Offences Against the Person: Involuntary Manslaughter

By the end of this unit, you will be able to (AO1):
- Describe what is meant by the term “involuntary manslaughter”
- Explain the key elements of gross negligence, constructive act and reckless manslaughter.
- Understand the development of involuntary manslaughter and how they may overlap

You will also be able to evaluate (AO2):
- The development of the law in relation to dangerous act in constructive act manslaughter
- Whether the offences should exist at all.
- The extent to which the Law Commission proposals reflect a move forwards in the law.

Homework
During this unit, you will be set the following. In completing homework, you will be expected to do your own research and supplement your own notes. This is essential to show understanding.

1. Write 1-2 sides of A4 in response to the following statement. “Consider the approach of the court to the problem of supplying or administering a drug. What is the current approach of the courts? How far do you agree with their decisions in the key cases?”

2. Revise the whole of OAP involuntary manslaughter for a 30 Mark DRAG test

End of Unit Assessment
You will sit a 30 Mark DRAG test at the end, and complete the following section B question in timed circumstances at the end of this topic:

1. Emma hires Fred, a qualified electrician, to re-wire her house. She is unhappy when she notices sparks coming from the switches as she turns some lights on or off. Emma complains to Fred who returns to do some checks. He assures her that everything is in order and perfectly safe. The next morning, Emma goes to take a shower in the bathroom. When she turns on the shower control, she receives an electric shock that causes her to fall and bang her head, knocking her unconscious. Fortunately, her friend, Gita, arrives almost immediately and discovers Emma. Gita calls an ambulance and Emma is rushed to hospital. While Emma is still critically ill she develops an infection.

Hugh, a junior doctor employed by the hospital, fails to read Emma’s medical notes properly. The notes clearly show that Emma is allergic to penicillin. Hugh gives Emma penicillin to treat the infection. As a result of her allergy Emma dies.

Discuss the liability of Fred and Hugh for Emma’s death. [50]
Involuntary Manslaughter

Unlike voluntary manslaughter, this is a common law partial defence, and D can be charged with this. They exist in addition to those voluntary manslaughter partial defences in the Homicide Act 1957.

Involuntary manslaughter arises where D causes the death of V but doesn't mean to. Put legally... he is lacking the ______ of murder, whether direct or indirect. Some of the cases that we will look at are ones we've seen already!

- A teenager pushes a stone off a bridge
- An anaesthetist doesn’t notice that the tube is stuck for ten minutes
- A man bullies his wife and she kills herself
- A landlord doesn’t check the gas fire
- A man sets his house on fire to try and get a new council house.

As you can see... it covers a huge range of blame – from the intentional to the accidental and the one who doesn’t even mean to cause harm!

Look at the situations above:

Which of these do you think there is a justified partial defence and which not? Why?

__________________________
__________________________
__________________________
__________________________

There are three types

- Gross Negligence
- Constructive (or unlawful) Act
- Reckless Act
Constructive (or unlawful) Act Manslaughter

This is the classic constructive act case. Read it and see if you can work out the four elements:

### Manslaughter charge after death

A man who suffered a serious head injury during an assault in Cambridgeshire has died.

John Stevens, 21, was found unconscious outside Vinter Terrace, off Hills Road, Cambridge, on Saturday.

He was taken to Addenbrooke’s Hospital in the city but died from his injuries the next day.

Sam Butler, 20, from Impington Lane, Impington, has been charged with manslaughter and will appear before Cambridge magistrates later.

### Element One:

### Element Two:

### Element Three:

### Element Four:

1. Why is called constructive act?

2. What problems can you see with the definition?

3. Who will decide the liability?

4. Why might it be justified to impose liability for constructive act?
Because D’s liability grows out (or ‘constructed’) upon the act, this must be a criminal offence e.g. assault although this can also include arson, burglary or criminal damage.

Below are some of the cases we’ve already looked at... what was the unlawful act for each?

<table>
<thead>
<tr>
<th>Case</th>
<th>Unlawful Act</th>
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<tr>
<td>R v Church</td>
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<td>R v Nedrick</td>
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<td>R v Hancock and Shankland</td>
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Ok, **rule number one**: if there is **no illegal act** there can be **no liability** for constructive manslaughter. A civil wrong (_______) is not enough!

**R v Franklin 1883**

**Facts:**

**Ratio:**

Now, listen to facts of **R v Lamb 1967**. Make a note of them below:

1. Why was there no unlawful act here?

2. What would have been needed for D to have been liable for V’s Manslaughter?

3. What do you learn about the definition of assault from this?
Finally, it is important to note that this requires a **positive, intentional action.** An omission is **not** enough.

