



SUPREME COURT OF CANADA

CITATION: R. v. Javanmardi, 2019 SCC 54

APPEAL HEARD: May 15, 2019

JUDGMENT RENDERED: November 14, 2019

DOCKET: 38188

BETWEEN:

Mitra Javanmardi
Appellant

and

**Her Majesty The Queen and
Attorney General of Quebec**
Respondents

- and -

**Association des avocats de la défense de Montréal,
Québec Association of Naturopathic Medicine,
Association des naturopathes agréés du Québec,
Canadian Association of Naturopathic Doctors and
Criminal Lawyers' Association**
Intervenors

OFFICIAL ENGLISH TRANSLATION: Reasons of Wagner C.J.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 46)

Abella J. (Moldaver, Karakatsanis, Côté and Brown JJ.
concurring)

DISSENTING REASONS:
(paras. 47 to 84)

Wagner C.J. (Rowe J. concurring)

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R. v. JAVANMARDI

Mitra Javanmardi

Appellant

v.

**Her Majesty The Queen and
Attorney General of Quebec**

Respondents

and

**Association des avocats de la défense de Montréal,
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File No.: 38188.

2019: May 15; 2019: November 14.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Unlawful act manslaughter — Criminal negligence causing death — Elements of offence — Naturopath charged and acquitted at trial in death of patient — Court of Appeal setting aside acquittals — Whether Crown must prove that underlying unlawful act was objectively dangerous to establish actus reus of unlawful act manslaughter — Whether Court of Appeal erred in intervening — Criminal Code, R.S.C. 1985, c. C-46, ss. 220, 222(5)(a).

On June 12, 2008, M and his wife visited the accused's naturopathic clinic. M was 84 years old, had heart disease and was frustrated with the treatment he had received at conventional medical clinics. After an hour-long consultation, the accused recommended intravenously administered nutrients. M reacted negatively to the injection and he died of endotoxic shock some hours later. The accused was charged with criminal negligence causing death and unlawful act manslaughter. The trial judge acquitted the accused of both charges but the Court of Appeal set aside both acquittals, substituted a conviction on the charge of unlawful act manslaughter, and ordered a new trial on the criminal negligence charge.

Held (Wagner C.J. and Rowe J. dissenting): The appeal should be allowed and the acquittals restored.

Per Abella, Moldaver, Karakatsanis, Côté and Brown JJ. : The Court of Appeal erred in holding that an intravenous injection is objectively dangerous regardless of the circumstances in which it is administered or the training, qualifications and experience of the person who administers it. The Court of Appeal

also erred in disturbing the accused's acquittals based on its conclusion that her conduct markedly departed from that of a reasonable person. These conclusions cannot be squared with the trial judge's findings of fact which the Court of Appeal replaced with its own.

The *actus reus* of criminal negligence causing death requires that the accused undertook an act — or omitted to do anything that it was his or her legal duty to do — and that the act or omission caused someone's death. The fault element is that the accused's act or omission shows wanton or reckless disregard for the lives or safety of other persons. As with other negligence-based criminal offences, the fault element of criminal negligence causing death is assessed by measuring the degree to which the accused's conduct departed from that of a reasonable person in the circumstances. For some negligence-based offences, such as dangerous driving, a "marked" departure satisfies the fault element. In the context of criminal negligence causing death, however, the requisite degree of departure is as an elevated one — marked and substantial.

The *actus reus* of unlawful act manslaughter under s. 222(5)(a) of the *Criminal Code* requires the Crown to prove that the accused committed an unlawful act and that the unlawful act caused death. The underlying unlawful act is described as the "predicate" offence. Where the predicate offence is one of strict liability, the fault element for that offence must be read as a marked departure from the standard expected of a reasonable person in the circumstances. The Crown is not required to

prove that the predicate offence was objectively dangerous. An objective dangerousness requirement adds nothing to the analysis that is not captured within the fault element of unlawful act manslaughter. An unlawful act, accompanied by objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, is an objectively dangerous act. As a result, the *actus reus* of unlawful act manslaughter is satisfied by proof beyond a reasonable doubt that the accused committed an unlawful act that caused death. There is no independent requirement of objective dangerousness.

The fault element of both offences require that an accused's conduct be measured against the standard of a reasonable person in their circumstances. An activity-sensitive approach to the modified objective standard should be applied. While the standard is not determined by the accused's personal characteristics, it is informed by the activity. Evidence of training and experience may be used to rebut an allegation of being unqualified to engage in an activity or to show how a reasonable person in the circumstances of the accused would have performed the activity.

