Reckless Manslaughter

Findlay Stark[*]

"Reckless manslaughter" (RM) apparently covers situations where: (i) the defendant's act or omission caused the death of another person; (ii) the defendant was aware at the time of acting or omitting that a risk of death or serious injury existed; and (iii) the relevant risk was taken without adequate justification.[1] The word "apparently" is necessary because very few writers think that RM exists uncontroversially in contemporary English law.[2] The more common view is that the existence of a distinct head of involuntary manslaughter called "reckless manslaughter" *is* controversial.[3] On this view, RM can merely be *assumed* to exist alongside the more established forms of involuntary manslaughter: unlawful act manslaughter (UAM) and gross negligence manslaughter (GNM). Hedged bets are thus common: "There *may* be a crime of reckless manslaughter";[4] "it *seems* clear that causing death by recklessness is a form of manslaughter in its own right";[5] "cases of *so-called* 'reckless manslaughter'".[6] Some sources avoid the hedging of bets by simply omitting reference to RM as a distinct type of involuntary manslaughter, one example being the recent Sentencing Council consultation on manslaughter.[7] Caution is necessary. If reported appellate decisions are anything to go by, few prosecutors

[*] Thanks to James Chalmers, Henry Mares, David Ormerod QC, Nicky Padfield, Jonathan Rogers and Andrew Simester for helpful comments on earlier drafts.

[1] Risks of serious bodily harm are always assumed to be within the ambit of RM, presumably because it is meant to have stemmed from murder.

[2] RM is assumed to exist in V. Tadros, "The limits of manslaughter" in C.M.V. and S. Cunningham (eds.), *Criminal Liability for Non-aggressive Death* (Aldershot: Ashgate, 2008), p.40; W. Wilson, "Dealing with drug-induced homicide" in the same collection, pp.178-179; C.M.V. Clarkson, "Context and culpability in involuntary manslaughter: principle or instinct?" in A. Ashworth and B. Mitchell (eds.), *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000), p.148. See, also, O. Quick, "Prosecuting (gross) medical negligence: manslaughter, discretion, and the Crown Prosecution Service" (2006) 33 *Journal of Law and Society* 421, 422.

[3] E.g. D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th edn. (Oxford: Oxford University Press, 2015), pp.644-645; A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 6th edn. (Oxford: Hart, 2016), pp.422-423; J. Rogers, "The Law Commission's proposed restructure of homicide" (2006) 70 J. Crim. L. 223, 227; B. Mitchell and R.D. Mackay, "Investigating involuntary manslaughter: an empirical study of 127 cases" (2011) 31 O.J.L.S. 165, 165-166.

[4] J. Herring, *Criminal Law*, 10th edn. (Basingstoke: Palgrave, 2017), p.160 (emphasis added).

[5] J. Horder, *Ashworth's Principles of Criminal Law*, 8th edn. (Oxford: Oxford University Press, 2016), p.302 (emphasis added).

[6] *Murder, Manslaughter and Infanticide* (Law Com. No.304, 2006), para. 1.14 (emphasis added); see too paras. 2.161, 3.54. The Commission had earlier proposed an offence of "reckless killing": see *Involuntary Manslaughter* (Law Com. No.237, 1996); Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000) and Involuntary Homicide Bill (2000), cl. 1(1).

[7] *Manslaughter Guideline Consultation* (Sentencing Council, 2017), 7 (identifying only gross negligence manslaughter and unlawful act manslaughter as species of involuntary manslaughter). See, too, W. Wilson, *Criminal Law*, 6th edn (Harlow: Person, 2017), p.393.

argue their case in terms of RM,[8] presumably because it will be more straightforward (and reliable) to secure a conviction for UAM or GNM.[9] The appellate courts have thus had virtually nothing to say about RM.

The first parts of this paper explain briefly how this uncertainty arose. RM is assumed to have emerged as the *mens rea* of murder contracted from the 1960s onwards. Beyond this assumption, the authority for the existence of RM rests almost exclusively[10] on one unreported case – *Lidar*.[11] It will be argued that *Lidar* is more consistent with the previous authorities on GNM than with a distinct category of advertence-based involuntary manslaughter covering the unjustified and advertent taking of risks of death or serious harm that results in death. With *Lidar* explained in such terms, there will be good reason to doubt that a distinct head of RM exists as a matter of doctrine in contemporary English law. The advertent taking of an unjustified risk with regard to causing serious bodily harm or death might merely be an element of the base crime in UAM, or a factor that might justify a finding of gross negligence in GNM. There are very few imaginable cases where RM would be *needed* to convict the defendant of manslaughter, and in these cases it will be contended that it is unclear if manslaughter *is* a competent verdict, or merely (intuitively) *ought to be*.

The combination of the breadth of UAM and GNM, and the difficulty of thinking up convincing examples of where only RM could secure a conviction for manslaughter, has led RM to be viewed as "primarily of academic interest only".[12] In the final section of this paper, it will be contended that this is unfortunate. Having a properly-established head of RM would bring significant benefits in terms of fair labelling, fair sentencing, and increased hope for a fairer law of homicide, particularly (but not exclusively) if manslaughter were broken up into discrete offences of homicide.

The Arguments for the Existence of Reckless Manslaughter

[8] Mackay and Mitchell identified 15 cases of "reckless manslaughter" – this was, it appears, the author's classification (the methodological basis of which is unclear): B. Mitchell and R.D. Mackay, "Investigating involuntary manslaughter: an empirical study of 127 cases" (2011) 31 O.J.L.S. 165, 181.
[9] J. Herring, *Criminal Law: Text, Cases and Materials*, 7th edn. (Oxford: Oxford University Press, 2016), p.278.
[10] *cf. Hussain* [2012] EWCA Crim 188, [2012] 2 Cr. App. R. (S.) 75, explained below.
[11] Unreported, Court of Appeal, 11 November 1999 [2000] 4 *Arch News* 3. Mitchell and Mackay's "Case 20" is alleged to be a case where the defendants pleaded guilty to "reckless manslaughter" in relation to facts similar to those in *Hyam v DPP* [1975] A.C. 55 (discussed below): B. Mitchell and R.D. Mackay, "Investigating involuntary manslaughter: an empirical study of 127 cases" (2011) 31 O.J.L.S. 165, 171. As noted below, the facts of *Hyam* are nowadays straightforwardly an example of UAM, so RM is not necessary to explain a conviction in such circumstances.
[12] J. Herring, *Criminal Law*, 10th edn. (Basingstoke: Palgrave, 2017), p.160.

There are two main arguments in favour of RM's existence. First, there is the argument that there are levels of risk-taking with life and serious injury that have been "vacated"[13] from murder, and – the argument claims – *must* now be the basis for involuntary manslaughter convictions.[14] RM is, on this view, a "near neighbour" of murder,[15] for those defendants at the "top end"[16] of involuntary manslaughter "who currently fall just short of … murder".[17]

The second argument for the existence of RM focuses on whether the cases of advertent risk-taking causing death that were formerly murder could be accommodated under UAM and GNM. The aim is to show that a separate head of RM is necessary to explain criminal liability for manslaughter in at least some cases of advertent risk-taking with life or serious injury that are nowadays beyond the scope of murder. To succeed, the argument needs to demonstrate that there is necessary space for RM without overlap with UAM and GNM, and that convictions for manslaughter are properly returnable in such situations.

Any argument that does not approach RM from the manslaughter end is deficient. Compare, for instance, the offence of rape: the fault element is that the defendant lacks a reasonable belief in consent.[18] That captures a range of mental states, but nobody argues that those are *independent heads* of rape, from culpable inadvertence to the risk of non-consent to full knowledge of non-consent.[19] There is simply one fault element – the absence of a reasonable belief in consent – even if this can be satisfied by proof of "higher" mental states such as intention or recklessness with regard to the absence of consent. Accordingly, if there is no space for RM alone to explain liability for decided cases of manslaughter, there is no reason to accept the argument that RM *must* exist independently of UAM and GNM.

The next sections contend that these arguments for RM's existence are unconvincing.

The Remainder of Murder

[13] See Smith "*Adomako*" [1994] Crim. L.R. 758, 759.
[14] D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Text, Cases and Materials on Criminal Law*, 12th edn. (Oxford: Oxford University Press, 2017), p.244.
[15] C.M.V. Clarkson, "Context and culpability in involuntary manslaughter: principle or instinct?" in A. Ashworth and B. Mitchell (eds.), *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000), p.148.
[16] V. Tadros, "The limits of manslaughter" in C.M.V. and S. Cunningham (eds.), *Criminal Liability for Non-aggressive Death* (Aldershot: Ashgate, 2008), p.50.
[17] B. Mitchell and R.D. Mackay, "Investigating involuntary manslaughter: an empirical study of 127 cases" (2011) 31 O.J.L.S. 165, 166. See, similarly, H. Keating, 'The Law Commission report on involuntary manslaughter: the restoration of a serious crime" [1996] Crim. L.R. 535, 538.
[18] Sexual Offences Act 2003, s. 1(1)(c).
[19] Historically, the Court of Appeal has approved of the practice of having separate *counts* on an indictment alleging intentional and reckless commission of an offence (to assist with sentencing) – e.g. *Hoof* (1980) 72 Cr. App. R. 126). This practice does not detract from the point about the modern offence of rape.