**R v Lowe 1973**

**Facts:**

**Ratio:**
At first instance, the trial judge instructed the jury that if they found him liable for wilful neglect, they could then find liability for constructive act manslaughter.

CA disagreed, and quashed his conviction.
Element Two: 
Dangerous Act

Whether or not D’s action is dangerous is assessed _________________. This means that it is irrelevan
t whether or not D himself realised that the act was dangerous.

**R v Church 1966**

*KEY CASE*

Facts:

Ratio:
A dangerous act is "such as all sober and reasonable people would inevitably recognise. It must subject the other person [V] to at least some harm resulting there form albeit not serious harm."

*Church* follows the earlier case of...

**R v Larkin 1943**

Facts:

Ratio:
"where the act which a person is engaged in is unlawful, then, if at the time it is a dangerous act, that is, and act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter."

... And is confirmed by the following case:

**R v Carey & Others 2006**

Facts:

Ratio:
"The *Church* principle must be loyally applied and without reservation"

But: the case (*Church*) has been described as “a confused and confusing case”

Why?

Developing your critical thoughts.

Why might we argue that this approach it too broad and unfair? *Aim to use at least one case in your reasoning.*
What kind of harm might be enough?

1. Harm aimed at another person (some one other than V)

R v Mitchell 1983
Facts:
Oh I do like a good queue in the Post Office!

More recently, Antoinette Richardson and Tony Virasami were convicted of the manslaughter of Kevin Tripp, over a case of mistaken identity and queue rage.

2. Harm aimed at Property

R v Goodfellow 1986
Facts:

3. What about if the Victim is weaker, so the harm is worse?

There must be a risk of physical harm obvious to the reasonable man.

R v Dawson 1985
Facts:
But, if the frailness of V was obvious to the reasonable person, and there was risk of physical harm, then they would still be liable.

**R v Watson 1989**

**Facts:**

**Ratio:**

*Note: On the facts, the conviction was overturned as it could not be proven that the burglars, rather than the paramedics etc which contributed to the death.*

How do you distinguish between these two cases?

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4. **What about Psychiatric Harm?**

*Note: in the criminal law, psychiatric harm is enough as long as it is a ‘recognised medical condition’ R v Chan Fook*

The most recent development on the law has come from the Court of Appeal in the case of **R v Dhawali 2006**. This was the case of a man who had physically and psychologically bullied his wife, who later killed herself. As a trial, the CPS brought a constructive manslaughter charge against them on the basis of section 20 **Offences Against the Person Act 1861** (ABH).

Although the CA did not consider that there was enough evidence in the case to convict here, they did state obiter that in theory bullying was enough to form the unlawful act, where it caused physical or psychological harm:

> "Where a decision to commit suicide has been triggered by a physical assault which represents the culmination of a course of abusive conduct, it would be possible... to argue that the final assault played a significant part."

This approach appears to have been endorsed by the more recent case of **R v Ajose and Can (2009)**, although there were clearly physical grounds for the conviction!
Element Three:  
Causing the Death

This really goes back to all the work on causation. Remember that D’s actions must  ________ and  ________________ cause the death of V.

Look at the following (very recent!) case... Does D meet the requirements of the offence?

R v Lewis 2010

D was driving home in the early morning. Students were crossing the road and one hit the car. D got out of the car and pushed the woman who hit the car. Her brother, V, intervened and then ran off. D ran after him, and V ran into the path of another car and died.

☐ Unlawful Act =  ________________
☐ Dangerous Act =  ________________
☐ Such that all sober and responsible person would foresee =  ________________
☐ Causing the death =  ________________

Now normally ‘causing the death’ is not an issue – you hit V, he falls over, hits his head and dies – you have met both of the tests. However this has proved slightly more contentious when it comes to drugs deaths, and the courts have taken a while to make up their minds!

The situation we are concerned with is this:

D supplies V with a drug (and may even prepare the syringe). V injects himself and then dies.

Has D committed an ‘unlawful act’?

Is the self-injection an intervening act?

There is a small piece of legislation, which is very relevant to this area:

s.23 Offences Against the Person Act 1861

which makes it a criminal offence to administer a noxious substance.

Why might this word cause problems?
R v Cato 1972  
Facts:  
Ratio:  

R v Dalby 1982  
Facts:  
Ratio:  

So, those are the two extremes, and the law seems pretty clear on these. No problems. But what if D has only prepared the syringe and the V self injects – is this enough for ‘administration’ under the Act?

