OCR

OXFORD CAMBRIDGE AND RSA EXAMINATIONS

General Certificate of Education Advanced Level

LAW

PRE-RELEASED SPECIAL STUDY MATERIAL

2573/RM

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May be opened and given to candidates upon receipt.

INSTRUCTIONS TO CANDIDATES

This copy may **not** be taken into the examination room.

2573 CRIMINAL LAW

SPECIAL STUDY MATERIAL

SOURCE MATERIALS

SOURCE 1

Extract from *Law reform and the Law Commission* by J H Farrar (1974) Sweet & Maxwell pp 28-9

Section 3 of the Law Commissions Act 1965 defined the duties and powers of the Law Commissions. First it was their basic duty to take and keep the law under review with a view to its systematic development and reform, including in particular codification, the elimination of anomalies, the repeal of obsolete enactments, consolidation and generally the simplification and modernisation of the law. It is to be noted that although the act contemplated codification it did not in fact require it. To execute their basic duty they were authorised to consider proposals for reform, to submit to the appropriate Minister (i.e. for England and Wales, the Lord Chancellor) programmes of law reform, and then, when approval had been given, to undertake the examination of particular items in the programme and to formulate proposals for reform by means of draft Bills or otherwise.

Where the programme covered a branch of law which seemed likely to be controversial in a political sense or to have a broad social trend it was unlikely that the detailed review would be entrusted to the Commissioners themselves. In cases like that it was thought by the Government that it would be more appropriate that the matter should be referred in accordance with the usual practice to a Royal Commission or a Departmental Committee.

The Commissioners were further authorised to prepare (at the request of the Minister), comprehensive programmes of consolidation and statute law revision and to undertake the preparation of draft Bills, to give advice and information to government departments and other bodies at the instance of the government, together with proposals for reform of any branch of law and lastly, the Commissioners were authorised and instructed to obtain such information on other legal systems as appeared to them likely to facilitate the performance of any of their functions.

The Act set out certain procedures with regard to Law Commission business. Section 3(2) provided that the Minister should lay before Parliament any programmes prepared by the Law Commission and approved by him and any proposals for reform formulated by the Commission pursuant to the programmes. Each Commission should make an annual report to the Minister of their proceedings and the Minister should lay the report before Parliament with such comments (if any) as he/she thought fit (Section 3(3)).

The general effect of these provisions was described by Sir Leslie Scarman in his Manitoba Law School Foundation Annual Lecture in 1967. By the Act, he said, the law of England and Scotland shifted its emphasis from reliance on judicial lawmaking to reliance on legislation to reform the law. It meant that Parliament has accepted “a greater, continuing responsibility for the reform of the law than in our history it has ever accepted before.” However, “Parliament in matters of law reform, is an extremely amateur and indolent body. It requires advice, it requires spurring on and to be stimulated into action.” The Act was, therefore, an attempt to provide Parliament with the advice which it needs in order to reach a skilled decision and to provoke it to action.

SOURCE 2

The following extracts are taken from:

The Law Commission Report on Involuntary Manslaughter:
(1) The Restoration of a Serious Crime

By Heather Keating, Criminal Law Review, August 1996, Sweet & Maxwell

As long ago as 1980, the Criminal Law Revision Committee emphasised that "so serious an offence as manslaughter should not be a lottery". Liability for involuntary manslaughter, it is argued, may arise from an unlucky combination of events. Moreover, the difficulties created by the breadth of the offence are universally acknowledged. Whilst the fact of causing death remains constant, the degree of "unintentional" fault may range from that which is almost murderous to that which is almost accidental. Serious doubts exist as to whether the present law can act either as an effective mechanism for censuring conduct or as guide for sentencers. In terms of "applicability, certainty, clarity, intellectual coherence and general acceptability" the present law has little to recommend it.

