

R v Creighton

Twenty Years Later: Harm versus Death Revisited

A M A R K H O D A Y *

I. INTRODUCTION

Twenty years ago, in *R v Creighton*, the Supreme Court of Canada debated a crucial issue – the appropriate fault standard for the offence of “unlawful act” manslaughter.¹ This is where an accused commits an unlawful act that results in the unintended death of another individual. Unlawful act manslaughter is distinguishable from murder in that the latter requires, at the very least, subjective foreseeability of death on the part of the accused.² By contrast, in *Creighton*, the Court unanimously held that in connection with unlawful act manslaughter, an objective, rather than subjective standard of fault applied. In *Creighton*, an experienced drug dealer and user injected another user with heroin resulting in her death. However, the Court was narrowly split as to whether the standard should be objective foreseeability of the risk of bodily harm that is neither trivial nor transitory (the majority opinion and the current standard of fault) or objective foreseeability of death (the dissenting opinion).³ The dissenting position

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¹ *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632 [*Creighton* cited to SCR].

² *R v Martineau*, [1990] 2 SCR 633, 79 CR (3d) 129 [cited to SCR]. The main murder-related provisions in the *Criminal Code*, RSC 1985, c C-46 are situated within ss 229 and 231.

³ *Creighton*, *supra* note 1 at 40-75.

articulated by Chief Justice Lamer contended that objective foreseeability of death was required as a minimal constitutional standard under section 7 of the *Canadian Charter of Rights and Freedoms*.⁴ Another four justices of the Court represented by Justice McLachlin (as she then was) held that the *mens rea* was objective foreseeability of the risk of bodily harm. Justice LaForest, in a concurring judgment, sided with the McLachlin wing of the Court and transformed her opinion into the majority position.⁵ It is worth noting that each wing concluded that Creighton's conduct met their chosen standard.

In this article, I revisit the *Creighton* holding and argue that despite the majority's conclusion, objective foresight of death is the more appropriate standard for assessing fault for unlawful act manslaughter.⁶ As the Supreme Court has recently observed, establishing the appropriate fault standard "is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction."⁷ Drawing from the *Creighton* opinion, I first contend that objective foreseeability of death is the more appropriate standard given that there is a substantial social stigma attached to unlawful act manslaughter, a form of culpable homicide. Although a conviction of second degree murder can carry more substantial legal penalties and stigma than unlawful act manslaughter, this hardly means that the stigma and penalties attached to the latter are so minor that they require the reduced standard currently employed. A person convicted of unlawful act

⁴ *Ibid* at 12-37.

⁵ *Ibid* at 37-40.

⁶ One might wonder why there is a need to revisit this decision. The standard established twenty years ago appears fairly well-settled. However, this hardly leads to the inexorable conclusion that the decision is somehow unimpeachable and does not deserve to be revisited. The *mens rea* or fault standard for unlawful act manslaughter remains problematic and it does not become unproblematic merely by virtue of the passage of time.

⁷ See *R v Roy*, 2012 SCC 26 at para 1, [2012] 2 SCR 60 (discussing the *mens rea* standard for dangerous driving causing death under s 249 of the *Criminal Code*). See also *R v Venneri*, 2012 SCC 33 at para 57, [2012] 2 SCR 211; *R v Mabior*, 2012 SCC 47 at para 19, [2012] 2 SCR 584. The stigma attached to criminal convictions is also relevant when examining if an act was committed voluntarily. See *R v Bouchard-Lebun*, 2011 SCC 58, [2011] 3 SCR 575 (stating that "criminal responsibility can result only from the commission of a voluntary act. This important principle is based on a recognition that it would be unfair in a democratic society to impose the consequences and stigma of criminal responsibility on an accused who did not voluntarily commit an act that constitutes a criminal offence" at para 45).

manslaughter is eligible to serve a term of life imprisonment. Given the serious nature of the offence, the stigma attached and the potential sentence of life imprisonment, it is appropriate that an individual should be convicted only where it was objectively foreseeable that their actions would result in the death of the victim. Furthermore, the current standard is problematic given the breadth of what constitutes “bodily harm” can include all but the most trivial of injuries. Should a conviction for unlawful act manslaughter rest solely on such a low threshold; one that is roughly equivalent to less serious offences like aggravated assault⁸ or unlawfully causing bodily harm?⁹ I argue that it should not.