R v Kennedy 1999  
Facts:  
Ratio:  

On what grounds did the Court of Appeal distinguish this decision from that of Dalby?

So, ok, we might not agree with this interpretation, but it is a clear decision. However, even the Court of Appeal was unhappy with its own decision as it made very clear in the following case:
**R v Dias 2002**

**Facts:**

**Ratio:**

"this case is also important to gross negligence manslaughter!"

... and what about applying a tourniquet?

**R v Rogers 2003**

**Facts:**

**Ratio:**

So, all of this confusion lead us back to... *Kennedy No.2*. The Criminal Cases Review Commission had thought that, given the confusion, the Court of Appeal ought to look at it again. They did, and upheld their previous decision, but did certify it and send it to the House of Lords...

All of which leads us to...

**Kennedy No.2 (2008)**

At the back of the handout is the Times Law Report of this case. Read it and then summarise the facts, ratio (including reasoning) and obiter below:

**Facts:**

**Ratio:**

**Obiter:**
Element Four:
Mens Rea

This is simple. D’s must have intended the mens rea necessary for the unlawful act not the death. It is also not necessary that D realise the act is unlawful or dangerous. This means that D can be convicted of the serious crime of manslaughter, even if he never intended or was even reckless as to killing!

R v Newbury & Jones 1976

Facts:  

Ratio:
Gross Negligence Manslaughter

Look at the following gross negligence case.
Using this and what you remember from omissions... work out the elements of the offence.

Doctors' 'negligence killed patient'

Two junior doctors killed a patient because they failed to diagnose he was suffering from blood poisoning after routine knee surgery, a court was told.

Senior house officers Amit Misra and Rajeev Srivastava failed to spot that Sean Philips was suffering from toxic shock syndrome, Winchester Crown Court heard.

The 31-year-old father-of-one died on 24 June, 2000, after suffering kidney failure at Southampton General Hospital.

Dr Misra, 34, of the Royal Preston Hospital, and Dr Srivastava, 38, of Glencaple Road, Dumfries, Scotland, both deny manslaughter due to gross negligence.

Doctors' failures

Philip Mott QC, prosecuting, told the jury that the two doctors were grossly negligent in the care of Mr Philips after he had had the simple operation on 23 June, 2000.

He said that while toxic shock syndrome was a rare condition the junior doctors were not expected to diagnose, Mr Philips was showing obvious symptoms of being ill, including a racing pulse, a raised temperature and low blood pressure.

These symptoms were not rare and it was not "rocket science at all" to diagnose them.

The court heard that both doctors failed to give any diagnosis for Mr Philips's illness.

Element One: __________________________________________________________

Element Two: __________________________________________________________

Element Three: _________________________________________________________

Element Four: __________________________________________________________
Read the enclosed case report and answer the following questions in as much detail as possible:

1. What was D’s duty to V?

2. What had he failed to do?

3. When do you think that he goes from simple negligence to gross negligence?

4. What is the key question when looking at the negligence of D?

5. What did the expert witnesses think of his conduct?

6. What are the four key elements of manslaughter by gross negligence?

7. What does Lord Mackay think of R v Seymour?

8. Which other duties and cases can you think of which may fall into this area of the law?
So, how do we establish whether or not a duty of care exists? The courts have consistently said that we should apply the civil law test for negligence laid down in the famous ginger beer and snail case! This was confirmed by Mackay LJ in *Adomako*.

**Donoghue v Stevenson 1932**

**Facts:**

**Plenary:**

"You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbours. Who then is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to acts or omissions which are called into question."

So, that’s what we start with... over the years the courts have developed a range of situations where a duty of care does exist. Remember: these are **not** finite (Khan & Khan makes it clear that the courts can develop new duties as appropriate... and they have).

In addition, the concept of a duty of care in the criminal law has developed beyond those laid down in the civil law.