It is not the purpose of this article to dissect these deficiencies in any detail. The case for reform is overwhelming. This is true even after the House of Lords decision of *Adomako* which revives the concept of gross negligence manslaughter. Whilst some commentators have welcomed the removal of "much unnecessary complication and injustice", others have been less sanguine about the development. Moreover, problems remain with the test adopted by Lord MacKay in this case. First, "it is circular: the jury must be directed to convict the defendant of a crime if they think his conduct 'criminal'. In effect, this leaves a question of law to the jury, and, because juries do not have to give reasons for their decisions, it is impossible to tell what criteria will be applied in an individual case." Secondly, the mixture of the civil concepts of "negligence" and "duty of care" with that of criminal liability is an unhappy one, giving rise to the fear that liability for manslaughter by omission has been at one and the same time both broadened and restricted. More fundamentally, of course, the decision in *Adomako* left untouched the law relating to constructive manslaughter. The Law Commission summarises the defects of this law thus:

> "[W]e consider that it is wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee, and which would not even have been *foreseeable* by a reasonable person observing his conduct. Unlawful act manslaughter is therefore, we believe, unprincipled because it requires only that a foreseeable risk of causing *some* harm should have been inherent in the accused's conduct, whereas he is actually convicted of causing death, and also to some extent punished for doing so."

Abolition of constructive manslaughter

In its review of offences against the person, the Criminal Law Revision Committee recommended that reckless killing should be the only form of involuntary manslaughter. In proposing that unlawful act manslaughter and gross negligence manslaughter be abolished it was firmly of the view that the "offenders fault falls too far short of the unlucky result" in such instances. The Law Commission agrees that these two forms of manslaughter should go. One might have thought that few would lament the passing of unlawful act manslaughter. However, the proposal in the Consultation Paper to abolish it met with a mixed response. Some commentators argued that those who embark upon a course of criminal conduct "involving, albeit slight, violence should take the consequences if the results turn out to be more catastrophic than they expected". But the doctrine of constructive crime does not fit

within the principles espoused by the Law Commission and is a legacy from harsher times. The Law Commission is, therefore right to state:

> "We consider that the criminal law should properly be concerned with questions of moral culpability, and we do not think that an accused who is culpable for causing *some harm* is sufficiently blameworthy to be held liable for the unforeseeable consequences of death."

… the abolition of unlawful act manslaughter is, therefore, sound in principle, but it would not mean that many defendants would, in practice, escape liability. Many such defendants would be liable for reckless killing. If not, liability may be based upon the second form of manslaughter, for unlike the Criminal Law Revision Committee, the Law Commission has recommended a further species of manslaughter: killing by gross carelessness.

The Law Commission's proposals: Reckless killing

It is not perhaps, surprising that the first recommendation of the Report is that there should be an offence of subjectively recklessly causing death:

> "We are quite certain that a person should ... be held criminally responsible for causing *death* in circumstances where he/she unreasonably and knowingly runs a risk of causing death (or serious injury). Indeed – and we are sure that many people would agree with us – we consider this type of conscious risktaking to be the most reprehensible form of unintentional homicide, on the very borders of murder."

The new offence is defined as:

> "[R]eckless killing, which would be committed if:
> (1) a person by his or her conduct causes the death of another;
> (2) he or she is aware that his or her conduct will cause death or serious injury; and
> (3) it is unreasonable for him or her to take that risk, having regard to the circumstances as he or she believes them to be."

In addition, the Law Commission argues that there is "a very thin line between behaviour that risks serious injury and behaviour that risks death, because it is frequently a matter of chance, depending on such factors as the availability of medical treatment, whether serious injury leads to death". To this small extent, at least, the Law Commission is prepared to allow defendants to run the gauntlet of luck. Such an approach is certainly more justifiable than the existing law because the "moral distance" between the harm done and that foreseen is lessened. Someone who foresees *some* harm resulting from their actions should not be held responsible for the consequence of death …

> "We consider that the criminal law should properly be concerned with questions of moral culpability, and we do not think that an accused who is culpable for causing *some harm* is sufficiently blameworthy to be held liable for the unforeseeable consequence of death."

