

R. v. CATO

Criminal Law — Homicide — Murder — 'Recklessness' — Manslaughter — Unlawful and Dangerous Act

Students of the law of homicide are familiar with the confusion engendered by the use of the word 'recklessness' to describe two quite distinct, in fact mutually exclusive concepts. The first is that form of malice aforethought, as an element in the crime of murder, which is more fully described as the realisation by the accused, at the time of performing the act which causes death, that the act is likely to result in death or grievous bodily harm.¹ The second is the high degree of negligence required to constitute manslaughter by criminal negligence.² These concepts are distinct not only because they are elements in two vitally different offences; but because recklessness as a form of malice aforethought is a subjectively tested intent,³ while negligence in any form is generally regarded as an objective concept.⁴

Consequently, the judgment of the Court of Appeal in the recent case of *R. v. Cato*⁵ is noteworthy for the following statement:

After all, recklessness is a perfectly simple English word. Its meaning is well known and it is in common use. There is a limit to the extent to which the judge in the summing up is expected to teach the jury the use of ordinary English words.⁶

But the real importance of *Cato's* case lies in what might be described as the cavalier approach of the court to the issues of law involved. It is fairly clear that the court was concerned primarily to make an example of the accused in an endeavour to deter others from similar activity. The propriety of this approach, both in principle and in practice, is of course open to debate.⁷

Cato was convicted of manslaughter and of the offence of administering a noxious thing contrary to section 23 of the Offences against the Person Act 1861 (Eng.). The charges arose out of the death of one Anthony Farmer. Cato, Farmer and two other men spent the evening before Farmer's death in a house which they occupied, injecting each other with heroin. The procedure followed was that each man would fill a syringe with the mixture of heroin and water he wanted and then give the syringe to his 'partner', who would then administer the injection. After some time, the other two men retired to bed, but the accused and Farmer apparently continued to give each other injections throughout the night.

The next morning both Cato and Farmer were found unconscious by the other occupants of the house. Cato was saved by the administration of 'rudimentary first aid', but Farmer died.

At the trial, the prosecution argued that Cato was guilty of the manslaughter of Farmer on two alternative grounds: manslaughter by criminal negligence or manslaughter by unlawful and dangerous act, and the judge included both in his direction to the jury.

On appeal, several distinct issues were argued on Cato's behalf, but the one which causes concern relates to the doctrine of manslaughter by unlawful and dangerous act.

¹ See *R. v. Jakac* [1961] V.R. 367; *R. v. Sergi* [1974] V.R. 1; *Pemble v. R.* (1971) 124 C.L.R. 107; *Hyam v. D.P.P.* [1975] A.C. 55.

² *Andrews v. D.P.P.* [1937] A.C. 576.

³ *R. v. Sergi* [1974] V.R. 1, 8.

⁴ *Pemble v. R.* (1971) 124 C.L.R. 107, 135 (per Menzies J.); Howard, *Australian Criminal Law* (2nd ed., 1970) 105-6.

⁵ [1976] 1 W.L.R. 110.

⁶ *Ibid.* 119 (per Lord Widgery C.J. on behalf of the court).

⁷ See generally Smith and Hogan, *Criminal Law* (3rd ed., 1973) 11-13.

This doctrine has its modern origin in the case of *R. v. Larkin*,⁸ where Humphreys J., on behalf of the Court of Criminal Appeal, said:

Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.⁹

This statement was unequivocally approved by the House of Lords in the very recent case of *D.P.P. v. Newbury*,¹⁰ where Lord Salmon, with whose judgment the other Lords agreed, said:

[T]hat is an admirably clear statement of the law which has been applied many times. It makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the act was unlawful and dangerous.¹¹

The dictum in *Larkin*¹² is also substantially true for Australia. In *Pemble's* case,¹³ Barwick C.J. described it as 'acceptable and presently appropriate'.¹⁴

It will be seen that these statements of the doctrine include two requirements: that the act should be unlawful and that it should be dangerous.¹⁵ However, the judgment of the Court of Appeal in *Cato's* case ignores the requirement of dangerousness completely and treats the requirement of unlawfulness as being satisfied in a very dubious way.

With regard to the element of dangerousness, Lord Widgery C.J., giving the judgment of the court, referred to the doctrine thus:

The judge left the manslaughter charge to the jury on the two alternative bases which the Crown had suggested, and it will be appreciated at once what they were. The first alternative was that the death was caused by the injection and the consequent intrusion of morphine into the body, and that was an unlawful act so that the killing was the result of an unlawful act and manslaughter on that footing.¹⁶

Later in his judgment, he said:

The next matter, I think, is the unlawful act. Of course on the first approach to manslaughter in this case it was necessary for the prosecution to prove that Farmer had been killed in the course of an unlawful act.¹⁷

Nowhere did the Court of Appeal contemplate the requirement of dangerousness. In the particular circumstances of *Cato's* case this probably made no difference to the result, as the court would have had little difficulty in characterising the injection of heroin as dangerous, had it turned its mind to the problem.¹⁸ However this aspect of the decision is completely at odds with the modern cases and cannot be regarded as good law.

⁸ (1942) 29 Cr.App. R. 18.

⁹ *Ibid.* 23.

¹⁰ [1976] 2 W.L.R. 918.

¹¹ *Ibid.* 921.

¹² *Ibid.*

¹³ (1971) 124 C.L.R. 107.

¹⁴ *Ibid.* 122. See also *R. v. Holzer* [1968] V.R. 481; *R. v. Longley* [1962] V.R. 137.