The question of whether there is a duty or not is a question of fact which is left to the __________ (although if there is a specific statutory duty, then the judge can instruct them on it *R v Willoughby 2005* confirmed in *R v Evans (Gemma) 2009.*).
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<td>Singh 1999</td>
<td>Duty to maintain property</td>
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<td>D owner &amp; master of ship. Knew engines may fail due to fuel contamination. Ship drifted onto the rocks and three crew died.</td>
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<td>Litchfield 1998</td>
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<td>Captain and crew</td>
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<td>Khan &amp; Khan 1998</td>
<td></td>
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<td>Possible duty to summon assistance?</td>
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<td>Dias 2002</td>
<td>Possible duty not to supply and prepare drugs for another?</td>
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<td>Pittwood 1902</td>
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<td>Gate operator and public</td>
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<td>Wacker 2002</td>
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<td>D was a lorry driver bringing 60 illegal immigrants in. Closed the air vent on the ferry to prevent detection, and forgot to open it again. Ferry was delayed. 58 were dead.</td>
<td>Simple duty owed on facts [despite illegal nature]</td>
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<tr>
<td>Stone &amp; Dobinson</td>
<td>Duty to continue with care when established.</td>
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<td>Gibbins &amp; Proctor</td>
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<td>Parents and children</td>
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<td>Specific relationship</td>
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<tr>
<td>Willoughby 2004</td>
<td>Person in a joint enterprise owes a duty to the other.</td>
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Element Two:

Breach of Duty Causing Death

Remember that this is measured against the standard expected of the reasonable, competent person. There are two elements to the proof:

1. That there was a breach of the duty of care
2. That the breach caused the death.

Both of these are factual matters based on the evidence before the court.

Student Thinking:
What if the victim does something which puts them in danger, even when they have been warned? Does this break the chain of causation, and relieve them of their duty?

R v Winters 2010

Facts: There was a fire on a farm. DD had stored fireworks in a metal container, which they had no licence for. The fire brigade were called. V1 was the media spokesman for the fire brigade, and V2 was the camera man. They were told to pull back, including by one of the defendants. However, they didn’t and the container exploded killing both victims.

Ratio:

What about the drugs cases?

As you have already seen, the courts have spent a lot of time trying to find a way to prosecute those who supply drugs to V where V dies. Normally their liability is broken because of ____________________________.

However, in gross negligence, there has been a recent decision which seems to have opened the door just a little....

R v Evans 2009 *key case*

1. What was the ratio of the case?

2. What is the role of the jury in gross negligence cases?

3. What had D done?

4. What was D’s duty and how was it established?

Extension: What was the question the court should consider in determining whether or not D owed a duty in this situation?
Element Three: 
Gross Negligence

Because this is criminal liability, a mere breach of a duty is not enough - it needs to be 'gross'. The next question is then what we mean by 'gross' – that is so wrong as to be criminal in the eyes of the jury.

This is clearly not an easy test to define, and it can mean that there are contrasting decisions from juries on very similar facts, as it really leaves the test of what is criminal up to them. They should take into account the seriousness of the breach in all the circumstances.

R v Bateman 1925
Facts:

Ratio:
To be liable for gross negligent manslaughter d must show...

"Such disregard for life and safety of others as to amount to crime against the state deserving of punishment."

This instruction was approved in Adomako by Lord Mackay

TEST: Whether having regard to the risk of death involved, the conduct of D was so bad in all circumstances as to amount, in their judgement to a criminal act or omission.
Element Four:  
Risk of Death

How much 'danger' must D be risking? The law seemed conflicted for a few years...

risk to health and welfare  or  risk of serious injury

R v Stone and Dobinson 1977 
Ratio:

WHAT WAS THE RISK HERE?

R v Bateman 1925 
Ratio:

WHAT WAS THE RISK HERE?

Andrews v DPP 1937 
Facts:

Ratio: the negligence needs to be more than that for civil and show such disregard for life and safety as to be deserving of punishment.

Straightforward huh? Well it would have been, except for the terribly worded statement of Lord Mackay in Adomako 1992

"In my opinion the law as stated in these two authorities [Bateman; Andrews] is satisfactory as providing a proper basis for describing the crime of involuntary manslaughter.... Examples in which this was done, to my mind, with complete accuracy are Reg. v. Stone"
A solution?


Facts:

Ratio:
D appealed on the grounds of a breach of Article 7 ECHR, arguing that the elements of the offence were unclear and therefore invalid.

In addition: “not whether D’s negligence was gross and additionally a crime but whether his behaviour was grossly negligent and consequently criminal” Judge LJ

In other words: the outcome not the offence is the only uncertain thing.

A risk of death only was sufficient.
Reckless Act Manslaughter

This has proven to be a rather controversial area of involuntary manslaughter. There has been a lot of debate over whether it even exists as a separate offence, or instead is part of gross negligence (just a different way of doing the same thing!)

In fact, following Adomako, the consensus was that it did not exist at all, and rather these fell into gross negligence (although according to Mackay you can use the word reckless to describe the actions – that’s fine!)

Anybody see the problem coming?

Again, for AO1 you will need to know the current law, but for AO2 you need to be able to evaluate the current law, and to do this effectively, you need to be able to understand where it comes from and how it has developed.