Following the passing of section 8 of the Criminal Justice Act 1967,[20] attention turned properly to the states of awareness of risk that would satisfy the *mens rea* of murder. *Hyam* v. *DPP*[21] focussed on intentionally exposed "serious" risks of death or serious bodily injury,[22] or intentional risk-taking that rendered death or serious injury "highly probable"[23] (or perhaps just "probable").[24] It was assumed that, if Hyam were not guilty of murder, she would be guilty of manslaughter.[25] The Lords did not explain why, but UAM would be straightforward: Hyam's act of arson was dangerous (i.e. the sober and reasonable person would have recognised the risk of some injury),[26] and caused the victims' deaths. Even if the majority had concluded that Hyam was not a murderer, they would not have needed RM to convict her of manslaughter.

As is well known, later cases added more clarity about the level of foresight sufficient to lead to an inference or finding of an intention to kill or cause grievous bodily harm in murder. In *Moloney*,[27] the focus was on "natural" consequences, such that in the "ordinary course of events" death or serious bodily harm would follow.[28] *Moloney* raised the bar of risk-taking required for murder (opaquely), potentially creating room for RM, whilst rendering superfluous[29] the requirement that the risk be one that is *intentionally* imposed on others. The quest for further clarity[30] led to the conclusion in *Nedrick*[31] that the intention to kill or cause serious harm required for murder *may* be present only where the defendant acknowledged the *virtual certainty* that death or serious bodily harm would in fact follow from his act or omission.[32] By that stage, the levels of foreseen risk of death or serious harm that had previously been relevant to murder and were thus now apparently relevant to manslaughter stretched from "serious" risks or "probable"/"highly probable" likelihoods of death or serious injury (no longer murder, but assumed by some writers to be RM) to those that are "virtually certain" to occur (potentially still murder).

To further complicate matters, the permissive nature of *Nedrick* and *Woollin* (the jury *may* find intention…),[33] makes it possible that foresight of a virtual certainty will *not* lead to a

[20] In response to *DPP v Smith* [1961] A.C. 290.
[21] [1975] A.C. 55.
[22] At 65, 75, 77, 79.
[23] At 82, 85.
[24] At 97.
[25] At 98.
[26] *Church* [1966] 1 Q.B. 59; *DPP v Newbury* [1977] A.C. 500.
[27] [1985] A.C. 905.
[28] At 929.
[29] *cf.* A. Pedain, "Intention and the terrorist example" [2003] Crim. L.R. 579.
[30] Urged on by *Hancock and Shankland* [1986] A.C. 455.
[31] [1986] 1 W.L.R. 1025.
[32] Approved in *Woollin* [1999] 1 A.C. 82.
[33] Emphasised in *Matthews and Alleyn* [2003] EWCA Crim 192, [2003] 2 Cr. App. R. 30 at [43].

finding of an intention to kill or cause grievous bodily harm in murder cases. Some difficult cases, such as the famous (and sadly now readily imaginable) example of a mother throwing her baby out of a high floor in a burning building, being virtually certain that this will kill or seriously harm the baby (but seeing no other way of potentially saving him) might not contain the fault element of murder on the basis that an intention to kill or cause grievous bodily harm might not be "found" by the jury.[34] Such cases would, assuming that the mother would also be found (if intention was not "found") to be justified in having taken the risk of killing or seriously harming the baby, not be putative examples of RM either.

Following the narrowing of the scope for findings of intention in murder cases, there is thus (quite a bit of) possible space for some defendants who were reckless as to a risk of causing death or serious injury, and would previously have been murderers, to be convicted instead of involuntary manslaughter. It is worth noting, for completeness, that nothing in theory prevents *lower* levels of foresight of the risk of death (or serious bodily harm, if it is sufficient) from securing a conviction for RM,[35] insofar as the taking of such risks might be adjudged unjustifiable. The point has simply never arisen for decision, and will not until greater clarity exists over the existence and place of RM, and thus the appropriateness of any directions given by the trial judge regarding it.

The argument for the existence of RM that flows from the gradual narrowing of the *mens rea* of murder will succeed in being convincing only if the levels of risk-taking with life and serious injury mentioned above are not accommodated by the offences of UAM and GNM in cases where convictions have been returned properly. If they are, there is no *need* to recognise the existence of a separate offence of RM to explain convictions. The next sections contend that UAM and GNM leave very little room behind for RM, and that in that room it is uncertain that manslaughter is an available verdict.

The Reach of Unlawful Act Manslaughter

The cases on involuntary manslaughter decided during the period covered by the previous section (roughly, the 1960s-1990s) are difficult to interpret, largely because of looseness in the understanding of the word "reckless" during that period.[36] As is well known, recklessness can

[34] For discussion, see A.W. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge: Cambridge University Press, 2014), pp.70-71.
[35] For discussion, see D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Text, Cases and Materials on Criminal Law*, 12th edn. (Oxford: Oxford University Press, 2017), p.244.
[36] For a detailed survey, see A. Halpin, *Definition in the Criminal Law* (Oxford: Hart, 2004), ch. 3; See, also, F. Stark, *Culpable Carelessness: Recklessness and Negligence in Scots and English Criminal Law* (unpublished Ph.D. thesis, University of Edinburgh, 2011), ch. 3, available at https://www.era.lib.ed.ac.uk/handle/1842/9797.

be (and during this time period was, in English law) defined in terms of the defendant's awareness of the relevant risk ("subjective", *Cunningham*[37] recklessness), or in terms of the foreseeability to the reasonable person of the relevant risk ("objective", *Caldwell* [38] recklessness). The word reckless was also used, at times, to describe behaviour. For instance, in *Wesson*,[39] the defendant was convicted of manslaughter on the basis that he had handled a firearm recklessly and had discharged it unintentionally, killing his wife. The word "reckless" appears to refer to the simple carelessness of the actions performed by the defendant, rather than making claims about his state of awareness of or indeed the foreseeability of the risk of his wife's death.[40] Cunningham has argued convincingly that such uses of recklessness should be accommodated under the banner of negligence,[41] but (as she acknowledges) this is not historically what has happened in English law. Mindful of this difficulty over establishing the meaning of recklessness in the context of involuntary manslaughter, cautious progress can be made.

Starting with UAM, in many circumstances where the defendant *does* foresee a risk of death or serious harm attendant upon his criminal act, this will be swallowed up by the base offence from which manslaughter is constructed.[42] For instance, if the defendant foresees the risk of inflicting grievous bodily harm, and grievous bodily harm is inflicted as a result of her act,[43] the defendant commits an offence under section 20 of the Offences against the Person Act 1861. Assuming the defendant's act was dangerous (in the sense described below), if the harmed person subsequently dies as a result of that unlawful and dangerous act, then the defendant will be convicted of UAM.

Of course, the section 20 offence can be committed where the defendant foresees the risk of *some harm*,[44] so there is in fact no need for foresight of even grievous bodily harm to found liability for UAM. The difficulty is thinking up an example of so-called RM, then, that would not creep into the territory occupied by section 20. The more detailed examples that are

[37] [1957] 2 Q.B. 396.
[38] [1982] A.C. 341.
[39] (1989) 11 Cr. App. R. (S.) 161.
[40] See, too, *Lowe* [1973] Q.B. 702.
[41] S. Cunningham, "Recklessness: being reckless and acting recklessly" (2010) 21 King's College L.J. 445. This underplays the fact that negligence can also be about the defendant's failure to have certain beliefs. See F. Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge: Cambridge University Press, 2016), ch. 8.
[42] A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 6th edn. (Oxford: Hart, 2016), pp.422-423. There is the odd suggestion by counsel for the defence in *Anderton* (1994) 15 Cr. App. R. (S.) 532 that the case was "reckless manslaughter" on the basis that the defendant's action was not deliberate, but this is – it is submitted – not important to the present discussion.
[43] UAM cannot be committed by omission: *Lowe* [1973] Q.B. 702.
[44] *Mowatt* [1968] 1 Q.B. 421.

sometimes given are unconvincing. Consider the tentative example from *Simester and Sullivan*: "D, an archer, might continue with his target practice even though V is present within the vicinity. When aiming at the target, D would not necessarily commit any offence against V. Accordingly, if V were killed by D's overshooting arrow, it might not be a case of constructive manslaughter but it would be reckless manslaughter if D foresaw a risk of causing death or serious harm."[45] Why, it might be asked, focus on when D aims the arrow? Is firing an arrow in such circumstances not going to result in a section 20 offence being committed if contact is made and serious injury results? The defendant is aware of the risk of *some harm* and the social worth of practising arrow shooting hardly justifies the defendant's action. The action is dangerous and causes death.[46] The same problem arises with Tadros's example of a driver's evading the police[47] (assuming the driver foresaw the risk of *some harm*) and Wilson's person who, for a joke, removes a ladder, trapping a window cleaner on a balcony, aware of the risk that he might break his leg trying to jump down.[48] UAM is readily made out in these examples. More difficult are cases of omission, but these will be returned to below.