Killing by gross carelessness

Having been persuaded that inadvertence may be culpable, the Law Commission had to determine the boundaries for a law which would hold a defendant liable for a death he/she neither intended nor foresaw. Two criteria are insisted upon. First, the harm has to be foreseeable:

> "If the accused is an ordinary person, he/she cannot be blamed for failing to take notice of a risk if it would not have been apparent to *an average person in his/her position*, because the criminal law cannot require an *exceptional* standard of perception or awareness from him/her. If the accused held themselves out as an expert of some kind, however, a higher standard can be expected of him/her; if he/she is a doctor, for example, he/she will be at fault if he/she fails to advert to a risk that would have been obvious to the average doctor in his/her position."

As with the offence of reckless killing, the Law Commission restricts the risk of harm to that of death *or* serious injury.

The second criterion is that the accused must have been capable of perceiving the risk:

> "[W]e consider that there is a clear distinction, in terms of moral fault, between a person who knowingly takes a risk and one who carelessly fails to advert to it, and that the worse case of advertent risk-taking is more culpable than the worst case of inadvertent risk-taking."
>
> "Since the fault of the accused lies in his/her failure to consider a risk, he/she cannot be punished for this failure if the risk in question would never have been apparent to him/her, no matter how hard he/she thought about the potential consequences of his/her conduct. If this criterion is not insisted upon, the accused will, in essence, be punished for being less intelligent, mature or capable than the average person."

Hart has persuasively argued for an assessment of capacity to be included in the definition of negligence. Explicitly doing so in the reform proposals should lay the ghost of *Elliot* v. *C* finally to rest. The offence which is proposed, based upon these two criteria, is that of killing by gross carelessness. It is modelled, to some extent at least, on the test of "dangerousness" in the offence of causing death by dangerous driving. The Report comments that this test is one with which lawyers, the courts and the public are familiar and, moreover, seems to have worked well.

It recommends that the new offence would be committed if:

> "(1) a person by his or her conduct causes the death of another;
> (2) a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position;
> (3) he or she is capable of appreciating that risk at the material time; and
> (4) *either* (a) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, or (b) he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, and the conduct causing (or intended to cause) the injury constitutes an offence."

SOURCE 3

Extract from the judgment of Edmund Davies J in *R* v *Church* [1965] 2 All ER 72

"It appears to this court, however, that the passage of years has achieved a transformation in this branch of the law and, even in relation to manslaughter, a degree of *mens rea* has become recognised as essential. To define it is a difficult task, and in *Andrews* v *DPP* [1937] AC 576 Lord Atkin spoke of 'the element of "unlawfulness" which is the elusive factor'. Stressing that we are here leaving entirely out of account those ingredients of homicide which might justify a verdict of manslaughter on the grounds of (a) criminal negligence or (b) provocation or (c) diminished responsibility, the conclusion of this court is that 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 recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm. See, for example, *R* v *Franklin 1883*, *R* v *Senior 1899*."

SOURCE 4

Extract from the judgment of Phillimore LJ in *R* v *Lowe* [1973] 1 QB 702

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

SOURCE 5

Extract from the judgment of Sachs LJ in *R* v *Lamb* [1967] 2 QB 981

"[Prosecution counsel] had at all times put forward the correct view that for the act to be unlawful it must constitute what is called 'a technical assault'. In this court moreover he rightly conceded that there was no evidence to go to the jury of any assault of any kind. Nor did he feel able to submit that the acts of the defendant were on any other ground unlawful in the criminal sense of that word. Indeed no such submission could in law be made: if, for instance, the pulling of the trigger had had no effect because the striking mechanism or the ammunition had been defective no offence would have been committed by the defendant.

Another way of putting it is that *mens rea*, being now an essential ingredient in manslaughter that could not in the present case be established in relation to the first ground except by proving that element of intent without which there can be no assault."