History
This is where we overlap the manslaughters.... and it all goes back to the objective test for recklessness established in Caldwell. Then we meet the following case again...

R v Seymour 1983
Facts:
Ratio:

Current Law
However, this seems to be making a (sort of) comeback thanks to the following Court of Appeal case:

R v Lidnar 2000
Facts:
Ratio:
The judge at first instance instructed the jury along the objective Caldwell route for reckless manslaughter and D was convicted.

He appealed on the grounds that the judge should have instructed the jury along GN

CA upholds the conviction. The ‘third limb’ exists. There is nothing in Adomako which suggests it was abolished...

The definition now is:

D sees risk of death or serious injury as highly probable, goes ahead and death results.

Extension: Using your research skills, identify one other reckless act manslaughter case and apply the rules to them. Bring these with you next lesson.
The conviction arose out of the conduct of an eye operation carried out at the Mayday Hospital, Croydon on 4 January 1987. The appellant was, during the latter part of that operation, the anaesthetist in charge of the patient.

The operation was carried out by two surgeons supported by a team of five nurses and a theatre sister. Anaesthesia commenced at about 9.45 a.m. The patient was paralysed by injection of a drug and an endotracheal tube was inserted to enable the patient to breathe by mechanical means. At the start of the operation the anaesthetist was Dr. Said, a registrar. An operating department assistant was also present to help him. At about 10.30 a.m. there was a changeover of anaesthetists. The appellant was called to attend and take Dr. Said’s place following which both Dr. Said and his assistant departed to deal with another operation elsewhere in the hospital. Another assistant was called to attend but did not arrive until later.

At approximately 11.05 a.m. a disconnection occurred at the endotracheal tube connection. The supply of oxygen to the patient ceased and this led to cardiac arrest at 11.14 a.m. During this period the appellant failed to notice or remedy the disconnection.

The appellant first became aware that something was amiss when an alarm sounded on the Dinamap machine, which monitors the patient’s blood pressure. From the evidence it appears that some 4½ minutes would have elapsed between the disconnection and the sounding of this alarm. When this alarm sounded the appellant responded in various ways by checking the equipment and by administering atropine to raise the patient’s pulse. But at no stage before the cardiac arrest did he check the integrity of the endotracheal tube connection. The disconnection itself was not discovered until after resuscitation measures had been commenced.

For the prosecution it was alleged that the appellant was guilty of gross negligence in failing to notice or respond appropriately to obvious signs that a disconnection had occurred and that the patient had ceased to breathe. In particular the prosecution alleged that the appellant had failed to notice at various stages during the period after disconnection and before the arrest either occurred or became inevitable that the patient’s chest was not moving, the dials on the mechanical ventilating machine were not operating, the disconnection in the endotracheal tube, that the alarm on the ventilator was not switched on and that the patient was becoming progressively blue. Further the prosecution alleged that the appellant had noticed but failed to understand the correct significance of the fact that during this period the patient’s pulse had dropped and the patient’s blood pressure had dropped.

Two expert witnesses gave evidence for the prosecution. Professor Payne described the standard of care as ‘abysmal’ while Professor Adams stated that in his view a competent anaesthetist should have recognised the signs of disconnection within 15 seconds and that the appellant’s conduct amounted to ‘a gross dereliction of care.’

On behalf of the appellant it was conceded at his trial that he had been negligent. The issue was therefore whether his conduct was criminal.

... The appellant himself said in evidence that when the alarm sounded on the Dinamap machine his first thought was that the machine itself was not working properly. ... It had never occurred to him that a disconnection had taken place. He stated in evidence that ‘after things went wrong I think I did panic a bit.’

In relation to the appellant’s actions during this period Professor Payne had conceded during cross-examination that ‘given that Dr. Adomako misled himself the efforts he made were not unreasonable.’ The period to which this evidence referred was obviously the period after the alarm had sounded on the Dinamap machine which was, as I have said, apparently some 4½ minutes after the disconnection occurred.
...[I]n my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.

It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.

My Lords, the view which I have stated of the correct basis in law for the crime of involuntary manslaughter accords I consider with the criteria stated by counsel although I have not reached the degree of precision in definition which he required, but in my opinion it has been reached so far as practicable and with a result which leaves the matter properly stated for a jury's determination.

My Lords, in my view the law as stated in Reg. v. Seymour [1983] 2 A.C. 493 should no longer apply since the underlying statutory provisions on which it rested have now been repealed by the Road Traffic Act 1991. It may be that cases of involuntary motor manslaughter will as a result become rare but I consider it unsatisfactory that there should be any exception to the generality of the statement which I have made, since such exception, in my view, gives rise to unnecessary complexity.