Moving beyond the base crime in UAM, the question of dangerousness has focussed, at least since *Church*,[49] on whether *some* bodily harm was a *foreseeable* consequence of the defendant's criminal action.[50] This test would thus incorporate the levels of advertent risk-taking that used to satisfy the fault element of murder, and go further: only *some* bodily harm must be *foreseeable*. The reach of UAM is, as has been recognised countless times, incredibly broad, leaving very little *necessary* space for a separate head of RM to explain a defendant's conviction for manslaughter.

Some potential space for RM is, of course, created by the limits of UAM. First, there are cases where the defendant's conduct is not criminal, or not criminal *per se* (e.g. criminalised simply in virtue of its careless performance).[51] Consider the electrician in *Holloway* (a case heard with *Adomako* in the Court of Appeal),[52] whose improper wiring of a central-heating

[45] A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 6th edn. (Oxford: Hart, 2016), p.423. A footnote points out that assault might be committed *whilst aiming*, which ignores the fact that the relevant act is surely D's *firing the arrow* and hitting V.
[46] Alternatively, assuming a risk of death is obvious in such situations, it could be said that, taking D's foresight of risk into account, his actions were "reckless" to the extent that they satisfy the high standard of gross negligence (see the discussion of this point below).
[47] V. Tadros, "The limits of manslaughter" in C.M.V. and S. Cunningham (eds.), *Criminal Liability for Non-aggressive Death* (Aldershot: Ashgate, 2008), pp.40-41.
[48] W. Wilson, "The structure of criminal homicide" [2006] Crim. L.R. 471, 484.
[49] [1966] 1 Q.B. 59. See, too, *DPP v Newbury* [1977] A.C. 500.
[50] See, recently, *F(J) and E(N)* [2015] EWCA Crim 351, [2015] 2 Cr. App. R. 5.
[51] *Andrews v DPP* [1937] A.C. 576 at 585.
[52] Reported with *Prentice* [1994] Q.B. 302.

system, and failure to fix it over a period of four months, caused death. If the defendant was *so* incompetent as to not be aware of the risk of even *some harm* resulting from his actions, he was not on his way to committing a section 20 offence in leaving the wiring in its unsafe state. Other imaginable offences concerning wiring will no doubt raise the thorny question of whether an offence of strict liability can ever be the base crime in UAM.[53] Even if it is correct that UAM is unavailable in relation to such offences, this example will, however, be of little help to the defender of the view that a distinct offence of RM exists in contemporary English criminal law. Assuming the recklessness involved in RM is "subjective", then RM could not (if it exists) lead to the electrician's conviction of manslaughter.

GNM could, however, come to the rescue. Indeed, the trial judge in *Holloway* attempted to leave GNM to the jury but misdirected them through reliance on *Lawrence*.[54] Had the trial judge told the jury that the defendant's carelessness, taking into account his explanations for why he did not foresee a risk of death or serious injury, had to be "reckless" (in an "ordinary" sense of the word, which will be seen below to incorporate at least *some* cases of inadvertent risk-taking), then his conviction might not have been interfered with. It is possible, so long as a serious and obvious risk of death is *foreseeable* (even if not foreseen by the individual defendant), that other non-criminal yet dangerous acts could be caught by GNM. A separate head of RM is not needed to fill this gap in UAM.

Secondly, there are cases where the base crime is an omission and cannot be the basis for UAM.[55] It is not difficult to imagine situations where the defendant realises that, if he fails to do a certain act, somebody may realistically die or be caused serious injury, and failing to act constitutes unjustified risk-taking. Again, many such situations will readily be captured by GNM. GNM is particularly well suited for cases where the defendant was under a duty to act and failed to do so, where *death* was a readily foreseeable (even if unforeseen) potential consequence. That was exactly the kind of fact situation raised by Adomako's failure to notice the problem with his patient's breathing.[56] (Where an obvious and serious risk of death is not present in relation to the defendant's omission, this raises additional difficulties, returned to below.)

[53] See: D. Ormerod, "*Andrews*" [2003] Crim. L.R. 477; D. Ormerod and D Perry (eds.), *Blackstone's Criminal Practice 2017* (Oxford: Oxford University Press, 2017), paras.B1.53-B1.54;, 479; M. Dyson, "The smallest fault in manslaughter" [2017] 6 Archbold Review 4.
[54] *Prentice* [1994] Q.B. 302 at 337-339.
[55] *Lowe* [1973] Q.B. 702 at 709.
[56] *Adomako* [1995] 1 A.C. 171.

The reach of UAM (especially when premised on the section 20 offence) is thus wide, and GNM covers a wealth of cases where UAM is unavailable (subject to the comments below about the limits of GNM).

One recent possible exception to this concerns cases where the defendant is alleged to have been an accessory to an offence of violence less serious than the intentional infliction of GBH, and the principal has committed murder. The judgment in *Jogee and Ruddock*[57] is clear that this could be a case of secondary liability for manslaughter, but it is unclear exactly *how*. One explanation presented in *Jogee and Ruddock* is UAM.[58] It is difficult to see how, however, liability for UAM follows if the unlawful act (something below GBH with intent) that the defendant intentionally encouraged or assisted did not *itself* cause death.[59]

Could RM explain the apparently straightforward manslaughter conviction in such cases where UAM seems problematic and GNM would be inappropriate to charge?[60] There is the suggestion in *Jogee and Ruddock* that "If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will not be guilty of murder but guilty of manslaughter."[61] This route to liability was (it appears) juxtaposed with UAM, but is surely expressed far too broadly, even if RM exists. Following *Jogee and Ruddock*, the defendant would need to intend to assist or encourage the principal to act with such foresight of risk before he could be liable as an accessory for RM.[62]

Even if this RM route is what was being described (opaquely) in the relevant part of *Jogee and Ruddock*, the Court's comments are too vague to be a firm doctrinal basis for concluding that RM is necessary as an explanation of an appropriately returnable manslaughter conviction. The sounder conclusion is that there is a serious question, which the Court of Appeal will have to face in due course, over whether manslaughter convictions are indeed as easy to make out as the decision in *Jogee and Ruddock* suggested.

The next section considers whether there will be cases where GNM cannot accommodate alleged RM cases that fall into the space left by UAM, thus necessitating a separate head of involuntary manslaughter.

---

[57] [2016] UKSC 8, [2016] UKPC 7, [2017] A.C. 387.
[58] At [96].
[59] A.P. Simester, "Accessory liability and common unlawful purpose" (2017) 133 L.Q.R. 73, 86-87.
[60] *cf.* D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Text, Cases and Materials on Criminal Law*, 12th edn. (Oxford: Oxford University Press, 2017), p.246.
[61] *Jogee and Ruddock* [2016] UKSC 8, [2016] UKPC 7, [2017] A.C. 387 at [96].
[62] *Jogee and Ruddock* [2016] UKSC 8, [2016] UKPC 7, [2017] A.C. 387 at [10], [90].

Gross Negligence Manslaughter: Before Lidar

The relationship between recklessness and gross negligence has always been unclear. Some older manslaughter cases make clear that recklessness was simply a way of explaining the high level of carelessness involved in the defendant's act or omission, and distinguishing manslaughter from cases of simple (blameless) inadvertence ("ordinary" negligence, if you will).[63] In *Andrews v DPP*,[64] Lord Hewart CJ said famously that "Probably of all the epithets that can be applied [to the high degree of carelessness] 'reckless' most nearly covers the case… recklessness suggests an indifference to risk whereas the accused *may* have appreciated the risk and intended to avoid it and yet have shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction" [emphasis added].[65] Thus, recklessness was originally a synonym of gross negligence (regarding the "life and safety of others" in *Andrews*),[66] and not necessarily an advertent mental state. It was not, at that time, a distinct fault element for involuntary manslaughter. Although the defendant's awareness of risk was certainly *a factor* in determining whether the defendant had been grossly negligent,[67] it was not a necessary ingredient of liability.

This trend towards equating gross negligence with recklessness (and not defining recklessness "subjectively") continued through the 1970s when the *mens rea* of murder began to narrow.[68] In *Stone and Dobinson*,[69] a requirement of "subjective" awareness of a risk of death or serious bodily harm in GNM cases was rejected. It was held that "indifference to an obvious risk and appreciation of such risk [of death or "injury to health"], coupled with a determination to nevertheless run it, [were] both examples of recklessness",[70] and recklessness was still simply a way of explaining to the jury the high degree of negligence required. It will be noted that indifference was juxtaposed with "appreciation" of the relevant risk of death or "injury to health",[71] suggesting that indifference could exist independently of awareness of those risks. This point will be returned to later in the discussion of *Lidar*.