In the second section, I address the potential impact of changing the *mens rea* standard to objectionable foreseeability of death. This will have two predictable consequences. First this will impact on the applicability of the thin skull doctrine in criminal cases. Second, cases of assault that result in death that are not objectively foreseeable will not end in manslaughter convictions, but may culminate in convictions of a lesser included crime that does not recognize the killing as a key component of the offence. I address how such instances should be resolved.

II. STIGMA

The social stigma attached to murder convictions has been an important feature of the Supreme Court’s jurisprudence with respect to the interplay between murder offences in the *Criminal Code* and section 7 of the *Canadian Charter of Rights and Freedoms*. For instance, in *Vaillancourt*¹⁰ and *Martineau*¹¹ the Court held that the concept of felony murder under sections 230(d) and (a) of the *Code*, respectively, were unconstitutional and could not be saved under section 1. An individual could be found criminally liable under section 230 for a murder committed during the course of perpetrating a felony listed in the section. This was regardless of whether the accused had any subjective

⁸ *R v Williams*, 2003 SCC 41 at para 22, [2003] 2 SCR 134 (stating that the *mens rea* for aggravated assault consists of the intent to apply force intentionally or recklessly or being wilfully blind to the fact that the victim does not consent coupled with the objective foresight of the risk of bodily harm).

⁹ See *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595.

¹⁰ *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 39.

¹¹ *Martineau*, *supra* note 2.

or objective foresight of death. In *Martineau*, the Court held that the social stigma attached to a murder conviction was significant enough that it warranted a *mens rea* standard of subjective foreseeability of death.¹² The consequence of the ruling was that felony murder, a centuries-old offence was invalidated within the ten years after the *Charter* came into being. As a result, any murder provision that included language that provided anything less than subjective proof of fault was read out.¹³ This also applied to modes of party liability with respect to murder.¹⁴

If the *Charter* mandated a minimum *mens rea* for murder offences, what implications did this or should this have had with respect to the unlawful act manslaughter – also a serious form of culpable homicide? Traditionally, all that the Crown had to prove with respect to the *mens rea* of unlawful act manslaughter was that in committing the unlawful act or predicate offence, it was objectively foreseeable that the risk of bodily harm would ensue. In *Creighton*, four justices of the Court (the Lamer wing or the dissent) concluded that the *Charter* mandated a minimum *mens rea* standard of objective foreseeability of death rather than just bodily harm.¹⁵ They concluded that this standard was mandated in large part due to the considerable stigma which attached to a manslaughter conviction predicated on an unlawful act.

Chief Justice Lamer articulated that there were two components to the social stigma analysis. First, a court must “look to the conduct being punished to determine if it is of sufficient gravity to import significant moral opprobrium on the individual found guilty of engaging in such conduct.”¹⁶ The Chief Justice asserted that the stigma attached to unlawful act manslaughter was serious, given that it gave rise to an individual being labelled by the state and community with the stigma of being responsible for the wrongful death of another. He observed: “there can be no conduct in our society more grave than taking the life of another without justification.”¹⁷ He

¹² The stigma does not stop with the accused but can also extend to the family. Hazel May, “Murderers’ Relatives’: Managing Stigma, Negotiating Identity” (2000) 29 J Contemporary Ethnography 198.

¹³ *Martineau*, *supra* note 2.

¹⁴ See e.g. *R v Logan*, [1990] 2 SCR 731, 79 CR (3d) 169.

¹⁵ *Creighton*, *supra* note 1 at 23-25.

¹⁶ *Ibid* at 19.

¹⁷ *Ibid*.

identified that additionally, the *actus reus* for both murder and unlawful act manslaughter may well be the same.

The second component of the stigma analysis, according to the Chief Justice, looks to the moral blameworthiness of the offender found guilty of having committed the offence. The dissent posited that the opprobrium that attaches to the individual who has committed unlawful act manslaughter is significant, but acknowledged that it does not approach the opprobrium reserved in Canadian society for those who knowingly or intentionally take the life of another.