...I consider it perfectly appropriate that the word ‘reckless’ should be used in cases of involuntary manslaughter, but as Lord Atkin put it ‘in the ordinary connotation of that word.’ ...

In my opinion it is quite unnecessary in the context of gross negligence to give the detailed directions with regard to the meaning of the word ‘reckless’ associated with Reg. v. Lawrence [1982] A.C. 510. The decision of the Court of Appeal (Criminal Division) in the other cases with which they were concerned at the same time as they heard the appeal in this case indicates that the circumstances in which involuntary manslaughter has to be considered may make the somewhat elaborate and rather rigid directions inappropriate. I entirely agree with the view that the circumstances to which a charge of involuntary manslaughter may apply are so various that it is unwise to attempt to categorise or detail specimen directions. For my part I would not wish to go beyond the description of the basis in law which I have already given.

In my view the summing up of the judge in the present case was a model of clarity in analysis of the facts and in setting out the law in a manner which was readily comprehensible by the jury. The summing up was criticised in respect of the inclusion of the following passage:

'Of course you will understand it is not for every humble man of the profession to have all that great skill of the great men in Harley Street but, on the other hand, they are not allowed to practise medicine in this country unless they have acquired a certain amount of skill. They are bound to show a reasonable amount of skill according to the circumstances of the case, and you have to judge them on the basis that they are skilled men, but not necessarily so skilled as more skilful men in the profession, and you can only convict them criminally if, in your judgment, they fall below the standard of skill which is the least qualification which any doctor should have. You should only convict a doctor of causing a death by negligence if you think he did something which no reasonably skilled doctor should have done.'

The criticism was particularly of the latter part of this quotation in that it was open to the meaning that if the defendant did what no reasonably skilled doctor should have done it was open to the jury to convict him of
causing death by negligence. Strictly speaking this passage is concerned with the statement of a necessary condition for a conviction by preventing a conviction unless that condition is satisfied. It is incorrect to treat it as stating a sufficient condition for conviction. In any event I consider that this passage in the context was making the point forcefully that the defendant in this case was not to be judged by the standard of more skilled doctors but by the standard of a reasonably competent doctor ...

For these reasons I am of the opinion that this appeal should be dismissed and that the certified question should be answered by saying:

‘In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case ... and that it is not necessary to refer to the definition of recklessness in Reg. v. Lawrence [1982] A.C. 510, although it is perfectly open to the trial judge to use the word ‘reckless’ in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case.’

...
PREPARATION OF HEROIN SYRINGE DOES NOT CONSTITUTE MANSLAUGHTER
Regina v Kennedy (No 2)

It was never appropriate to find someone guilty of manslaughter where that person had been involved in the supply of a class A controlled drug, which was then freely and voluntarily self-administered by a fully informed and responsible adult to whom it had been supplied, and the administration of the drug then caused his death. The House of Lords so held in allowing an appeal by the appellant, Simon Kennedy, from the dismissal by the Court of Appeal, Criminal Division (Lord Woolf, Lord Chief Justice, Mr Justice Davis and Mr Justice Field) (The Times April 6, 2005; [2005] 1 WLR 2159) of his second appeal, following a reference by the Criminal Cases Review Commission, against his conviction on November 26, 1997 at the Central Criminal Court (Judge Hawkins, QC and a jury) for, inter alia, manslaughter.

Mr Patrick O'Connor, QC and Mr David Bentley for the appellant; Mr David Perry, QC and Mr Duncan Penny for the Crown.

LORD BINGHAM, giving the opinion of the committee, said that the agreed facts were clear and simple. The appellant prepared a dose of heroin for the deceased and gave him a syringe ready for injection. The deceased then injected himself and returned the empty syringe to the appellant, who left the room. The deceased then appeared to stop breathing. An ambulance was called and he was taken to hospital, where he was pronounced dead.

To establish the crime of manslaughter based on the unlawful act of the defendant it had to be shown, among other things not relevant to the appeal: (i) that the defendant committed an unlawful act; (ii) that such unlawful act was a crime; and (iii) that the defendant's unlawful act was a significant cause of the death of the deceased. There was no doubt but that the appellant committed an unlawful, and criminal act by supplying the heroin to the deceased. But the act of supplying, without more, could not harm the deceased in any physical way, let alone cause his death. So, as the parties agreed, the charge of unlawful act manslaughter could not be founded on the act of supplying the heroin alone.