In the 1980s, the cases where the *Caldwell*/*Lawrence* sense of recklessness (which included "obvious" unjustified risks that the defendant might have missed) was applied in

[63] E.g. *Finney* (1874) 12 Cox C.C. 625 at 626. See, further, K.JM. Smith, *Lawyers, Legislators and Theorists* (Oxford: Oxford University Press, 1998), pp.192-195.
[64] [1937] A.C. 576.
[65] At 583 (emphasis added).
[66] Apparently synonymous with serious injury: *Misra* [2004] EWCA Crim 2375, [2005] 1 Cr. App. R. 21 at [49].
[67] See, also, *Lamb* [1967] 2 Q.B. 981 at 990.
[68] E.g. *Cato* [1976] 1 W.L.R. 110 at 114, 117, 119.
[69] [1977] Q.B. 354.
[70] At 363.
[71] See, too, *R v West London Coroner (ex p. Gray and Others)* [1988] Q.B. 467 at 477.

manslaughter cases provide further support for the view that recklessness was not understood as requiring foresight of death, or indeed serious bodily harm. For example, in *Seymour*,[72] the House of Lords held that foresight of such risks was not an ingredient of manslaughter, even if "recklessness" was the appropriate way to explain the fault in involuntary manslaughter to the jury.[73] In the 1983 edition of his *Textbook on Criminal Law*, Williams thus referred to "reckless manslaughter" as involving "what is called recklessness (in a special sense)", referring to *Bateman*.[74] Around the same time, *Smith and Hogan* reported that "It was not clear whether [recklessness and gross negligence] were merely two ways of describing the same thing, or whether they represented two distinct conditions of fault."[75] It is submitted that it *was* tolerably clear that the courts were using the words to describe the same, difficult to define, thing: the level of carelessness required for a conviction for involuntary manslaughter.

The synonymy of recklessness and gross negligence in involuntary manslaughter was re-emphasised in the 1990s in *Adomako*, where – despite discouraging use of the *Caldwell*/*Lawrence* direction on recklessness – Lord Mackay (with whom the other Lords agreed) opined that "it [is] perfectly appropriate that the word 'reckless' should be used in cases of involuntary manslaughter, but as Lord Atkin put it [in *Andrews*][76] 'in the ordinary connotation of that word'".[77] Recklessness was *still* not being given the "subjective", awareness-based meaning in relation to GNM, even by the mid 1990s. Once again, foresight of the risk of death (or perhaps serious injury, if the older cases were right) would simply be *a factor* to take into account when considering whether the defendant was, overall, grossly negligent in relation to the killing.[78] There was thus no third category of ("subjective") RM recognised in judicial overviews of the law at around the same time.[79]

It is worth noting at this point that the courts have never engaged in the following *a fortiori* argument: "subjective" recklessness regarding the risk of death (or, more controversially, GBH), being a "higher" form of *mens rea* than "gross negligence" with regard to a serious and obvious risk of death, automatically satisfies the *mens rea* requirements of GNM. (Just as intending that the complainant was not consenting will satisfy the relevant *mens*

---

[72] [1983] 2 A.C. 493.
[73] See, too: *Kong Cheuk Kwan v The Queen* (1986) 82 Cr. App. R. 18; *Goodfellow* (1986) 83 Cr. App. R. 23 at 28.
[74] G. Williams, *Textbook on Criminal Law*, 2nd edn. (London: Stephens, 1983), p.259 (emphasis supressed).
[75] J.C. Smith and B. Hogan, *Criminal Law*, 6th edn. (London: Butterworths, 1988), p.352. Similar statements appear in the 7th (p.372), 8th (p.384), 9th (p.375) and 10th (p.385) editions.
[76] [1937] A.C. 576 at 583.
[77] [1995] 1 A.C. 171 at 187.
[78] This is consistent with reading *Adomako* to require a risk of *death* to which the defendant was ("objectively") grossly negligent.
[79] E.g. *Attorney-General's Reference (No. 3 of 1994)* [1998] A.C. 245 at 269.

rea requirement of rape.) Instead, foresight of a risk of death or serious bodily harm has consistently been considered *a factor* in assessing whether there was gross negligence.

By the close of the 1990s, then, the situation was that significant levels of foresight of a risk of death or serious injury (together with certain *foreseeable* risks of injury) could be accommodated by UAM and GNM. This explains why contemporary explanations of the argument that RM necessarily existed were usually[80] coy. Consider the Law Commission's 1996 view that, post-*Moloney*, cases involving foresight of death or serious injury "*must* have fallen, by default, into the scope of the offence of manslaughter. There is *little or no separate authority*, however, about this type of manslaughter, since such cases are dealt with in practice as cases of unlawful act manslaughter, and the accused's awareness of the risk is taken into account only as an aggravating factor when it comes to sentencing."[81] In fact, there was simply *no* authority, by 1996, grounding a separate head of RM.[82] The Commission was simply unable to prove the relevant negative.

Supporters of the argument for RM's modern existence will point nowadays to positive evidence of RM in the "leading"[83] authority of *Lidar*,[84] decided in 1999. It is worth analysing *Lidar* in some depth, before consideration turns to the boundary of GNM and any space it may leave behind for RM.

Re-assessing Lidar

Lidar drove his Range Rover at speed, whilst another person (X) hung half in, and half out, of it. Eventually, X's foot was caught in a wheel, and he was dragged fully out of the vehicle and run over by it. He died of his injuries. The trial judge directed the jury on manslaughter explicitly in terms of *recklessness* as to the risk of death or (a vague degree) of injury, not gross negligence, and the Court of Appeal had to decide whether this was a misdirection, given the re-assertion of gross negligence in manslaughter five years earlier in *Adomako*. As noted above, Lord Mackay had permitted in *Adomako* the continuation of explanations of that level of fault in terms of "ordinary" recklessness with regard to the risk of causing death, with awareness of the risk of death or (if the older authorities remained sound) serious injury being a *factor* to

[80] *cf*. J.C. Smith, *Smith and Hogan: Criminal Law*, 9th edn. (London: Butterworths, 1999), p.645.
[81] *Involuntary Manslaughter* (Law Com. No.237, 1996), para.2.27 (emphasis added).
[82] *cf.* J.C. Smith "*Khan and Khan*" [1998] Crim. L.R. 830, 831 ("There are two categories of involuntary manslaughter: (i) manslaughter by an unlawful and dangerous act... and (ii) manslaughter by gross negligence or recklessness").
[83] D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th edn. (Oxford: Oxford University Press, 2015), p.645.
[84] [2000] Archbold News 3.

consider, rather than determinative. Although the trial judge was open to criticism for not indicating the importance of awareness of a risk of *serious harm*, as opposed to lower levels of harm, the conviction was adjudged safe in the circumstances.

Is *Lidar*, then, a case of GNM, but using Lord Mackay's "ordinary" sense of recklessness? It is impossible to be *absolutely* certain, because what is available of the judgment is unclear. The Court of Appeal in *Lidar* explained the relevant understanding of recklessness in the following terms:[85]

> We find it difficult to understand how the point of criminal liability can be reached, where gross negligence is alleged, without identifying the point by reference to the concept of recklessness as it is commonly understood: that is to say, whether the driver of the motor vehicle was aware of the necessary degree of risk of serious injury to the victim and nevertheless chose to disregard it, or was indifferent to it.

The opening words of this sentence suggest that the Court was attempting to explain an example of GNM, not set out a distinct form of manslaughter. Despite this, and mindful of the dangers of reading reports of judgments as though they are statutes, it must be noted that the latter part of the Court's statement is ambiguous regarding the relevance of awareness of risk. By contrast to *Stone and Dobinson*, indifference is not juxtaposed *clearly* with such awareness: awareness of risk is mentioned *before* the distinction between choice and indifference, which might suggest that awareness of a risk of death or serious bodily injury is core to *both* conceptions of recklessness.

The statement in *Lidar* about recklessness admits, unhelpfully, of two interpretations. The first is that the defendant had to: (1) be aware of the risk of at least serious harm; *and then* (2a) choose to take it, *or* (2b) be indifferent as to it.[86] The difficulty is making sense of the distinction between these concepts: the defendant's indifference towards the relevant risk(s) is presumably demonstrated in his failure to be moved appropriately by his awareness of the risk(s), i.e. his choice to take the risk(s).[87] Perhaps the court meant indifference to speak to an *additional* attitude towards the *foreseen* risk(s), but this is an unusual conception of recklessness in English criminal law, and is an unconvincing reading of *Lidar*.

---

[85] At 4.

[86] There is a wealth of discussion on the point of whether a person can be indifferent to that which she has not foreseen. See, e.g., A.R. White, *Misleading Cases* (Oxford: Clarendon, 1991), p.38; R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell, 1990), ch.7. See, further, *Murder, Manslaughter and Infanticide* (Law Com. No.304, 2006), para.2.99.

[87] See, similarly, J. Burchell, *Principles of Criminal Law*, 4th edn. (Claremont: Juta, 2013), pp.365-370.