SOURCE 6

Extract from the judgment of Lord Mackay LC in *R* v *Adomako* [1995] 1 AC 171

"… in 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 a breach of duty is established the next question is whether that breach of duty has 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 a correct 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 …

… 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.' Examples in which this was done, to my mind, with complete accuracy are *R* v *Stone* [1977] QB 354 and *R* v *West London Coroner, ex parte Gray* [1988] QB 467.

SOURCE 7

Extract from *Criminal Law* by William Wilson 1998 (Longmans)

A more precise and meaningful fault element was identified by Watkins LJ in *R* v *West London Coroner ex. parte Gray* [1987] 2 All ER 129, at 136, which likewise passed over *Lawrence* recklessness, this time in favour of a more cogent indifference based test.

> "To act recklessly means that there was an obvious and serious risk to the health and welfare of [the deceased] to which [the accused], having regard to his duty, was indifferent or that, recognising that risk to be present, he deliberately chose to run the risk by doing nothing about it. It should be emphasised, however, that a failure to appreciate that there was a risk would not by itself be sufficient to amount to recklessness."

This statement suggests that a satisfactory direction to the jury would require them to consider whether the failure to attend to appreciate the risk was due to inexperience, forgetfulness, stress or incompetence however gross, or was due to the defendant not caring enough to act in accordance with standards of safety and care which would minimise any risk. Only in the latter case would they be entitled to find recklessness.

One desirable feature in Lord Mackay's circular, if "jury friendly", test of gross negligence is the explicit reference to "the risk of death". Before *Adomako* it was by no means certain that the defendant's conduct must be such as to create the risk of death. In *Stone and Dobinson* it was said to be enough that the accused's conduct provoked the risk injury to "health and welfare". More recently Lord Taylor CJ spoke of the risk of injury to health. Both seem to set the standard too low, quite apart from the unacceptable vagueness characterising "welfare" in *Stone*. Most authorities provide, however, that the risk must be of death or grievous bodily harm. This coheres with a notion of homicide separated only by the type of decision made by the accused. Thus intention characterises murder and culpable risk-taking, manslaughter. However, given that manslaughter does not require proof of deliberate risk-taking, it is submitted that fairness to the accused requires the risk to be of death, or at least serious injury.

SOURCE 8

Extract adapted from *Corporate Homicide* by Francis Bennion. New Law Journal May 5 2000

If Mr Andrew Dismore's 10-minute rule Bill were to be enacted, one result would be a marked shortage of company secretaries. His proposed measure, entitled the Corporate Homicide Bill, was read a first time by the Commons on April 18. There was no debate, just a brief speech by the promoter.

Before becoming a Member of Parliament Mr Dismore practised as a personal injury lawyer. His clients included people who had lost relatives in major incidents such as the Zeebrugge ferry disaster and the King's Cross fire. Of the latter he told the House "As I took statements

from victims, distraught relatives, firefighters and tube staff, and as I sat through the public inquiry day after day hearing over and over again about the failures of the senior management of London Underground Ltd., it struck me as outrageous that neither the company nor any of its managers would face criminal proceedings over those 31 deaths."

During his inquiry into the 192 deaths on the Herald of Free Enterprise at Zeebrugge, Mr Justice Sheen said:

> "All concerned in management, from the members of the board of directors down are guilty of fault. The failure on the part of … management to give proper and clear directions was a contributory cause of the disaster."

However, Mr Dismore went on, the prosecutions in the Zeebrugge case also collapsed owing to those same inadequacies of the criminal law.

The Bill seeks to enact changes first proposed by the Law Commission. In its report "Legislating the Criminal Code: Involuntary Manslaughter" (Law Com No 237) 1996, the Commission recommended a new criminal office of "corporate killing".