The parties were further agreed that an unlawful act of the appellant on the present facts had to be found, if at all, in a breach of section 23 of the Offences against the Person Act 1861, namely, administering a noxious thing to, or causing a noxious thing to be administered to, or taken by another person. Although the death of the deceased was the tragic outcome of the injection of heroin, the death was legally irrelevant to the criminality of the appellant's conduct under the section: he either was or was not guilty of an offence under section 23 irrespective of the death.

The criminal law generally assumed the existence of free will. The law recognised certain exceptions, in the case of the young, those who for any reason were not fully responsible for their actions, and the vulnerable, and it acknowledged situations of duress and necessity, as also of deception and mistake.

But, generally speaking, informed adults of sound mind were treated as autonomous beings able to make their own decisions how they would act, and none of the exceptions was relied on as possibly applicable in the instant case.

Thus D was not to be treated as causing V to act in a certain way if V made a voluntary and informed decision to act in that way rather than another.

The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, was fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.

The sole argument open to the Crown was, therefore, that the appellant administered the injection to the deceased. It was argued that the term "administer" should not be narrowly interpreted.
Reliance was placed on the steps taken by the appellant to facilitate the injection and on the trial judge's direction to the jury that they had to be satisfied that the appellant handed the syringe to the deceased for immediate injection.

But, the heroin was described as "freely and voluntarily self-administered" by the deceased. That, on the facts, was an inevitable finding.

The appellant supplied the heroin and prepared the syringe. But the deceased had a choice whether to inject himself or not. He chose to do so, knowing what he was doing. It was his act.

In resisting that conclusion Mr Perry relied on R v Rogers ([2003] 1 WLR 1374). In that case, the defendant pleaded guilty, following a legal ruling, to a count of administering poison contrary to section 23 of the 1861 Act and a count of manslaughter.

The relevant finding was that the defendant physically assisted the deceased by holding his belt round the deceased's arm as a tourniquet, so as to raise a vein in which the deceased could insert a syringe, while the deceased injected himself.

It was argued in support of his appeal to the Court of Appeal that the defendant had committed no unlawful act for purposes of either count. That contention was rejected. The court held that it was unreal and artificial to separate the tourniquet from the injection. By applying and holding the tourniquet the defendant had played a part in the mechanics of the injection which had caused the death.

His Lordship said there was, clearly, a difficult borderline between contributory acts which might properly be regarded as administering a noxious thing and acts which might not. But the crucial question was not whether the defendant facilitated or contributed to administration of the noxious thing but whether he went further and administered it.

What mattered, in a case such as Rogers and the present, was whether the injection itself was the result of a voluntary and informed decision by the person injecting himself. In Rogers, as in the present case, it was. That case was, therefore, wrongly decided.

The essential ratio of the decision of the Court of Appeal in the instant case was that the administration of the injection was a joint activity of the appellant and the deceased acting together.

It was possible to imagine factual scenarios in which two people could properly be regarded as acting together to administer an injection. But nothing of the kind was the case here.

The appellant supplied the drug to the deceased, who then had a choice, knowing the facts, whether to inject himself or not. The heroin was self-administered, not jointly administered. The appellant did not administer the drug. Nor, for reasons already given, did the appellant cause the drug to be administered to or taken by the deceased.

Solicitors: Bullivant & Partners; Crown Prosecution Service, Ludgate Hill.
DUTY TO MITIGATE HARM DONE AND SAVE LIFE

Regina v Evans (Gemma)
Judgment April 2, 2009

For the purposes of gross negligence manslaughter, when a person had created or contributed to the creation of a state of affairs which he knew, or ought to have known had become life-threatening to another person, a consequent duty would normally arise on him to act by taking reasonable steps to save the other’s life.

The existence or otherwise of such a duty of care was a question of law, whereas the question whether the facts established the existence of the duty was for the jury. If the existence of the duty was in dispute, the jury should be directed that if particular facts were established, then in law a duty would arise but if other facts were present the duty would be negatived.

The Court of Appeal, Criminal Division, so held in a reserved judgment, dismissing an appeal by Gemma Evans against her conviction at Swansea Crown Court before Mr Justice Lloyd Jones and a jury on April 18, 2008, for manslaughter, for which she was imprisoned for four years. Mr Ian Murphy, QC and Mr Dyfed Lilion Thomas, assigned by the Registrar of Criminal Appeals, for the appellant; Mr Paul Thomas, QC and Mr John Hipkin for the Crown.

THE LORD CHIEF JUSTICE, giving the judgment of the court, said that the appellant, together with her mother, was convicted of manslaughter by gross negligence following the death of her half-sister, Carly, aged 16, who had self-injected with heroin supplied by the appellant.