The alternative, if less literal, way to read the comments in *Lidar* is that they appear to endorse alternative, rather than cumulative criteria: not *only* awareness-based recklessness as to the risk of death or serious bodily harm form part of the fault element of involuntary manslaughter (GNM, to be precise), but also *indifference* to (i.e. a culpable failure to notice) those same risks. As Elliott noted soon afterwards, this makes *Lidar* look similar to the *Lawrence*-recklessness conception of involuntary manslaughter that was downplayed in *Adomako* in favour of gross negligence.[88] The understanding of recklessness in *Lidar* is also similar to the pre-*Lawrence* understanding of manslaughter present in *Stone and Dobinson*, where a non-awareness-based conception of "indifference" was used as a marker of gross negligence. On one view, then, *Lidar* is simply a(nother) case where recklessness *qua* (at least sometimes inadvertent) indifference to the risks of death or serious injury was used to explain the high level of carelessness required for a conviction of GNM, rather than a decision recognising the necessary existence of a third category of involuntary manslaughter premised on awareness of the relevant risk(s).

This alternative way of understanding the brief discussion of recklessness in *Lidar* conceives of indifference to risk as a distinct, not (always) awareness-based form of culpability. This reading suggests that the defendant did not need to be aware of the risk of death or serious harm (in the sense of having a belief that it existed at the relevant time),[89] but instead demonstrated *through his failure to notice that risk* that he was insufficiently motivated by the interests threatened.[90] This form of understanding of indifference avoids tautology and is consistent with earlier decisions on GNM such as *Andrews* and *Stone and Dobinson*, which viewed indifference to the risk of death or serious injury as one mark of gross negligence. Such an inadvertent conception of indifference towards risk is also, although the law was far from clear, present in at least some rape cases from the 1980s and 1990s.[91] Indifference towards the risks of death or serious injury is, then, of vital importance to understanding *Lidar*, yet at least two leading textbooks fail to even mention it when discussing RM.[92] This gives the misleading impression that *Lidar* recognised only an awareness-based conception of RM.

---

[88] C. Elliott, "What direction for gross negligence manslaughter?: *R* v. *Lidar* and *Attorney-General's Reference (No. 2 of 1999)*" (2001) 65 J. Crim. L. 145, 145-147.

[89] See F. Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge: Cambridge University Press, 2016), ch.4.

[90] *cf.* R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell, 1990), ch.7.

[91] See J. Temkin, "The limits of reckless rape" [1983] Crim. L.R. 5; S. Gardner, "Reckless and inconsiderate rape" [1991] Crim. L.R. 172, 172-175.

[92] D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th edn. (Oxford: Oxford University Press, 2015), p.645; J. Horder, *Ashworth's Principles of Criminal Law*, 8th edn. (Oxford: Oxford University Press, 2016), p.302.

It is noteworthy, however, that in *Adomako*, the focus had begun to turn to gross negligence regarding a serious and obvious risk of *death*,[93] and thus *Lidar* is problematic in suggesting that inadvertent indifference to a risk of serious injury could ever be enough for GNM.[94] It is nevertheless easier to conceive of this anomaly as an example of the Court of Appeal mis-speaking (or at least being misreported), rather than as a sound basis for concluding that in reality they were identifying RM as independent of GNM.

Lidar is, then, a simple case of GNM, where awareness of the risk of death or serious injury was recognised simply *a factor* to consider in relation to the final question of whether the defendant was grossly negligent. Accepting this point is not problematic in explaining the court's decision to uphold the defendant's conviction. The defendant's action showed a very clear disregard for the life of his "passenger" (to whom he presumably owed a duty), and his awareness of the risk of serious injury (if not death!) corroborates his high degree of culpability in relation to the death.[95]Additionally, even if these points about GNM were debated, Lidar was inevitably committing a section 20 offence, given his awareness of X's being at risk of at least *some harm* by Lidar's actions, so UAM could also have been made out. In short, *Lidar* does not indicate the necessity of RM to explain why the defendant was liable for manslaughter.

After Lidar

Months after *Lidar*, it was confirmed in *Attorney-General's Reference (No 2 of 1999)*[96] that the gross negligence test in *Adomako* was "objective" and that a conviction for manslaughter could be returned in cases of inadvertent risk-taking.[97] Indeed, the Court endorsed the view in *Stone and Dobinson* that indifference to a risk of "injury to health" could be sufficient for gross negligence.[98] The Court of Appeal nevertheless went on to say that, in certain circumstances, proof of advertent recklessness as to levels of injury, or death, would be crucial to a finding of gross negligence.[99] Again, an *a fortiori* argument based on recklessness being a "higher" *mens rea* state than gross negligence, and thus could stand in its stead, was not adopted.

---

cf. D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Text, Cases and Materials on Criminal Law*, 12th edn. (Oxford: Oxford University Press, 2017), p.246.

[93] [1995] 1 A.C. 171 at 187.

[94] See, too, *Mirsa* [2004] EWCA Crim 2375, [2005] 1 Cr. App. R. 21.

[95] Furthermore, in a case of such clear culpability, presumably the court was anxious to avoid quashing a conviction on the basis of the exact language used by the trial judge: J. Rogers, "The Law Commission's proposed restructure of homicide" (2006) 70 J. Crim. L. 223, 227 (fn. 16).

[96] [2000] Q.B. 796.

[97] [2000] Q.B. 796 at 809. See, further: *R* v. *DPP, ex p Jones* [2000] I.R.L.R. 373; *R* v. *DPP* [2003] EWHC 693 (Admin) at [29].

[98] At 809.

[99] At 809.

As Smith explained in his commentary to *R v DPP, ex p Jones*,[100] the best that could be made of the law was that proof of "subjective" recklessness (it is unclear from the case and commentary whether only relating to the risk of death, or including risks of serious injury) might convince the jury to convict in cases where it is not entirely clear that, "objectively", the defendant's conduct was *grossly* negligent.[101] This might be taken to mean that proof of advertent recklessness with regard to the risk of death, or potentially serious injury, might be necessary in cases where "ordinary" recklessness (i.e. gross negligence) is not clear on the facts.[102] In other words, a person's conduct could, if inadvertent, look simply careless, and the death constitute a regrettable accident, but – in circumstances of advertence to the risk of death, or perhaps serious injury – the same conduct could look extremely callous and support a conviction for GNM.[103] Such awareness of risk is not, however, a *necessary* condition of liability for GNM.[104] Gross negligence is not "recklessness in disguise",[105] at least as a matter of law.

As a matter of doctrine, accepting this point about recklessness in manslaughter is unproblematic, even following the departure from *Caldwell* in criminal damage cases in *G and Another*.[106] It is important to remember, although this point is often forgotten,[107] that it is conceptually possible for different understandings of recklessness to still exist in England and Wales. Lord Bingham was careful to limit his consideration of the definition of recklessness to the immediate context of criminal damage.[108] Lord Rodger saw the benefits of adopting different understandings of recklessness in different contexts.[109] Despite statements from the Court of Appeal about *G and Another*'s "general principles",[110] it is thus still – as a matter of doctrine – possible for recklessness to be interpreted "objectively" in certain contexts.

It is submitted that this is particularly true if recklessness was already used in an "objective" sense prior to *G and Another*, and not based on *Caldwell*. Recklessness was so

[100] [2000] Crim. L.R. 858, 860.
[101] Smith was, it should be noted, not convinced that this was correct *in theory*.
[102] *cf*. D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th edn. (Oxford: Oxford University Press, 2015), p.644.
[103] Note Quick's finding that in cases of so-called medical manslaughter, the prosecution would often only proceed against medical professionals who *were* in fact aware of the risk of death: O. Quick, "Prosecuting (Gross) Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service" (2006) 33 *Journal of Law and Society* 421, 444-445.
[104] *R (Rowley) v DPP* [2003] EWHC 693 (Admin) at [29].
[105] O. Quick, "Medical killing: need for a specific offence?" in C.M.V. and S. Cunningham (eds.), *Criminal Liability for Non-aggressive Death* (Aldershot: Ashgate, 2008), p.163.
[106] [2003] UKHL 50, [2004] 1 A.C. 1034.
[107] *cf. Misra* [2004] EWCA Crim 2375, [2005] 1 Cr. App. R. 21 at [55].
[108] At [28].
[109] At [69].
[110] *Attorney-General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] Q.B. 73 at [12].

understood in involuntary manslaughter since at least the 1930s, and it was *Lawrence* (a decision that was not disavowed in *G and Another*)[111] that influenced later manslaughter decisions such as *Seymour*.[112] Furthermore, things had moved on beyond *Lawrence*/*Seymour* with the House of Lords' decision in *Adomako*. Thus it is defensible (in the doctrinal sense) for the courts to view *G and Another* as having no bearing on the understanding of "recklessness" adopted in GNM.[113] As a matter of *theory*, it would be preferable if *mens rea* words such as recklessness were used consistently in the criminal law (and the language of recklessness simply dropped in this context, in favour of gross negligence),[114] but there is no doctrinal necessity for the courts to conclude that manslaughter must now require *G and Another*'s brand of recklessness. It would be better – if this approach is to be persisted in – to explain that the case for a finding of gross negligence is strengthened where the defendant was *aware* of the risk of death or (serious?) injury attaching to her conduct, and eschew talk of recklessness altogether.