By contrast, the McLachlin wing disagreed with this, arguing that objective foreseeability of bodily harm was the appropriate standard. According to her,

[the] most important feature of the stigma of manslaughter is the stigma which is *not* attached to it. The *Criminal Code* confines manslaughter to non-intentional homicide. A person convicted of manslaughter is *not* a murderer. He or she did *not* intend to kill someone.¹⁸

While manslaughter was clearly acknowledged as a serious offence, Justice McLachlin posited that it did not reach the level of blameworthiness reserved for murder. This conclusion was buttressed by the fact that while a conviction for murder imposes a mandatory life sentence, the punishment for manslaughter carries no minimum mandatory punishment.

The stigma attached to manslaughter may be different from that of murder, but the difference may not be quite as significant and glaring as the Court majority suggested. While some in society may be aware that there is a distinction between murder and manslaughter, not everyone is. Justice L'Heureux-Dubé once observed that if there is an apprehension that accused will be labelled as “murderers”, they will not likely fare better as “manslaughterers”.¹⁹ There is nothing inherent in the term “manslaughter” that indicates *per se*, that the distinction between murder and unlawful act manslaughter necessary lies in the presence or absence of the intent to kill someone. Indeed the term “slaughter” in its ordinary meaning is synonymous with murder, butchery and massacre. The term slaughter may even suggest the notion of an even more brutal form of killing, rather than an act that is less severe than murder. It is likely that for many, a person who has committed

¹⁸ *Ibid.*

¹⁹ Martineau, *supra* note 2 at 678-679.

manslaughter is, at the very least, no less a murderer. Notably, while a murderer is someone who has committed murder, there is no easy equivalent term to describe the individual who has been convicted unlawful act manslaughter. Such a person is not referred to as a “manslaughterer”. Apart from Justice L’Heureux-Dubé’s facetious use of the word, it is hardly recognized as a typically used term.²⁰ What is left to refer to them as? There are of course labels like murderer or killer, of which the former may not be legally accurate but may likely be used nonetheless.²¹ Within the larger social context, the stigma attached to being identified as someone who has been convicted of unlawful act manslaughter may not be as wide a gap from someone who has been convicted of murder. For many, it may very well be a distinction without a difference. After all, the person who has committed the predicate offence has done so intentionally and is responsible for the ensuing death.

Leaving aside the issue of social stigma, the gulf between murder and manslaughter within the law may not always be as disparate as the *Creighton* majority contended either. As mentioned, the majority posited that the distinction is significant since the *mens rea* for murder requires the intent to kill while unlawful act manslaughter does not include the intent to kill. This emphasis on intent as the *sine qua non* of murder is overstated. It is also trite law that not all murder convictions require the intent to cause death or intent to cause grievous bodily injury that the accused knows is likely to cause death.²² There are other ways in which an individual may be liable for murder, short of proof of intent to cause the death of another. For instance, an individual may be convicted of murder without intending to cause the victim’s death. Under section 229(c) of the *Criminal Code*, a person can be found guilty of murder even where there is no intent to cause the victim’s death and the accused engages in a dangerous act in furtherance of an unlawful object if she knew the act was likely to cause death - notwithstanding that she desired to effect her object without causing death or bodily harm to

²⁰ One searches in vain in standard or legal dictionaries for the word “manslaughterer”.

²¹ See Colin Perkel, “Manslaughter Conviction Tossed Over Lack of Aboriginals on Ontario Juries” *The Canadian Press* (14 June 2013); Ryan Cormier, “Dirty-kitchen Killer Guilty of Manslaughter” *Edmonton Journal* (21 March 2013).

²² *Criminal Code*, *supra* note 2 at s 229(a)(i) and (ii). See also *R v Cooper*, [1993] 1 SCR 146, 78 CCC (3d) 289.

any human being.²³ Clearly under such circumstances a person will carry the stigma of being convicted of murder short of having the specific intent to kill.²⁴

In addition, an individual may also be liable for murder (and the stigma attached it), even if they did not actually perpetrate, aid, or abet an intentional murder under section 229(a).²⁵ Under subsection 21(2) of the *Criminal Code*, they may be criminally liable by virtue of their participation in a common plan that results in a murder if they knew that murder was a likely consequence of committing an act in furtherance of the common plan.²⁶ Again, this liability extends even if they did not intend the killing. The notion that manslaughter only involves an unintended killing is not entirely accurate either. Canadian law recognizes that notwithstanding that a killing may be intended (thus murder), it may be reduced to manslaughter if the killing was “provoked.”²⁷ While it is a partial defence of limited applicability, provocation nevertheless indicates a legal recognition that not all convictions of manslaughter result from an unintended killing.²⁸