¹⁵ The debate as to whether the 'dangerousness' of the act should be tested subjectively or objectively, and as to the precise type of unlawfulness required, is significant, but beyond the scope of this note.

¹⁶ *R. v. Cato* [1976] 1 W.L.R. 110, 114.

¹⁷ *Ibid.* 118.

¹⁸ *Ibid.* 119, where the court deals with the argument that heroin is not a 'noxious thing'.

With regard to the requirement that the act should be unlawful, the court found itself in a dilemma. It was argued by counsel for Cato that the relevant English legislation, the Misuse of Drugs Act 1971 (Eng.), did not prohibit the taking or the administering of heroin and that therefore the act which caused death was not unlawful (leaving aside the question of the conviction under the Offences against the Person Act 1861 (Eng.)). The court was forced to agree:

That which the appellant did, namely taking Farmer's syringe already charged and injecting the mixture into Farmer as directed, is not an unlawful act, says [counsel for Cato], because there is nothing there which is an offence against the Misuse of Drugs Act 1971, and when he shows us the terms of the section it seems that that is absolutely right.¹⁹

The court then pointed out that, as it proposed to uphold the conviction under the Offences against the Person Act 1861 (Eng.), this argument became irrelevant. Nevertheless, in deference to counsel's argument, the court ruled on it as follows:

[W]e think we ought to say that had it not been possible to rely on the charge under section 23 of the Offences against the Person Act 1861, we think there would have been an unlawful act here, and we think the unlawful act would be described as injecting the deceased Farmer with a mixture of heroin and water which at the time of the injection and for the purposes of the injection the accused had unlawfully taken into his possession.²⁰

Quite apart from the fact that this statement shows clearly the court's determination to uphold the conviction despite all arguments, it is open to serious objection as a matter of law. The 'unlawful act' as described by the court is in fact made up of two acts: injecting and possessing. Having admitted that the act of injecting was not unlawful, the court sought to make it so by attaching to it the possession of heroin, which clearly was unlawful.²¹

This cannot possibly be right, for at least two reasons. First, the 'description' of the unlawful act adopted by the Court of Appeal simply does not accord with the modern law. The dictum quoted from *Larkin*²² implies that there must be some connection between the unlawfulness of the act and its dangerousness; that is, as Professor Howard says,²³ that the act should be unlawful *because* it is dangerous. Some authorities in fact describe the doctrine as 'manslaughter by unlawful dangerous act'.²⁴ An alternative statement of this view might be that there must be some causal link between the unlawfulness of the act and the death.²⁵

This requirement was not satisfied on the facts of *Cato's* case. Possession of heroin is not unlawful because it is in itself dangerous; nor was there a sufficient connection between the mere possession of heroin by the accused and the victim's death. On the other hand, though the act of injection may be regarded as dangerous, it was not, as has been said, unlawful. It was this problem that the court attempted, quite improperly, it is submitted, to overcome.

The second and more fundamental reason why the Court of Appeal's treatment of the unlawful act is wrong is that it leads to results which the law cannot accept and which no one would even argue should be accepted. Thus it is inconceivable that the careful driver of the car under which a suicidal pedestrian kills himself should be guilty of manslaughter merely because the car was not registered at the time. Yet this would be the result if *Cato's* case were right.

¹⁹ *Ibid.* 118.

²⁰ *Ibid.*

²¹ Misuse of Drugs Act 1971 (Eng.), s. 5.

²² (1942) 29 Cr.App.R. 18.

²³ Howard, *op. cit.* 118.

²⁴ *R. v. Holzer* [1968] V.R. 481 (*per* Smith J.).

²⁵ And see *People v. Mulcahy* (1925) 149 N.E. 266 (Supreme Court of Illinois).

One final point should be mentioned. Even if the court's analysis of the unlawful act had not been open to the objections already discussed, it is at least arguable that Cato was not in possession of heroin in the legal sense (and it may be of some slight significance that he was not apparently charged with this offence).

The Misuse of Drugs Act 1971 (Eng.) makes it clear that, for the purposes of the offence of possession under the Act, an important factor is the element of control.²⁶ Thus, if the heroin which killed Farmer had been owned by him, it could be strongly argued that merely by passing it to Cato with the instruction that the latter should inject it into Farmer, he was not relinquishing control so as to give legal possession of the drug to Cato.

The report does not disclose the ownership of the supplies of heroin used by the four men and it is entirely possible of course that they were owned jointly by all four of them (or by Cato himself). There is a suggestion in the report, however, that this point was raised at the trial. In his summing up, the trial judge put six questions to the jury; originally, the first of these was: 'Did [Cato] take possession of some heroin in a syringe and then inject the contents of the syringe into Anthony Farmer?'²⁷ This question was changed, 'consequent upon some argument later in the course of the hearing'²⁸ to this:

Did [Cato] take into his hand, so as to control and carry out the injection, a syringe which contained heroin and also water which was mixed and then supplied (*sic*) the dose by injection to Tony Farmer?²⁹

Whatever the legal position regarding Cato's 'possession' of heroin, it is just one more point to which the Court of Appeal failed to do justice.

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²⁶ Misuse of Drugs Act 1971 (Eng.), s. 37 (3): 'For the purposes of this Act the things which a person has in his possession shall be taken to include any thing subject to his control which is in the custody of another.'

²⁷ *R. v. Cato* [1976] 1 W.L.R. 110, 114.

²⁸ *Ibid.* 115.

²⁹ *Ibid.*

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