Alas, the mixing and matching of gross negligence and recklessness has continued. For instance, in *Mark and Nationwide Heating Services Ltd*,[115] the trial judge directed the jury on what "gross negligence" meant by making reference to recklessness: "where there is an obvious and serious risk of death, a defendant was either indifferent to that risk – i.e. he demonstrated he couldn't care less about it – or, having recognised the risk, deliberately chose to run it". The juxtaposition of foresight-based recklessness (notably towards the risk of *death* only) and indifference-based recklessness is here clearer than it was in *Lidar*. The Court of Appeal explained that there was some space between recklessness and gross negligence: "a defendant might appreciate risk and intend to avoid it but show such a high degree of negligence as to justify its categorisation as gross".[116] The gross negligence here is not created through the defendant's decision to take the relevant risk (of death), but rather through the inept steps taken towards avoiding it. Such defendants are difficult to describe as "indifferent" to risk (they are trying, albeit ineptly, to avoid it), and it might be difficult to show that they have *chosen* to take a risk that they are trying very hard to avoid.

[111] *G and Another* [2003] UKHL 50, [2004] 1 A.C. 1034 at [28].
[112] [1983] 2 A.C. 493.
[113] *Mark and Nationwide Heating Services Ltd* [2004] EWCA Crim 2490 at [33].
[114] F. Stark, "'It's Only Words': On Meaning and *Mens Rea*" (2013) 72 C.L.J. 155.
[115] [2004] EWCA Crim 2490 at [22].
[116] This is not the only space between the concepts, insofar as it might be grossly negligent to conclude for insufficient reason that a foreseen risk of death (or perhaps serious injury) had been removed entirely.

In *Winter and Winter*,[117] the defendants had been convicted on an indictment alleging GNM, and yet the trial judge made references to the defendant's awareness of the particular risks involved in their conduct and the jury was told to convict *only* if the defendants had been "reckless" (regarding precisely which risks it is not entirely clear).[118] This definition of recklessness is not included in the appellate judgment, but the transcript shows that it was beyond dispute that the defendants were aware of the risk of killing or harming someone. Even if the trial judge had meant "subjective" recklessness as to the risk of death (or serious injury), that such a direction was given in a GNM case is not necessarily incoherent. The defendants' carelessness might have been recognised by the trial judge as being careless, but not careless enough (without awareness of the risk of death, or perhaps of some level of injury) to be left to the jury. On appeal, it appears that recklessness was conceived of not as an ingredient of GNM *per se*, but as a "seriously aggravating factor" affecting sentencing.[119] The use of recklessness to emphasise the particularly culpable quality of the defendant's conduct is found in other sentencing decisions.[120]

Harder to explain is *Hussain*,[121] which appears to give credence to the view that RM exists as a distinct head of involuntary manslaughter, specifically premised on advertence to the risk of death or serious bodily harm.[122] The defendant's car had collided (faultlessly) with a two-year-old child. Hussain panicked, and drove on, with the child under the car. The child was killed as a result of Hussain's decision to drive on after the initial accident. It was explained on appeal that the Crown's case had been "put on the basis, not of unlawful act manslaughter or gross negligence, but on the basis of reckless manslaughter … that [the defendant] foresaw the risk of serious injury or death … and yet chose to take that risk and death resulted".[123]

The doctrinal claim that the Crown was really charging a separate head of manslaughter, rather than just a particularly egregious example of UAM or GNM, is weak. First, the existence of RM as a separate category of involuntary manslaughter is suspect, as has been demonstrated at length. Secondly, if the jury had been asked whether driving, aware that a two-year-old child was under the car, was carelessness sufficient to meet the standard of gross negligence, it is

[117] [2011] 1 Cr. App. R. (S.) 78.
[118] At [43].
[119] At [46].
[120] E.g. *Brown* [2010] EWCA Crim 2832, [2011] 2 Cr. App. R. (S.) 11 at [1] ("This is said to be a case of manslaughter by gross negligence, but manslaughter by prolonged recklessness is perhaps closer to the mark."); *S* [2015] EWCA Crim 558, [2015] 2 Cr. App. R. (S.) 29 at [26].
[121] [2012] EWCA Crim 188, [2012] 2 Cr. App. R. (S.) 75.
[122] See D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th edn. (Oxford: Oxford University Press, 2015), p.644.
[123] *Hussain* [2012] EWCA Crim 188, [2012] 2 Cr. App. R. (S.) 75 at [25].

unlikely that they would have had reasonable doubt. Once again, there is no *need* for RM to be wheeled out to explain the defendant's conviction (although it may of course be desirable for the prosecution to emphasise the defendant's awareness of the risks involved in driving on in terms of sentencing). The fact that GNM requires an obvious risk of death (see below) is no barrier to conviction here. The defendant's actions carried with them a clear risk not simply of serious injury (although that might have been all the defendant himself, who had a low IQ, foresaw); they were also actions that clearly gave rise to a risk of death.[124] Once again, UAM would alternatively have been made out: presumably it is at least a section 20 offence to drive a car, aware of the risk that a person is underneath and will suffer some harm, and the defendant's offence was both dangerous and caused death. If either GNM or UAM had been used, the defendant's awareness of the risk of death or serious injury could, as will be discussed later, in theory have aggravated the sentence he received.

The Reach of Gross Negligence Manslaughter

Even with the decisions in *Lidar* and *Hussain* explained, there might still be alleged to be space for RM cases where manslaughter is a potential verdict, but that *cannot* fall under GNM. The significant limit on GNM is that there must nowadays be a serious and obvious risk of *death*,[125] i.e. a serious risk of death that would be obvious to the reasonable person in the defendant's situation.[126] (The extent to which the defendant's characteristics and knowledge will be considered is notoriously difficult.) A case where the defendant is aware of a risk of death (that it would be unjustified to take) arising from an omission, where a serious and obvious risk of death is "objectively" unforeseeable, is unlikely to arise in practice. Far more likely to arise is a case where the defendant foresees a risk of serious harm arising from an omission (that in the circumstances it is unjustified to take), and an obvious and serious risk of death is "objectively" unforeseeable. Consider the following example:[127]

---

[124] D. Ormerod (ed.), *Blackstone's Criminal Practice 2017* (Oxford: Oxford University Press, 2017), para.B1.36.
[125] *Misra* [2005] EWCA Crim 2375, [2005] 1 Cr. App. R. 21; *Rudling* [2016] EWCA Crim 741.
[126] *Singh* [1999] Crim. L.R. 582.
[127] An alternative example is as follows:

Dirty Restaurant: D omits to carry out basic food safety checks in her restaurant. D foresees the risk that this could result in serious harm to a diner. V dines in the restaurant. A vulnerability of V's means that he dies after contracting a bug from eating the food. Assume, again, that the risk of death was not "objectively" obvious and serious.

Again, intuitions are going to differ over whether this *should* be manslaughter (as opposed to some other offence) and the point remains that it is unclear whether it *can* be, at least on the existing authorities.

> *School Dinner*: D, who is responsible for preparing the meals at a school, sees V, a pupil, pick up a sandwich that contains pesto. D is aware of V's allergy to pine nuts. V is unaware that pesto contains pine nuts. D, who dislikes V, omits to warn V about the sandwich, foreseeing the risk that V may be seriously injured as a result of eating it. V eats the sandwich and dies because of a particularly violent allergic reaction. Such violent reactions from persons with V's allergy are, for the sake of the example, rare.

The intuition that *School Dinner* ought to be a case of involuntary manslaughter, rather than something else (which will not be held by everyone),[128] cannot be enough *itself* to confirm RM's existence as an independent head of manslaughter. This is particularly so given the doubts that have been cast above on the supposedly strongest supporting authorities. (It is important, here, that both *Lidar* and *Hussain* involved acts, rather than omissions.) Instead, examples such as *School Dinner* (if thought to merit a conviction for manslaughter), where GNM and UAM appear to be unavailable, may simply indicate the need to *create*, rather than show the present *existence of*, a separate head of involuntary manslaughter, RM, in contemporary English criminal law.

Much also depends on how strong the serious and obvious risk of death constraint is in GNM. If the courts were to endorse something like the *a fortiori* argument mentioned above, it may be that advertent recklessness as to serious injury is simply a "higher" *mens rea* ingredient satisfying the "lesser" ingredient of gross negligence with regard to an obvious and serious risk of death, thus meaning that there is no need for a separate head of manslaughter (RM) to lead to a conviction in *School Dinner*. It would simply be GNM. The need for an obvious and serious "objectively" foreseeable risk of death would, if this argument were taken forward by the courts, be restricted to cases where the defendant *lacked* awareness of a risk of death or serious injury attendant upon her actions or omissions (which, in the circumstances, it was unjustified to take).

In the light of the doctrinal discussion above, there is good reason to believe that there is no independent offence of RM in contemporary English criminal law: involuntary manslaughter is, after all, limited to UAM and GNM. The next section explains why this is a regrettable position to be in, even in cases where a prosecution for UAM or GNM could, unlike in *School Dinner*, definitely secure a conviction for manslaughter.

Is There Any Need for Reckless Manslaughter?

[128] D's culpability in *School Dinner* and *Dirty Restaurant* is higher than that of some defendants convicted of UAM, and perhaps some defendants convicted of GNM. This point is not determinative, though: UAM and GNM are renowned for being defined too broadly.