The McLachlin wing articulated that another major difference between murder and manslaughter is the sentencing distinction. A conviction for second degree murder calls for a mandatory life sentence without the

²³ *Ibid*, s 229(c). See *R v Shand*, 2011 ONCA 5 at para 169, 104 OR (3d) 291; *R v Meiler*, (1999) 136 CCC (3d) 11 at para 40, 25 CR (5th) 161 (ONCA). However, as Kent Roach has observed, the jurisprudence surrounding s 229(c) is not unproblematic. In some instances, Roach posits that courts have applied s 229(c) to circumstances where ss 229(a) or (b) should have applied. In other words, s 229(c) was applied to cases where there was an actual intent to kill a particular victim, or an intent to kill one person resulting in the killing of another (transferred intent). In other cases, it was applied where there was an absence of an intent to kill in connection with arson. See Kent Roach, “The Problematic Revival of Murder Under Section 229(c) of the *Criminal Code*, (2010) 47 Alta L Rev 1.

²⁴ Although s 229(c) was not used as extensively given the earlier use of s 230, it was not dormant either. See *R v Vasil*, [1981] 1 SCR 469, 121 DLR (3d) 41.

²⁵ S 229 provides that one commits murder where they cause the death of a human being and do so with intent or mean to cause the victim serious bodily harm that the accused knows is likely to cause death. *Criminal Code*, supra note 2 at s 229(a).

²⁶ *Criminal Code*, supra note 2 at s 21(2). See *R v Ferrari*, 2012 ONCA 399 at paras 60-72, 287 CCC (3d) 503.

²⁷ *Criminal Code*, supra note 2 at s 232. See e.g. *R v Ottertail*, 2013 SKQB 215 (available on WL Can).

²⁸ David M Paciocco, “Subjective and Objective Standards of Fault for Offences and Defences” (1995) 59 Sask L Rev 271 at 279.

possibility for parole for at least ten years. By contrast, a conviction of manslaughter does not include a mandatory life sentence and can range from one day in detention to incarceration for life. For the McLachlin wing, the fact that an individual could be sentenced to one day in prison was justification for keeping the *mens rea* standard for unlawful act manslaughter to objective foresight of the risk bodily harm that is neither trivial nor transitory.²⁹ Yet, given the seriousness of a manslaughter conviction and the chance of a sentence of life imprisonment, this suggests that objective foreseeability of death may be justified.³⁰ An unintended killing can easily result in a sentence equal to that of a murder conviction³¹ and for reasons previously stated could garner the same degree of stigma as a murder conviction. Meanwhile convictions for crimes such as aggravated assault and unlawfully causing bodily harm where the *mens rea* standard is objective foresight of bodily harm, may garner a maximum of fourteen or ten years respectively.³²

There is a considerable asymmetry between the stigma of culpable homicide and the label of having committed “manslaughter” on one hand

²⁹ Such short sentences for unlawful act manslaughter convictions are likely incredibly rare or non-existent, and that typically the time imprisoned is much higher. In 1993 and 1994, the average sentence for Manslaughter in Adult Provincial courts was a little over five years. AC Birkenmeyer & JV Roberts, “Sentencing in Adult Provincial Courts: A Study of Nine Canadian Jurisdictions: 1993 & 1994” (Ottawa: StatCan, 1997) at 1, 9. Although no recent statistics were found, a random selection of cases suggests the imposition of sentences ranging between one to numerous years. See e.g. *R v Gabriel*, 2013 MBCA 45, 291 Man R (2d) 291 (12 Months Imprisonment); “Emotions High at One-Punch Manslaughter Case” *The Record* (7 February 2013) online: [The Record](http://www.therecord.com) <<http://www.therecord.com>> (30 months imprisonment); *R v Z* (AA), 2013 MBCA 33, 291 Man R (2d) 152 (Five years, four months secure custody); *R v Pearce*, 2012 MBQB 248, 283 Man R (2d) 129 (Five years, six months’ imprisonment); Steve Bruce, “Killer Sentenced to 13 Years” *The Chronicle Herald* (23 November 2011) online: [Chronicle Herald](http://thechronicleherald.ca) <<http://thechronicleherald.ca>> (13 years imprisonment). In other jurisdictions such as Queensland, Australia, the average number of years of imprisonment is four years. See e.g. Daniel Hurst, “Four years typical manslaughter term”, *Brisbane Times* (24 June, 2011) online: [Brisbane Times Queensland](http://www.brisbanetimes.com.au) <<http://www.brisbanetimes.com.au>>.

