

**R v. Javanmardi<sup>1</sup> – Clarifying... to an extent**

**By N Zandsalimi**

Ms. Javanmardi was charged with unlawful act manslaughter and criminal negligence causing death. The victim, 84-year old Mr. Matern, had heart disease and came to the accused's naturopathic clinic with the hopes that naturopathy would improve his quality of life. After conducting a consultation, Ms. Javanmardi recommended a course of treatment with nutrient injections. The victim insisted that the treatment begin that day. He died later that night due to a contaminated nutrient vial that was used for the injection that day.

The decision provided key insight and clarity to the requirements of negligence-based offences. Prior to this decision, it was required that the underlying act must be dangerous. The court held here that it is not necessary for the underlying act to be dangerous, so long as it can be proven the accused has met the elements of the offence as laid out in the Criminal Code provision. In the case of unlawful act manslaughter, the actus reus is satisfied by proof beyond a reasonable doubt that the accused committed an unlawful act that caused death.<sup>2</sup> In other words, the crown does not need to prove that the predicate offence was objectively dangerous independently from the fault element in order to prove the actus reus. There were no inherent risks in this case since she was using the proper protocols and administered the injection with the required care, thus her act was not objectively dangerous.

The fault element of both negligence-based offences which Javanmardi was charged with require that the accused's conduct be measured against the standard of a reasonable person in their circumstances. The objective mens rea or the requisite degree of departure from the standard of a reasonable person is marked and substantial for the offence of unlawful act manslaughter. "The fault element of unlawful act manslaughter is objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, coupled with the fault element for the predicate offence."<sup>3</sup> The court also notes that when the predicate (underlying) offence is one of strict liability as it was in this case, "the fault element for that offence must be read as a marked departure from the standard expected of a reasonable person in the circumstances."<sup>4</sup>

The differing levels of departure as it relates to objective mens rea have important implications on stigmas. Essentially, these levels of marked departure and marked and substantial departure are moral labels on how we as a society find the convicted person culpable. We are more likely to attribute higher moral culpability to first degree murder than to manslaughter or negligence. This is why moral culpability will not be determined with what the accused actually intended or knew but rather what they ought to have known. However, the court did not actually give us any useful guide or definition for 'marked and substantial' as opposed to simply 'marked' and the moral labels that flow from these offences remain at large a matter of public opinion.

More clearly, the decision provided a useful caveat to the mythical reasonable person. When comparing someone to the reasonable person, they must be compared to the reasonable person with similar experiences, trainings and qualifications *with respect to that activity*. The court is

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<sup>1</sup> *R v Javanmardi*, 2019 SCC 54.

<sup>2</sup> *Ibid* at para 30.

<sup>3</sup> *Ibid* at para 31.

<sup>4</sup> *Ibid*.

careful to specify that the standard is not to be determined by personal characteristics, but rather by activity.<sup>5</sup> Based on this analysis, the court held the Court of Appeal erred by failing to incorporate Javanmardi's experience and training into consideration. Ms. Javanmardi should be compared against the standard of care exercised by a reasonable and prudent naturopath. This seems to make logical sense and sheds light on the obscurities of the reasonable person. Requiring the circumstances of the reasonable person to bear some resemblance can assist with the blurred lines. The activity-sensitive approach is also apparent in the decision of *R v. Creighton* and the approach to the modified objective standard that considers the nature of the activity taking place.<sup>6</sup> The majority here not concerned with looking at the dangerousness in relation to actus reus, they interpret *Creighton* to be read as whether there was a foreseeability of harm as part of the mens rea. We can see that while the dangerousness of the activity is no longer a requirement of the actus reus, it is still used for establishing the mental element and the objective mens rea of the offence. Based on the evidence, the majority agreed with the trial judge that that than an intravenous injection performed properly by a naturopath who is qualified to administer these injections did not pose an objectively foreseeable risk of bodily harm in the circumstances. Her experience, education and qualifications were used to determine that she did meet the applicable standard of care.<sup>7</sup>

The dissent differed in their opinion with respect to the elements of the actus reus. They found that the objective dangerousness of the unlawful act is part of forming the actus reus of the offence. Per Wagner J, the objective dangerousness of the unlawful act will be proved on the grounds that it can be shown the accused acted in a way that a reasonably prudent person would have known was likely to subject another person to a risk of bodily harm. This analysis will not consider foreseeability aspects that form part of the mens rea. The act was found to be objectively dangerous in this case.<sup>8</sup> They found that the independent objective dangerousness of the offence created a higher standard of care and Ms. Javanmardi did not meet this standard since she had used the vial for two other patients before using it for the victim. The decision by the dissent turned on the point that since the act was objectively dangerous, this warranted intervention by the Court of Appeal. On the other hand, the majority held that it was not for the Court of Appeal to meddle with the findings of fact made by the trial court.

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<sup>5</sup> *Ibid* at para 38.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* at para 40.

<sup>8</sup> *Ibid* at para 70.