There are three major problems raised by the current legal position, even where UAM and GNM could lead to a conviction for manslaughter.

Labelling

First, there is a problem of fair labelling,[129] insofar as the present law of involuntary manslaughter does not distinguish meaningfully between different types of culpability regarding the causing of death. In relation to UAM, the defendant's culpability can be anything from acting in the face of foreseeable bodily injury to awareness of a very high risk of death. This is a shockingly broad range of culpability to be captured under one label, and the communicative impact of this route to a manslaughter conviction is minimal.

With regard to GNM, the criminal law very rarely keeps recklessness and (any form of) negligence together in offence definitions, and it is submitted that this is because of the difference between advertent and inadvertent wrongdoing being taken, at least usually in non-regulatory contexts, to be morally significant.[130] Only a sketch of this difference can be offered here.[131] Defendants' choices are limited by their awareness: they cannot choose to take a risk of *x* if they were unaware that *x* was a possible consequence of their actions, or circumstance potentially surrounding it. If a defendant is aware of a relevant risk, she can choose to take it. That choice links the defendant particularly clearly with her risk-taking and its consequences, bridging the gap between the defendant, as an agent, and her wrongdoing that culpability is designed to cross. This is not to say that without awareness of risk there is no way to link defendants, as agents, with their risk-taking and the materialisation of those risks.[132] It is merely to say that a choice-based model of culpability is *particularly* compelling in the context of the criminal law.[133]

Inadvertent risk-taking is not choice-based, except in very peculiar situations where the defendant chooses to be inadvertent later.[134] This means that in most instances of inadvertent risk-taking, the link between the defendant (as an agent), her risk-taking, and its consequences

---

[129] See B. Mitchell, "Further evidence of the relationship between legal and public opinion on the law of homicide" [2000] Crim. L.R. 814, 826.

[130] An exceptional case is rape, where the law endorses a negligence-type standard (the absence of a reasonable belief in consent) for all cases.

[131] See, F. Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge: Cambridge University Press, 2016), ch. 6.

[132] E.g. L. Alexander and K. Kessler Ferzan, *Crime and Culpability: A Theory of the Criminal Law* (Cambridge: Cambridge University Press, 2009), ch.3.

[133] See, further, A.P. Simester, "A disintegrated theory of culpability" in D. Baker and J. Horder (eds.), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (Cambridge: Cambridge University Press, 2013), p.178.

[134] *cf. People* v. *Decina* 2 NY 2d 133, 138 N.E. 2d (1956, N.Y.).

is less clear. The criminal law can be less sure of the grounds for blame, as there are various reasons why the risk could have been missed. Hence, inadvertent negligence – including inadvertent gross negligence – is (rightly) used more sparingly in the criminal law than advertent fault elements.[135]

It is problematic, from a labelling perspective, that this distinction in relative culpability is not reflected more explicitly in English criminal law's offence of involuntary manslaughter, particularly where the comparison is between inadvertence and advertence regarding a risk of death. Outside that context, overlap is imaginable: gross negligence as to an obvious and serious risk of death is presumably, all other things being equal, "worse" in terms of culpability than awareness of a minimal (yet unjustified) risk of bodily harm.[136] This could explain why the courts have, more clearly in modern judgments, focussed on awareness of a risk of at least *serious* injury. Perhaps some instances of gross negligence regarding the risk of death could be viewed as being "worse" than awareness of a real risk of serious bodily harm, which would have implications for both the courts' existing approach and the *a fortiori* argument mentioned above (which, as has been noted, has never been adopted by the courts). It is nevertheless submitted that the view that it is *typically* more culpable to advertently risk serious bodily harm than it is to miss an obvious and serious risk of death is defensible, and could justify a distinction between such cases in the labelling of offences.

A more refined category of involuntary manslaughter, separated from voluntary manslaughter, would be preferable – in terms of reflecting culpability – to the current mixing of recklessness with regard to death or serious injury with GNM and UAM. If the arguments above are accepted, however, it seems that the best that prosecutors can do is argue cases explicitly based on foresight of a risk of death or serious injury, and hope that sentencing reflects the defendant's true culpability.

A response to this argument is that, even if prosecutors were to try and draw a distinction between such advertence-based cases and other forms of involuntary manslaughter, the final label is always going to be manslaughter, an uninformative tag. There *is* good reason, on grounds of typical relative culpability, to mark more clearly the distinctions between voluntary and involuntary, constructive and non-constructive,[137] and reckless and (grossly) negligent

[135] See F. Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge: Cambridge University Press, 2016), pp.260-266.
[136] A. Ashworth, "Manslaughter: general or nominate offences?" in C.M.V. and S. Cunningham (eds.), *Criminal Liability for Non-aggressive Death* (Aldershot: Ashgate, 2008), pp.236-237.
[137] For a more adventurous argument about labeling and UAM, see B. Mitchell, "More thoughts about unlawful and dangerous act manslaughter and the one-punch killer" [2009] Crim. L.R. 502, 509-511.

killing. Those distinctions would be marked most helpfully through different *offences*, rather than merely different modes of commission.[138] The Law Commission proposed in 1996 for a new offence of "reckless killing" (dependant on awareness of a risk of causing death or serious injury) to sit alongside "killing by gross carelessness" (in essence, a firmer version of GNM), whilst UAM would be abolished.[139] These proposals had much to commend them, but it is highly unlikely that they will be taken forward, despite their benefits in terms of labelling.[140] This is regrettable.

Sentencing

A second benefit of marking out a distinct head of manslaughter based on recklessness as to the risk of death or serious bodily harm would be in terms of sentencing.

Presently, sentences for GNM are higher where (presumably "subjective") recklessness regarding death or serious bodily injury is averred and proved.[141] The difficulty is that this sentencing regime is tremendously fragile if the substantive law of manslaughter remains as it is. In *Current Sentencing Practice*, for instance, there was (until the most recent edition) a separate section on "reckless manslaughter", but virtually every case in it is formally a GNM case.[142] Without requiring, in *every* judicial direction given in a relevant case, a formal finding that advertent recklessness regarding death or serious bodily harm was present, the sentencing court will have to go by inference to establish whether such awareness existed and whether the

---

[138] M. Wasik, "Sentencing in homicide" in A. Ashworth and B. Mitchell (eds.), *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000), pp.187-190; C.M.V. Clarkson, "Context and culpability in involuntary manslaughter: principle or instinct?" in the same volume, pp.141-145. A. Ashworth, "Manslaughter: general or nominate offences?" in C.M.V. and S. Cunningham (eds.), *Criminal Liability for Non-aggressive Death* (Aldershot: Ashgate, 2008), pp.242-247.

[139] *Involuntary Manslaughter* (Law Com. No.237, 1996). Previous Law Commission proposals would have seen the abolition of gross negligence manslaughter: e.g. *A Criminal Code for England and Wales* (Law Com. No.177, 1989), cl. 55.

[140] The Commission's proposals in 2006 pushed voluntary manslaughter into (second degree) murder, some cases of RM into first-degree murder (where the defendant intended to do serious injury and was aware of a serious risk of causing death: *Murder, Manslaughter and Infanticide* (Law Com. No.304, 2006), paras.2.50-2.69) others into second-degree murder (where the defendant intended to cause injury or fear of injury, aware of the serious risk of causing death: paras.2.95-2.116), and maintained an undifferentiated offence of manslaughter. From a labelling perspective, these proposals do not solve the problem with involuntary manslaughter.

[141] See the sample in C.M.V. Clarkson, "Context and culpability in involuntary manslaughter: principle or instinct?" in A. Ashworth and B. Mitchell (eds.), *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000), p.163. See, too: *Johnson* [2008] EWCA Crim 2976, [2009] 2 Cr. App. R. (S.) 28 at [11]. An intention to cause some harm is also an aggravation: *Bowler* [2015] EWCA Crim 849, [2015] 2 Cr. App. R. (S.) 38 at [18].

[142] L. Harris (ed.), *Current Sentencing Practice* (London: Sweet & Maxwell, 2013), para.B1-3.3G *et seq*. The exception was *Hussain* [2012] EWCA Crim 188, [2012] 2 Cr. App. R. (S.) 75, explained above. The 2017 edition does not recognise RM as a separate category. *Archbold* considers "reckless" manslaughter in its section on "gross negligence manslaughter", and makes clear that there is no major conceptual distance between them: P.J. Richardson (ed.), *Archbold: Criminal Pleading, Evidence and Practice 2017* (Sweet & Maxwell, 2017) paras.19.123-19.124.

offence was, accordingly, aggravated. The same is true of cases of UAM, where sometimes no awareness of any risk of death or serious injury will be consistent with a conviction.