³⁰ In cases where a firearm is used in the commission of a crime resulting in manslaughter, there is a minimum punishment of four years imprisonment. *Criminal Code*, *supra* note 2 at s 236(a).

³¹ Delon Schurtz, “Lesser Charge, Same Sentence For City Man” *Lethbridge Herald* (24 November 2012), online: [Lethbridge Herald](http://www.lethbridgeherald.com) <<http://www.lethbridgeherald.com>>.

³² *Criminal Code*, *supra* note 2 at ss 268-269.

and *mens rea* standard of objective foreseeability of the risk of bodily harm that is neither trivial nor transitory. Bodily harm is defined as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient and trifling in nature.”³³ Merely transient has been interpreted as “fleeting” or “passing away quickly”, while trifling is something of little value, insignificant or petty.³⁴ The range of conduct which may give rise to bodily harm that is more than merely transient or trivial is vast. Given the stigma attached to a manslaughter conviction, it seems unjust and discordant to impose a manslaughter conviction where the risk of bodily harm may only be slightly more than trivial or transitory, but the objective foresight of death is clearly lacking. For example, an accused delivers one or two punches to the victim’s head followed by a single kick to the victim’s stomach resulting in an unforeseen physiological reaction whereby the latter aspirates his own vomit due to a malfunctioning epiglottis. A kick to the stomach of another could certainly give rise to objective foresight of bodily harm that is neither trivial nor transitory, but barring other circumstances, does not support the idea of objective foresight of death. Such a result is unjust, and it certainly took place in *R v Smithers*.³⁵

Objective foresight of death would incorporate conduct of a significantly harmful nature warranting the stigma of a manslaughter conviction. This can include those who commit an aggravated assault or aggravated sexual assault which entails wounding, maiming, disfiguring or endangering the life of the complainant or at the least other serious bodily harm that may fall just short of the level of bodily harm caused in circumstances of aggravated assault and

³³ *Ibid*, s 2 [emphasis added].

³⁴ See *R v Dixon*, [1988] 5 WWR 577, 64 CR (3d) 372 (YK CA); *R v Moquin*, 2010 MBCA 22 at paras 22-23, (2010), 251 Man R (2d) 160.

³⁵ *R v Smithers*, [1978] 1 SCR 506, (1977), 75 DLR (3d) 321, 1977 CarswellOnt 25. In a more recent Manitoba case, a drug dealer sold pills to an individual who then overdosed and passed away. The Manitoba Crown charged the accused with unlawful act manslaughter for her death. Although the verdict is still pending the *mens rea* standard set in *Creighton* could give rise to a manslaughter conviction. There is a marked difference between injecting someone with narcotics like heroin where there is clearly an objective foresight of death, and selling someone narcotics which is in the victim’s control. See Mike McIntyre, “Providing Fatal Morphine Dose is Manslaughter: Crown” *Winnipeg Free Press* (22 February 2013) online: *Winnipeg Free Press* <<http://www.winnipegfreepress.com>>.

aggravated sexual assault.³⁶ There will undoubtedly be instances where conduct can produce a risk of bodily harm where death was not objectively foreseeable but death ensues nevertheless.³⁷ While a conviction of manslaughter should not be the appropriate ramification for such a consequence, it does not mean the death should go unpunished either and I address options for how to address this below.

III. CONSEQUENCES OF A HIGHER STANDARD OF FAULT

Changing the fault standard for unlawful act manslaughter to objective foresight of the risk of death would not come without certain consequences. First, it would have an impact on the applicability of the thin skull doctrine as mentioned in Justice McLachlin's decision in *Creighton*.³⁸ Second, there may be a concern that the commission of an unlawful act that leads to an unintended death that was not objectively foreseeable would thus lead to an acquittal. I address each consequence in turn.