According to the Law Commission, there appear to have been only four prosecutions of a corporation for manslaughter in the history of English law. Only one of these resulted in a conviction. That was the Dorset canoeing case, where because the corporation was a one-man company, the problem of identifying the necessary "controlling mind" did not arise.

The Commission say that the problem is that, under the present law, prosecutions for corporate manslaughter can be brought only where a corporation, *through the controlling mind of one of its agents*, does an act which fulfils the requirements of the crime of manslaughter. Usually the effective acts of carelessness are diffused through the company.

The Law Commission saw no reason why companies should continue to be effectively exempt from the law of manslaughter. It thought they should be liable to prosecution for a homicide offence if they caused death through conduct sufficiently blameworthy. It therefore made the following recommendations:

(1) There should be a specific offence of "corporate killing", broadly comparable to killing by gross negligence on the part of an individual.
(2) A corporation should be liable to prosecution for corporate killing if (a) a management failure by the corporation results in a person's death, and (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.
(3) Companies charged should be tried in the Crown Court.
(4) Where a company is convicted of corporate killing, the judge should have power: (a) to fine it an unlimited sum; and (b) order it to remedy the cause of death.

In February 2000, the Select Committee on Environment, Transport and Regional Affairs endorsed this proposal and added: "We recommend that the Government brings forward legislation to introduce a crime of corporate killing as soon as possible."

Under the Bill a company secretary (as well as the chairman, managing director and chief executive) would also be guilty of corporate killing, and liable to a fine and/or imprisonment, if the way the company's operational activities were managed or organised fell far below the reasonable and resulted in death. Company secretaries are not normally concerned in the detail of operational matters. Nor for that matter are company chairmen.

OCR

Oxford Cambridge and RSA Examinations

Advanced GCE

LAW
CRIMINAL LAW SPECIAL STUDY

2573

Specimen Paper

Additional materials:
Answer paper

TIME 1 hour 30 minutes

INSTRUCTIONS TO CANDIDATES

Write your name, Centre number and candidate number in the spaces provided on the answer booklet.

Write all your answers on the separate answer paper provided.

If you use more than one sheet of paper, fasten the sheets together.

Answer **all** questions.

INFORMATION FOR CANDIDATES

The number of marks is given in brackets [ ] at the end of each question or part question.

You will be awarded marks for the quality of written communication where an answer requires a piece of extended writing.

In this paper you are expected to show your knowledge and understanding of different aspects of the English legal system and specific areas of Law.

You are reminded of the importance of including relevant knowledge from all areas of your course, where appropriate, including the English Legal System.

*Answer **ALL** questions*

1. The Law Commission recommends changes to the criminal law in its 1996 Report - 'Legislating The Code - Involuntary Manslaughter.'

   Critically consider the role of the Law Commission in assisting Parliament to change the law.

   [20 marks]

2. Discuss why Lord Mackay's definition of gross negligence manslaughter in the House of Lords' decision in *R* v *Adomako (*1994) has been criticised as unsatisfactory.

   [20 marks]

3. Examine how decided cases have developed the offence of unlawful act / constructive manslaughter.

   [30 marks]

4. David and Imran, both aged 22, are in David's house while David's parents are away on holiday. David tells Imran that his father has got a revolver in a drawer in his bedroom. They agree that it would be fun to get it and pretend to be gangsters by pointing the gun at each other and making exaggerated threats. David knows his father has also got some 'dummy' bullets and some live bullets in a box next to the gun. He tells Imran they are only dummy bullets. They put six of these bullets into the chamber. They then take turns pointing the gun at each other and pulling the trigger. Unfortunately one of the bullets is real and when David squeezes the trigger for the third time he shoots Imran dead with a real bullet.

   When questioned David admits that he didn't really know the difference between the dummy bullets and the real ones but he hoped they were all dummy bullets.

   David has now been charged with manslaughter.

   Discuss his liability:

   (a) under the existing law; **and**

   (b) under the Law Commission's proposals for the reform of involuntary manslaughter.

   [30 marks]