Granted, the trial judge will have heard all the evidence that the jury was presented with or know the factual basis of the defendant's plea. It might, then, be thought that she will presumably be able to come to a sensible judgment about whether the defendant was aware of the risk of death or grievous bodily harm. An additional offence "box", with the same maximum sentence (life imprisonment) might thus be thought unnecessary. There are two responses available. First, it is not normal for juries to get judges, through their verdicts, into *such* a rough ballpark, after which the trial judge exercises such wide-ranging discretion over sentencing. Of course, intention and recklessness are discrete forms of *mens rea* for a host of crimes, and yet the jury does not make clear whether it thought the defendant intended or was reckless as to the elements of the *actus reus*.[143] But the difference between intention and recklessness is more pronounced, and more readily inferable by a trial judge, than the distinction between inadvertent and advertent unjustified risk-taking with regard to death or serious injury. Secondly, it seems very unlikely that the basis of plea, or the jury's verdict, will tell the trial judge *everything* she needs to know in order to assess the question of awareness of risk.[144]

It would be far more transparent, and hopefully more consistent, if trial judges were given a steer by the jury (or in the factual basis of the plea) on the question of whether the defendant was aware of the risk of death or serious bodily harm. The creation of a clear and consistent distinction (at least in prosecution approach) between such cases of advertence and other cases of UAM and GNM could be encouraged through sentencing guidelines making clear that awareness of such risks impacts substantially on the sentencing range and will have to be proved expressly to the satisfaction of the jury.

The Sentencing Council's present proposals will not achieve this end.[145] The Council (correctly, if the arguments in this article are accepted) does not identify RM as a separate species of involuntary manslaughter, and so the draft guidelines consider awareness of risk under the umbrellas of GNM and UAM only. Awareness of a "clear" risk of death would indicate high culpability in GNM, whilst unawareness of the same – presumably including foresight of a risk of serious injury (presently recognised as an aggravating factor) – would be

[143] It is of course open to (but not mandatory for) the prosecution to allege intention and recklessness in respect of different counts on the indictment.
[144] This is, of course, not a problem limited to the context of manslaughter, and does suggest that theoretical niceties in the assessment of culpability must sometimes be missed in practice.
[145] *Manslaughter Guideline Consultation* (Sentencing Council, 2017).

an indicator of lower culpability.[146] Sentencing judges would thus have to be even more fine-grained in their assessments of the defendant's foresight of risk (with no additional help from the jury) than at present. This will be no easy task. In relation to UAM, an indicator of high culpability would be that "death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender".[147] There is no formal distinction between cases of advertent taking of these risks and inadvertent taking of those risks in terms of the assessment of culpability. The proposals will thus not make it more attractive for prosecutors to nail their colours to the mast in cases where they believe the defendant was aware of the risk of death or serious injury involved in her act or omission.

A second benefit to separating out cases involving awareness of a risk of death or serious injury concerns combatting the gradual creep in sentences for all homicide offences.[148] The view has been taken by the Court of Appeal that the increased starting points (and overall sentences) for murder contained in the Criminal Justice Act 2003 and an increased legislative focus on harm (i.e. death)[149] justify higher sentencing for UAM[150] and GNM.[151] The overall result has been a rise in sentences for both murder and manslaughter, and it is not inconceivable that a rise in the tariffs for murder could, once more, increase the severity of manslaughter sentences globally. The difficulty with this pegged approach is that the heads of manslaughter cover a large range of wrongdoing and culpability,[152] and it is highly questionable that sentencing for murder is, once the fact of death has been accounted for, relevant to *all* of it. The cases where sentences for murder should, presumably, matter most are where there is some correlation between the defendant's culpability and the culpability required for murder. There does appear to be good reason to tie the sentencing in manslaughter cases where there is a risk of death or *serious* bodily harm to the sentences available in murder cases.[153] *Typically*, however, cases of UAM and GNM are relatively far removed from murder in terms of culpability (though of course they involve the same basic harm of death).[154] There is reason,

[146] At 24.
[147] At 15.
[148] See Ashworth, *Sentencing and Criminal Justice*, 6th edn. (Cambridge: Cambridge University Press, 2015), pp.128-134; H. Quirk, "Sentencing white coat crime: the need for guidance in medical manslaughter cases" [2013] Crim. L.R. 871, 874-878.
[149] Criminal Justice Act 2003, s. 143(1).
[150] E.g. *Appleby* [2009] EWCA Crim 2693, [2010] 2 Cr. App. R. (S.) 46.
[151] E.g. *Holtom* [2010] EWCA Crim 934, [2011] 1 Cr. App. R. (S.) 18 at [19]; *Barrass* [2011] EWCA Crim 2629, [2012] 1 Cr. App. R. (S.) 80 at [15]; *Garg* [2013] EWCA Crim 2520, [2013] 2 Cr. App. R. (S.) 30 at [45].
[152] E.g. *Folkes* [2011] EWCA Crim 325, [2011] 2 Cr. App. R. (S.) 76 at [15].
[153] Cf. *Huggins* [2016] EWCA Crim 1715, [2017] 1 Cr. App. R. (S.) 21. I am grateful to David Ormerod QC for mentioning this case to me.
[154] Some cases are not, of course – *Hussain* [2004] EWCA Crim 763, [2004] 2 Cr. App. R. (S.) 93. The possibility that focusing *just* on the harm of death is conceivably too narrow an approach is left open here.

then, to have a far higher sentencing band for the cases that are assumed by some to be cases of RM than for UAM and GNM. Even if the maximum sentence is always life imprisonment, these bands can help mark important differences in culpability more clearly and consistently than the existing or Council-proposed sentencing regimes.

Rather than recognise this broad culpability hierarchy haphazardly by considering awareness of the risk of death or serious bodily harm (rarely stated as a necessary ingredient of liability in judicial directions) as an aggravation of one of those other forms of involuntary manslaughter, the existence of an independent head of RM could ensure much more clarity, transparency and consistency in sentencing. Again, the clearest route forwards would be to legislate to reform the area of manslaughter (and homicide in general).

The Reach of Manslaughter

The third benefit in recognising RM as a meaningfully distinct form of homicide concerns the overall fairness of the law of murder and manslaughter under English law. *Some* people convicted of UAM were aware of a risk of death or serious injury that in the circumstances was unjustified to take. Such defendants are not the ones that critics of the law of UAM are usually concerned about. They are concerned with defendants who have committed property offences or minor offences related to violence, unaware of the risk of death or serious injury, in circumstances where there is an obvious risk of "some injury" occurring and death results.[155]

Similarly, *some* people convicted of GNM will have been aware of the deadly consequences of their actions, and thus demonstrate more clearly their insufficient concern for the lives of others. Nobody doubts that manslaughter convictions are appropriate in such circumstances. Those aware of a risk of serious harm are also (though more controversially) deserving of significant censure in relation to the causing of death. Yet, other defendants will have been oblivious to the risk of death in circumstances of extreme pressure and anxiety that might unsettle a finding of clear culpability (think of the defendant in *Adomako*),[156] but still be bad enough to amount to gross negligence. Those cases are more difficult and controversial. There is a place for (gross) negligence in the law of homicide, but the current approach is insufficiently nuanced.[157]

---

[155] E.g. B. Mitchell, "Minding the gap in unlawful and dangerous act manslaughter: a moral defence for one-punch killers" (2008) 72 J. Crim. L. 537.
[156] V. Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005), pp.84-85.
[157] *cf.* V. Tadros, "The limits of manslaughter" in C.M.V. and S. Cunningham (eds.), *Criminal Liability for Non-aggressive Death* (Aldershot: Ashgate, 2008), p.51. There is not space to explore this question here, but see F. Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge: Cambridge University Press, 2016), ch.8.

If cases where the defendant was aware of a risk of death or serious bodily harm, and took it without justification (i.e. RM), were not triable only as instances of (very bad) UAM and GNM, they would not be able to lend respectability to offences that can convict persons of manslaughter in these extremely controversial circumstances. In removing that veneer, those controversies would be even more apparent and less easy to live with, prompting the reforms that GNM and UAM so desperately require.

Conclusion

It has been argued at length that there is good reason to doubt that, as a matter of doctrinal law, there exists a separate head of RM in modern English criminal law. The more plausible account of the law is that awareness of a risk of death or serious injury, which it is unjustified to take in the circumstances, is simply a factor for consideration in a case of UAM or GNM, and an aggravating (and, it is submitted, unclear) factor at sentencing. This position is unsatisfactory from the perspectives of fair labelling, fair sentencing and fairness generally in the law of manslaughter. The best solution to this problem would be to have separate, clearly-defined offences of RM, GNM and UAM. An alternative (but far inferior) solution is for the prosecution to nail their colours to the mast and setting out to prove awareness of the relevant risk(s) in cases of GNM and UAM. The practical need to do so to secure appropriately tougher sentences is weak at present, and the Sentencing Council's proposed guidelines are unlikely to change matters drastically. It seems that the current, confused legal position is unlikely to be clarified soon.

Cases that can be brought under UAM and GNM are, at least, clearly manslaughter. Far more difficult to resolve are examples such as *School Dinner*, where the defendant falls into the gaps in both UAM and GNM, and there is – it has been contended – no firm basis for concluding that a manslaughter conviction is properly returnable under the existing law. The culpability of such defendants is undeniably clearer than in some cases of UAM and GNM, and yet there is real room for doubt that they are guilty of a homicide offence. Surely such an unclear legal position ought to be a cause for embarrassment, and make the already indisputable case for wholesale legislative reform of the law of homicide even stronger.