The thin skull doctrine is a common law concept that is applicable in both civil and criminal law. Within the criminal law context, it is applicable when determining if the accused committed the *actus reus*. It provides that an accused or defendant must take their victim as they come. Thus, if a victim has a condition which leads to their death that otherwise would not occur in a person who did not have that condition the accused will still be liable even if they were unaware of that condition. This is why in *Smithers*³⁹ discussed above, the accused could be found guilty of unlawful act manslaughter for having merely kicked the victim in the stomach. The kick caused the victim to vomit who then aspirated the foreign material due to a malfunctioning epiglottis. Even though the victim's death was not objectively foreseeable (given *Smithers*' lack of knowledge about the victim's malfunctioning

³⁶ *Criminal Code*, *supra* note 2, ss 268 and 273.

³⁷ See e.g. Mike McIntyre, "Not guilty verdict in one-punch killing", *Winnipeg Free Press* (6 June 2012) online: Winnipeg Free Press <<http://www.winnipegfreepress.com/local/not-guilty-verdict-in-one-punch-killing-157418585.html?device=mobile>>, *R v Botelho* (28 April 2011), Winnipeg CR11-01-31074, (Man QB). See also *R v Valente*, 2012 ABQB 151 at para 1, 534 AR 385, per Ross J, "it was also a very brief assault, it lasted mere seconds, and the kicks did not cause any injury. Mr. Pillay's death was caused when he fell and hit the back of his head."

³⁸ *Creighton*, *supra* note 1 at 16-17.

³⁹ *Smithers*, *supra* note 35.

epiglottis), the risk of bodily harm that was neither trivial nor transitory was objectively foreseeable.

Justice McLachlin asserted that the elevation of the fault standard would result in the evisceration of the thin skull doctrine.⁴⁰ An accused could not be found criminally liable because death would not necessarily be objectively foreseeable absent knowledge of the victim's condition. I argue that if this is the inevitable result of applying a *Charter*-compliant standard, then the common law must give way. Since the promulgation of the *Charter*, common law principles and norms connected to both the criminal law and private law have been impacted. The Court has invalidated the felony murder rule (a centuries-old rule)⁴¹ and infused common law principles with *Charter* values in other instances.⁴² It has mandated that language be read out of the *Criminal Code* in order to be *Charter* compliant.⁴³ Numerous lower courts overturned the common law definition marriage which was restricted to a union between a man and a woman.⁴⁴ The Supreme Court has indicated that the common law must be influenced by *Charter* values even in the context where the *Charter* does not apply directly. In much the same way, if the *Charter* requires a fault standard that nullifies a common law principle operating within the context of the criminal law, then so be it.⁴⁵

⁴⁰ Although this does not seem to trouble the Court when it comes to the test for causation for first degree murder under s 231(5) of the *Criminal Code*. In *R v Harbottle*, the Court held that where a murder takes place in the course of committing certain acts of domination as set out in the section, an accused's act must "form an essential, substantial and integral part of the killing of the victim." [1993] 3 SCR 306 at 324, 24 CR (4th) 137.

⁴¹ See *Martineau*, *supra* note 2.

⁴² See e.g. *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129; *Grant v Torstar*, 2009 SCC 61, 314 DLR (4th) 1, *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

⁴³ *Martineau*, *supra* note 2.

⁴⁴ See e.g. *Halpern v Canada (Attorney General)*, (2003) 65 OR (3d) 161, 225 DLR (4th) 529.

⁴⁵ Leaving aside the constitutional issues, Alan Brudner has also articulated that the thin skull doctrine is problematic for other reasons. He argues that there is little reason why a victim's unknowable susceptibility should convert an otherwise non-responsible agent into a responsible one. As Brudner articulates, it certainly does not advance the principle of deterrence. Alan Brudner, "Owning Outcomes: On Intervening Causes, Thin Skulls, and Fault-undifferentiated Crimes" (1998) 11 Can JL & Juris 89 at 111. For an opposing view, see Dennis Klimchuk, "Causation, Thin Skulls and Equality" (1998) 11 Can JL & Juris 115 (arguing, *inter alia*, that the thin skull doctrine is an important doctrine which requires a wrongdoer to take his victim as he/she finds him/her and to do otherwise

