 (New South Wales) [↑](#footnote-ref-108)
109. *Borkowski* [2009] NSWCCA 102 at [57] [↑](#footnote-ref-109)
110. *Ibid.* at [3] [↑](#footnote-ref-110)
111. *Loc cit* [↑](#footnote-ref-111)
112. Contrary to s 86(1) of the *Criminal Code*. See e.g. *Pettigrew* (1990) 56 CCC (3d) 390, British Columbia Court of Appeal; *Gosset* [1993] 3 SCR 76, Supreme Court; *Tataryn* 2001 BCCA 406, British Columbia Court of Appeal; *McMath* 2013 BCSC 2434, Supreme Court of British Columbia [↑](#footnote-ref-112)
113. Yeo, S, *The Fault Elements for Involuntary Manslaughter: Some Lessons from Downunder* (2000) 43 Crim LQ 291, at p.293 [↑](#footnote-ref-113)
114. [1973] QB 702 [↑](#footnote-ref-114)
115. Contrary to s 1(1) of the Children and Young Persons Act 1933 [↑](#footnote-ref-115)
116. [1973] QB 702, at p.709 [↑](#footnote-ref-116)
117. [2013] NSWCCA 317, New South Wales Court of Criminal Appeal [↑](#footnote-ref-117)
118. At [64]. Emphasis added [↑](#footnote-ref-118)
119. Horder, J, *Ashworth’s Principles of Criminal Law*, 8th edition (2016), Oxford University Press at p.295 [↑](#footnote-ref-119)
120. Allen, M J, *op. cit.* at p. 360 [↑](#footnote-ref-120)
121. Simester, A P et al, *op. cit.* at p.410. Emphasis in original [↑](#footnote-ref-121)
122. See e.g. *Reeves* [2012] EWCA Crim 2613, Court of Appeal [↑](#footnote-ref-122)
123. Simester, A P et al, *op. cit.* at p.410 [↑](#footnote-ref-123)
124. (1997) 185 NBR (2d) 190, Court of Appeal of New Brunswick [↑](#footnote-ref-124)
125. Contrary to s 215(1)(a) of the *Criminal Code* [↑](#footnote-ref-125)
126. Emphasis added [↑](#footnote-ref-126)
127. (1944) 29 Cr. App. R. 18 [↑](#footnote-ref-127)
128. *Ibid.* at p.23 [↑](#footnote-ref-128)
129. [1966] 1 QB 59 [↑](#footnote-ref-129)
130. *Ibid.* at p.70 [↑](#footnote-ref-130)
131. [1998] AC 245.. [↑](#footnote-ref-131)
132. ‘All that it is needed, once causation is established, is an act creating a risk to anyone’, per Lord Mustill, *ibid*. at p.263. Emphasis in original [↑](#footnote-ref-132)
133. (1987) 39 CCC (3d) 346, British Columbia Court of Appeal [↑](#footnote-ref-133)
134. *Ibid.* at [37] [↑](#footnote-ref-134)
135. [1977] AC 500 [↑](#footnote-ref-135)
136. *Ibid*. at p.507. Lords Diplock, Edmund-Davies, Simon and Kilbrandon agreed [↑](#footnote-ref-136)
137. Mitchell, B, *Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence of One-punch Killers* (2008) 72 J Crim L 537, at p. 547. See also Mitchell, B, *More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-Punch Killer* [2009] Crim LR 502: ‘the extraordinarily low level of moral culpability whch suffices for unlawful and dangerous act manslaughter’, at p.502 [↑](#footnote-ref-137)
138. [1993] 3 SCR 3, Supreme Court of Canada [↑](#footnote-ref-138)
139. As she then was. L’Heureux-Dubé, Gonthier and Cory J agreed. La Forest J gave a concurring judgment [↑](#footnote-ref-139)
140. [1993] 3 SCR 3 at p.52 [↑](#footnote-ref-140)
141. *Sarrazin* 2011 SCC 54; [2011] 3 SCR 505, Supreme Court of Canada, at [18]; *Maybin* 2012 SCC 24; [2012] 2 SCR 30, Supreme Court of Canada, at [36]; *H* 2013 SCC 28, [2013] 2 SCR 269, Supreme Court of Canada, at [91] [↑](#footnote-ref-141)
142. With whom Sopinka, Iacobucci and Major JJ agreed [↑](#footnote-ref-142)
143. [1993] 3 SCR 3 at p.23 [↑](#footnote-ref-143)
144. Khoday, A, *R v Creighton Twenty Years Later: Harm versus Death Revisited* (2013) 37 Manitoba Law Journal 167 at pp.174-175 [↑](#footnote-ref-144)
145. Yeo, S, *The Fault Elements for Involuntary Manslaughter: Some Lessons from Downunder* (2000) 43 Crim LQ 291, at p.299 [↑](#footnote-ref-145)
146. Khoday, A, *op. cit.* at p.175 [↑](#footnote-ref-146)
147. [1992] HCA 31; (1992) 174 CLR 313, High Court of Australia [↑](#footnote-ref-147)
148. Mason CJ, Toohey, Gaudron and McHugh JJ at [49] [↑](#footnote-ref-148)
149. [1968] VR 481, Supreme Court of Victoria [↑](#footnote-ref-149)
150. *Ibid.* at [32] [↑](#footnote-ref-150)