When Carly had developed and complained of symptoms consistent with a heroin overdose the appellant and her mother had decided not to seek medical assistance because they feared that they themselves and possibly Carly would get into trouble.

Instead, they put Carly to bed, hoping that she would recover spontaneously. The following morning Carly was dead. The cause of death was heroin poisoning.

It was not in dispute that the appellant had remained at the premises from the time when Carly injected herself, throughout the evening and night; that she had witnessed obvious signs of the effect of the drug taken by Carly and that she appreciated that her condition was very serious and indicative of an overdose; and that the appellant and her mother believed that they were responsible for the care of Carly after she had taken heroin.

The problem of fixing liability, whether in tort or in crime, on the basis of omission had generated much, indeed prolonged debate.

The question was whether, notwithstanding that their relationship lacked the features of familial duty or responsibility which marked her mother’s relationship with Carly, the appellant was under a duty to take reasonable steps for the safety of Carly once she appreciated that the heroin she had procured for her was having a potentially fatal impact on her health.

When omission or failure to act were in issue, two aspects of manslaughter were engaged.

The first was manslaughter arising from the defendant’s gross negligence: R v Adomako ([1995] 1 AC 171).

The second arose when the defendant had created a dangerous situation and when, notwithstanding his appreciation of the consequent risks, he failed to take any reasonable preventive steps: R v Miller ([1983] 2 AC 161).
None of the relevant authorities involved what could sensibly be described as manslaughter by mere omission and in each it was an essential requirement of any potential basis for conviction that the defendant should have failed to act when he was under a duty to do so.

The duty necessary to found gross negligence manslaughter was plainly not confined to cases of a familial or professional relationship between the defendant and the deceased.

In their Lordships’ judgment, consistently with Adomako and the link between civil and criminal liability for negligence, for the purposes of gross negligence manslaughter, when a person had created or contributed to the creation of a state of affairs which he knew, or ought reasonably to have known had become life-threatening, a consequent duty on him to act by taking reasonable steps to save the other’s life would normally arise.

There was an inconsistency between the authorities in relation to the question whether the judge or the jury was responsible in an individual case for deciding whether the defendant owed a duty of care to the deceased, which the court must address and resolve: see Adomako, R v Wacker ([2003] QB 1207) and R v Willoughby ([2005] 1 WLR 1880).

Subject to any statutory exceptions, in the criminal trial, decisions of fact were the exclusive responsibility of the jury and questions of law were for the judge.

In principle therefore, the existence, or otherwise, of a duty of care, or a duty to act, was a stark question of law: the question whether the facts established the existence of the duty was for the jury.

In some cases, where the existence of the duty was not in dispute, the judge might well direct the jury that a duty of care existed. Such a direction would be proper.

But in any cases where the issue was in dispute, and assuming that the judge had found that it would be open to the jury to find that there was a duty of care, or a duty to act, the jury should be directed that if facts a plus b and/or c or d were established, then in law a duty would arise, but if facts x or y or z were present, the duty would be negatived.

In that sense, of course, the jury was deciding whether the duty situation had been established. Understood in that way, no potential problems arising from articles 6 and 7 of the European Convention on Human Rights were engaged.

That conclusion accorded with the principles which would obtain if, in the extremely unlikely event of an order for trial by jury, the issues arose in a civil action.

On the facts, the appellant was under a plain and obvious duty to take reasonable steps to assist or provide assistance for Carly. The remaining ingredients of the offence were proved. The appeal would be dismissed.

These will be the last questions on the paper and are worth 20 marks each. You will have a choice of two questions and need to choose one!

You may answer these in bullet points. They are assessed only for AO2 which means that they are only interested in your application of the rules for that defence or offence. You should not be using a lot of cases, and definitely not giving the details of them!

There is a simple structure for each section:

1. Define the elements
2. Apply each element
3. Reasoned conclusion: is the statement true or false?

**Statement A:** Angela is guilty of the attempted murder of Bob.

**Statement B:** Angela is guilty of attempted grievous bodily harm against Bob.

**Statement C:** Angela is guilty of the murder of Carla.

**Statement D:** Angela is guilty of the involuntary manslaughter of Carla.

Angela discovers that her boyfriend Bob is having an affair with another woman. She plans to injure him as an act of revenge. She gets a gun and confronts him in the office where he works. She pulls out the gun and aims a shot at Bob’s leg. The bullet misses Bob, bounces off the floor and hits a secretary Carla in the head killing her instantly.