

Devan Reid

R. v Javanmardi: Clarification and Confusion

The case of *R. v Javanmardi* brings some clarity to the requirements of negligence-based offences (or ‘objective mens rea’ offences) like criminal negligence causing death and unlawful act manslaughter. The Court also examines the relevance of necessary skills and experience in regards to the appellant’s conduct in this case. However, *Javanmardi* also perpetuates the confusion surrounding the difference between ‘marked’ and ‘marked **and** substantial’ departures from the reasonable person standard.

The facts of this case are that Javanmardi was a naturopath based in Quebec who had extensive training and experience within her field.¹ Mr. Matern visited her naturopathy clinic looking for treatment, and Javanmardi recommended an intravenous injection.² However, the vial used for the injection was contaminated, and Mr. Matern died later that night. Javanmardi was charged with unlawful act manslaughter and criminal negligence causing death, but was found not guilty on both charges by the trial judge in her case.³ The trial judge stated that Javanmardi had the necessary skills and experience needed to perform the injection, she had followed safety procedures, and had purchased her products from reputable sources.⁴ She concluded that a reasonable person in Javanmardi’s position would not have thought that the injection would harm Mr. Matern.

The Quebec Court of Appeal overturned this ruling and found Javanmardi guilty on the charge of unlawful act manslaughter and ordered a new trial for the criminal negligence charge. The Court also stated that Javanmardi’s expertise as a naturopath was not relevant. However, the Supreme Court held that the trial judge’s original ruling should stand and that the Court must consider the accused’s training and experience, and overturned the Court of Appeal’s decision.⁵

The Court provided some clarification on the ‘objective dangerousness’ requirement for unlawful act manslaughter offences within their ruling in this case. For this offence, the actus reus requirement is that the Crown must prove that the accused committed an unlawful act (the predicate offence) and that the unlawful act caused death.⁶ The question surrounding this requirement is whether or not the Crown has to prove that the predicate offence is ‘objectively dangerous’. Abella J. writes for the majority that the

¹ *R. v Javanmardi*, 2019 SCC 54 at paras 1-47 [*Javanmardi*].

² *Ibid* at para 2.

³ *Ibid* at para 8.

⁴ *Ibid* at paras. 10-11.

⁵ *Ibid* at paras 39-46.

⁶ *R. v Creighton*, [1993] 3 S.C.R. 3, at paras 42-43 [*Creighton*].

objective dangerousness requirement adds nothing to the analysis that is not already captured within the fault element (mens rea requirement) of unlawful act manslaughter offences.⁷ The fault element of this offence is that there must be an objective foreseeability of risk of bodily harm that is not trivial or transitory in nature.⁸ Abella J. points out that an unlawful act, accompanied with the foreseeability of risk, is an objectively dangerous act.⁹ Therefore, there is no individual actus reus requirement of objective dangerousness, because the 'dangerousness' requirement is already made out within the foreseeability requirement.

While the Supreme Court provided some clarity on the objective dangerousness requirement in this case, the court declined to provide any guidance on the difference between a 'marked' departure standard for the fault element of an unlawful act manslaughter offence, and the 'marked **and** substantial' departure standard for a criminal negligence causing death offence. Surprisingly, the Court bypasses the issue of distinguishing between these two standards completely. This is a potential problem for criminal law because it could lead to a gap in the understanding and differentiation of what these standards actually mean, and therefore how the two offences are charged and prosecuted. Because of the lack of clarification of what makes a departure 'marked and substantial', there is a potential for the justice system to rely on the unlawful act manslaughter offence, rather than the more onerous criminal negligence causing death one. If the police and prosecutors do not have the knowledge of what the standard entails, then they may be more reluctant to bring charges forward under that offence. It is possible that this case represents a missed opportunity for the Supreme Court to elaborate on what the differences of these two standards are, and provide some clarification within the law.

The majority of the Supreme Court also notes that Javanmardi's experience and education regarding naturopathy were relevant factors in determining whether or not she was qualified for the activity she was engaging in, and were therefore relevant for determining if she had departed from the reasonable person standard.¹⁰ A departure from the reasonable person standard is measured by the degree to which the accused's conduct departed from that of a reasonable person in the circumstances. Based on the contextual factors in this case of Javanmardi's naturopathic experience in administering injections and her adherence to safety procedures, her conduct does not represent a marked departure from the reasonable person standard.¹¹ It is unlikely a reasonable person would have foreseen the risk of Mr.

⁷ *Supra* note 1.

⁸ *Ibid* at para 31.

⁹ *Ibid* at para 29-30.

¹⁰ *Ibid* at paras. 10-11.

¹¹ *Ibid* at para 12.

Matern dying as a result of the injection of a benign solution.¹² It is also unlikely that Javanmardi could have taken any steps to avoid Mr. Matern's death, as she purchased her products from reputable company that followed governmental policies and followed safety procedures for the injection itself. Based on the context of the case, the trial judge and Supreme Court made the correct decision to acquit Javanmardi of both charges, as a departure from the reasonable person standard was not made out for either charge.

This case represents an interesting mix of both clarity and confusion coming from the Supreme Court. The Court provides clarity regarding the non-existence of an independent 'objective dangerousness' requirement for the actus reus of unlawful act manslaughter offences and instead points out that this dangerous requirement can be found within the foreseeability element of the mens rea requirement. The Court also points out that the experience of an accused is relevant to the contextual assessment that is performed by the Court in determining whether a reasonable person would have foreseen the risk and taken steps to avoid it. Javanmardi's extensive experience as a naturopath is an important factor in this case. Finally, the Court also perpetuates the confusion surrounding the differences between the standards of 'marked' and 'marked and substantial' by refusing to address the issue in this case.

¹² *Ibid* at paras 12-13.