I now address the second potential consequence arising from a change in the fault standard. Transforming the *mens rea* test for unlawful act manslaughter to one that requires objective foreseeability of the risk of death may lead to acquittals for unlawful act manslaughter.⁴⁶ This would certainly be a legitimate concern as an individual who has committed an unintended killing may result only in a conviction of a lesser offence short of a conviction for homicide. For example a person may be convicted of merely committing assault or assault causing bodily harm, but the fact of the unintended and unforeseeable nature of the death would not be appropriately recognized. While this may seem unacceptable, the responsibility for addressing this shortfall would be Parliament's and it would be fixable.

It is possible to modify current *Criminal Code* provisions to punish a killing that was not objectively foreseeable. For example, Parliament has created offences that punish negligent conduct that result in death but that is short of the standard required for criminal negligence causing death or criminally negligent manslaughter. An example of this is dangerous driving of a vehicle causing death.⁴⁷ This offence recognizes that a person has killed another through a negligent act that is a marked departure from that of a reasonable person. It calls for a less serious penalty.⁴⁸ Meanwhile under criminal negligence, the Crown must show that the accused's conduct was a marked and substantial standard from that of a reasonable person.⁴⁹

With respect to punishing an assault resulting in death that was not objectively foreseeable, a revision to the *Code* (for example section 267) can take the following form.

would require the victim to take legal responsibility for some condition they possess" at 137).

⁴⁶ It is probably worth recognizing that in a number of unlawful act manslaughter cases, the circumstances suggest the *mens rea* standard of objective foresight of death would have been met. For example, in *Creighton*, the Lamer J. observed that an experienced drug dealer injecting heroin into the victim would meet the higher standard. See also, *R v Worrall*, (2004), 189 CCC (3d) 79, 19 CR (6th) 213 (Ont SC); *R v LaBerge* (1995), 165 AR 375 (available on WL Can) (AB CA); *R v L* (SR), (1992) 11 OR (3d) 271; 76 CCC (3d) 502; (Ont CA); *R v NRR*, 2011 MBQB 90, 264 Man R (2d) 155; *R v Ferguson*, 2006 ABCA 261, 65 Alta LR (4th) 44; *R v Choy*, 2009 ABQB 343, 456 AR 228; *R v Turner*, (1995), 164 NBR (2d) 241, (available on WL Can) (NBQB); *R v Knight*, 2001 ABQB 247, 288 AR 128.

⁴⁷ *Criminal Code*, supra note 2, s 249(4).

⁴⁸ *Ibid.*

⁴⁹ See *R v JF*, 2008 SCC 60 at paras 8-10, [2008] 3 SCR 215, 299 DLR (4th) 42.

Every one who, in committing an unlawful act causes death, the risk of which was not objectively foreseeable, but for which the risk of bodily harm was objectively foreseeable, is guilty of an indictable offence and liable to imprisonment for a term not exceeding twenty years.⁵⁰

This is distinguishable from instances where an aggravated assault results in death, the risk of which is objectively foreseeable given the acts involved. As mentioned earlier, actions which constitute aggravated assault involve maiming, wounding or otherwise endangering the life of the complainant.⁵¹ As such in cases of assault causing death, what are involved are actions that fall short of the seriousness encapsulated under aggravated assault but are more than trivial or transitory.

IV. CONCLUSION

Unlawful act manslaughter is a serious offence that carries substantial social stigma upon conviction. It carries the potential for a serious penalty of life imprisonment equaling effectively that of a punishment for murder. In light of this, a heightened fault standard as articulated by Chief Justice Lamer writing in dissent requiring objective foresight of the risk of death was the more appropriate standard for a conviction for unlawful act manslaughter. Also, while the adoption of this heightened standard would effectively eliminate the use of the thin skull doctrine in such cases, the common law must give way for legal standards mandated by the *Charter*. Lastly, while a change in the *mens rea* standard for unlawful act manslaughter to objective foresight of death may result in accused being found guilty of a lesser included crime that does not include death as a component of the offence, this can be remedied through revisions by Parliament.

⁵⁰ *Criminal Code*, *supra* note 2, s 267.

⁵¹ *Ibid* s 268.