151. [2005] HCA 37; (2005) 222 CLR 67, High Court of Australia (Gleeson CJ, McHugh, Gummow and Hayne JJ at [128]) [↑](#footnote-ref-151)
152. [2012] HCA 35 [↑](#footnote-ref-152)
153. O’Reilly, M, *The Law of Involuntary Manslaughter: Wilson v R* (1993) 15 Sydney Law Review 357 at p.362 [↑](#footnote-ref-153)
154. *Loc cit* [↑](#footnote-ref-154)
155. Yeo, S, *The Fault Elements for Involuntary Manslaughter: Some Lessons from Downunder* (2000) 43 Crim LQ 291, at p.294 [↑](#footnote-ref-155)
156. [2008] SASC 96, South Australia Court of Criminal Appeal [↑](#footnote-ref-156)
157. *Ibid*. at [90]. Emphasis added [↑](#footnote-ref-157)
158. [2012] HCA 35 [↑](#footnote-ref-158)
159. At [9] [↑](#footnote-ref-159)
160. As amended by the Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014 [↑](#footnote-ref-160)
161. This provision entered into force on 1st November 2014 [↑](#footnote-ref-161)
162. (1985) 81 Cr App R 150 [↑](#footnote-ref-162)
163. *Ibid.* at p.155 [↑](#footnote-ref-163)
164. *Ibid.* at p.156 [↑](#footnote-ref-164)
165. [2006] EWCA Crim 17 [↑](#footnote-ref-165)
166. *Ibid.* at [37] [↑](#footnote-ref-166)
167. [2012] EWCA Crim 2293, [2013] 1 WLR 1083 [↑](#footnote-ref-167)
168. *Dewey* (1999) 132 CCC (3d) 348; 21 CR (5th) 232, Court of Appeal of Alberta. Picard JA: ‘Objective foreseeability is objective foreseeability of the risk of bodily harm in general, not of a specific type of harm’ (at [10]) [↑](#footnote-ref-168)
169. (2004) 189 CCC (3d) 79; 19 CR (6th) 213, Ontario Superior Court of Justice [↑](#footnote-ref-169)
170. Emphasis added [↑](#footnote-ref-170)
171. [1989] Crim LR 730 [↑](#footnote-ref-171)
172. Smith, J, Commentary on *Ball*, *Ibid.* at p.732 [↑](#footnote-ref-172)
173. [1989] 1 WLR 684 [↑](#footnote-ref-173)
174. *Ibid.* at pp.686-687 [↑](#footnote-ref-174)
175. [2013] EWCA Crim 1540; [2014] Crim LR 457 [↑](#footnote-ref-175)
176. *Ibid.* at [34] [↑](#footnote-ref-176)
177. *Ibid.* at [17] [↑](#footnote-ref-177)
178. [2004] NSWCCA 449, New South Wales Court of Criminal Appeal [↑](#footnote-ref-178)
179. *Ibid.* at [84] [↑](#footnote-ref-179)
180. *Ibid.* at [83] and [138] [↑](#footnote-ref-180)
181. (1985) 81 Cr App R 150 [↑](#footnote-ref-181)
182. [2006] EWCA Crim 17 [↑](#footnote-ref-182)
183. *Ibid.* at [53] [↑](#footnote-ref-183)
184. *Ibid.* at [37] and [45] [↑](#footnote-ref-184)
185. [2015] EWCA Crim 351, [2015] 2 Cr App R 5 [↑](#footnote-ref-185)
186. *Ibid.* at [21] [↑](#footnote-ref-186)
187. [2006] VSC 494, (2006) 167 A Crim R 596, Supreme Court of Victoria [↑](#footnote-ref-187)
188. *Ibid.* at [13] [↑](#footnote-ref-188)
189. [1983] 2 VR 201, Supreme Court of Victoria [↑](#footnote-ref-189)
190. *Ibid.* at p.212 [↑](#footnote-ref-190)
191. *Loc cit* [↑](#footnote-ref-191)
192. [2006] VSC 494 at [10] [↑](#footnote-ref-192)
193. [2004] VSC 169, (2004) 148 A Crim R 28, Supreme Court of Victoria [↑](#footnote-ref-193)
194. *Ibid.* at [34] and [38] [↑](#footnote-ref-194)
195. [2015] NSWSC 537, Supreme Court of New South Wales [↑](#footnote-ref-195)
196. *Ibid.* at [69] [↑](#footnote-ref-196)
197. *Ibid.* at [69] and [70] [↑](#footnote-ref-197)
198. See e.g. *Morhall* [1996] 1 AC 90; *Morgan Smith* [2001] 1 AC 146, [2000] 3 WLR 654; *Attorney-General for Jersey v* *Holley* [2005] UKPC 23, [2005] 2 AC 580, [2005] 3 WLR 29. Provocation was abolished by s 56, Coroners and Justice Act 2009 [↑](#footnote-ref-198)
199. The conviction in *Andrews* [2002] EWCA Crim 3021; [2003] Crim LR 477 should have been quashed on the basis of the lack of an unlawful act with a fault element [↑](#footnote-ref-199)
200. [1973] QB 702 [↑](#footnote-ref-200)
201. (1997) 185 NBR (2d) 190, Court of Appeal of New Brunswick [↑](#footnote-ref-201)
202. *Church* [1966] 1 QB 59; *Creighton* [1993] 3 SCR 3; (1993) 105 DLR (4th) 632, Supreme Court of Canada [↑](#footnote-ref-202)
203. *Wilson* [1992] HCA 31; (1992) 174 CLR 313, High Court of Australia [↑](#footnote-ref-203)
204. Section 4A, as inserted by the Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014 [↑](#footnote-ref-204)