

Analysis of *R v Javanmardi*

By M Zerbe

R v Javanmardi is a recent case from the Supreme Court of Canada that made some clarifications to some objective liability criminal offences in Canada.

Facts:

Javanmardi first opened naturopathic clinic in 1985, and since 1992 has administered nutrients to around 10 patients per week by intravenous injection. In June 2008, Matern, an 84-year-old man with heart disease visited Javanmardi. After a consultation, Javanmardi recommended intravenously administered nutrients. Matern insisted on having the treatment that day, although Javanmardi told him that she did not normally administer intravenous injections on a first visit. Javanmardi combined nutrients from several vials, one of which happened to be contaminated, although two people had already received nutrients from it without issue that day. Matern reacted negatively to the injection almost immediately. Despite his symptoms, Matern did not want to go to a hospital. Javanmardi explained that Matern needed to stay hydrated and informed his daughter to take him to the hospital if she was unable to keep him hydrated. Matern was taken to the hospital later that night and died some hours later.¹ Javanmardi was charged with criminal negligence causing death and unlawful act manslaughter.

Law:

The *Criminal Code* provisions for criminal negligence causing death are as follows:

- 219 (1)** Every one is criminally negligent who
- (a) in doing anything, or
 - (b) in omitting to do anything that it is his duty to do,
- shows wanton or reckless disregard for the lives or safety of other persons.

Criminal negligence causing death carries a maximum sentence of life, and for offences involving firearms carries a minimum sentence of four years.

The provisions for unlawful act manslaughter are as follows:

- 222 (1)** A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
- (4)** Culpable homicide is murder or manslaughter or infanticide.
- (5)** A person commits culpable homicide when he causes the death of a human being,
- (a) by means of an unlawful act;
- 234** Culpable homicide that is not murder or infanticide is manslaughter.

Unlawful act manslaughter carries the same penalty as criminal negligence causing death.

¹ *R v Javanmardi*, 2019 SCC 54 at paras 1-7 [*Javanmardi*].

For some objective liability offences, such as dangerous driving, the court must consider whether the actions of the accused showed a marked departure from the standard of care of a reasonable person.² However, for cases of criminal negligence, the Crown must prove that there was a *marked and substantial* departure from the standard of care of a reasonable person.³

Prior to *Javanmardi*, a leading case on unlawful act manslaughter was *R v Creighton*. In *Creighton*, it was decided that the mens rea test for unlawful act manslaughter was “objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act”.⁴

Decision:

The court in *Javanmardi* made some modifications to the *Creighton* test, but largely affirmed it. The court decided that it is not necessary to show that the act was objectively dangerous, as an unlawful act with the objective foreseeability of bodily harm is already enough to show that the act is objectively dangerous.⁵ *Javanmardi* confirmed that for predicate offences of strict liability, the mens rea of that offence must be read as a marked departure from the standard of care of a reasonable person in the circumstances.⁶ However, the court endorses a form of a modified objective test, taking into account the special care and skill of the accused with respect to the activity in question.⁷ Therefore in the present case, with the activity of intravenous injection, the standard of a reasonable naturopath in the circumstances was the appropriate test.⁸

With respect to criminal negligence causing death, *Javanmardi* confirmed that the appropriate test is whether there was a marked and substantial departure from the standard of care of a reasonable person. However, the court declined to explain what the difference is between “marked departure” and “marked and substantial departure”.⁹ The case did not turn on the distinction, therefore it was not seen as necessary to define the difference.¹⁰

Conclusion:

R v Javanmardi brought some level of clarity to the law. The key point is that an unlawful act itself does not need to be objectively dangerous in order for it to be a predicate offence for unlawful act manslaughter. The determination that there was an unlawful act with reasonable foreseeability of bodily harm is enough to show that an act was objectively dangerous.

The weak point in *Javanmardi* is the fact that the court avoided the question of the difference between “marked” and “marked and substantial”. Whatever the difference may, it is likely to be highly contextual, and a court will likely try to avoid determining a case on the basis of the distinction. Although there could be some criticism that the avoidance of this question creates

² *R v Roy*, 2012 SCC 26 at para 36.

³ *R v JF*, 2008 SCC 60 at para 10.

⁴ *R v Creighton*, [1993] 3 SCR 3 at para 78, [1993] SCJ No 91.

⁵ *Javanmardi*, *supra* note 1 at para 26.

⁶ *Ibid* at para 31.

⁷ *Ibid* at para 37.

⁸ *Ibid* at para 38.

⁹ *Ibid* at para 23.

¹⁰ *Ibid*.

uncertainty, it is most likely that the disadvantages of this uncertainty rest largely on the court. It seems unlikely that police would avoid bringing charges because they are uncertain whether a person's activity was a "marked" or a "marked and substantial" departure from a reasonable person. Additionally, it seems unlikely that people will change their behaviour because they are unsure if a court would see their actions as a "marked" or a "marked and substantial" departure from a reasonable person. The uncertainty most likely arises after a person has been charged by police and the court now has to decide the issue.