In measuring the accused's conduct against this standard in the instant case, the trial judge was obliged to consider the accused's prior training, experience and qualifications as a naturopath. The trial judge found that the accused was properly qualified to administer intravenous injections and took the necessary precautions at every stage of administering the intravenous injection, including observing sufficient protocols to prevent sepsis. All of the trial judge's factual findings, which were based

on the evidence, amply support the conclusion that an intravenous injection, performed properly by a naturopath qualified to administer such injections, did not pose an objectively foreseeable risk of bodily harm in the circumstances.

Per Wagner C.J. and Rowe J. (dissenting): The appeal should be allowed in part: the conviction for unlawful act manslaughter should be set aside and a new trial ordered on this charge. Entering a conviction on an appeal from an acquittal is an exceptional measure, and the error of law at issue here is also a rare occurrence. A conviction for manslaughter was not so inevitable as to justify the measure ordered by the Court of Appeal.

The offence of unlawful act manslaughter requires proof of an underlying unlawful act. The *actus reus* of the offence has three elements: (1) an underlying unlawful act; (2) the objective dangerousness of that act; and (3) a causal connection between the act and the death. Unlawful act manslaughter also has two cumulative fault elements: the *mens rea* of the underlying act and the *mens rea* specific to manslaughter.

The second element of the *actus reus*, the objective dangerousness of the unlawful act, is assessed without reference to the accused's personal characteristics. It will be proved if the court is satisfied that the accused did something that a reasonable person would have known was likely to subject another person to a risk of bodily harm. In considering the *actus reus*, the court is not to assess the extent to which the accused's conduct departed from this standard of care or the accused's state of mind.

This evidentiary threshold reflects the fact that, at this stage of the analysis, the court is considering whether the accused committed the physical element of the offence, not whether the accused had the state of mind required for a conviction.

Injecting a substance across physiological barriers is an inherently dangerous activity. The accused's experience does not alter this. The dangerousness of the act would have been established even if it had been performed by a health professional who was authorized to do so. By refusing to find that the unlawful injection was objectively dangerous, the trial court failed to arrive at the legal conclusion that was necessary in light of the facts as found. This was an error of law whose impact is such that it requires a new trial.

Cases Cited

By Abella J.

Considered: *R. v. Creighton*, [1993] 3 S.C.R. 3; **referred to:** *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; *R. v. Tutton*, [1989] 1 S.C.R. 1392; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *R. v. L. (J.)* (2006), 204 C.C.C. (3d) 324; *R. v. Al-Kassem*, 2015 ONCA 320, 78 M.V.R. (6th) 183; *R. v. Sharp* (1984), 12 C.C.C. (3d) 428; *R. v. Fontaine*, 2017 QCCA 1730, 41 C.R. (7th) 330; *R. v. Blostein*, 2014 MBCA 39, 306 Man. R. (2d) 15; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Plein*, 2018 ONCA 748, 50 C.R. (7th) 41; *R. v. Kahnpace*, 2010

BCCA 227, 76 C.R. (6th) 38; *R. v. L.M.*, 2018 NWTTC 6; *R. v. P.S.*, 2018 ONCJ 274; *R. v. Curragh Inc.* (1993), 125 N.S.R. (2d) 185; *R. v. Fournier*, 2016 QCCS 5456; *R. v. Gendreau*, 2015 QCCA 1910; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021.

By Wagner C.J. (dissenting)

R. v. J.M.H., 2011 SCC 45, [2011] 3 S.C.R. 197; *Vézeau v. The Queen*, [1997] 2 S.C.R. 277; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Creighton*, [1993] 3 S.C.R. 3; *Autorité des marchés financiers v. Patry*, 2015 QCCA 1933; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215.

Statutes and Regulations Cited

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Medical Act, CQLR, c. M-9, s. 31.

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- Yeo, Stanley. “The Fault Elements for Involuntary Manslaughter: Some Lessons from Downunder” (2000), 43 *Crim. L.Q.* 291.

APPEAL from a judgment of the Quebec Court of Appeal (Hilton, Gagnon and Marcotte JJ.A.), 2018 QCCA 856, 47 C.R. (7th) 296, [2018] AZ-51499093, [2018] J.Q. n° 4661 (QL), 2018 CarswellQue 4498 (WL Can.), substituting the acquittal for unlawful act manslaughter entered by Villemure Prov. Ct. J., C.Q., No. 500-01-013474-082, April 8, 2015, with a conviction, and ordering a new trial for criminal negligence causing death. Appeal allowed, Wagner C.J. and Rowe J. dissenting.

Isabel J. Schurman, Julius Grey, Francis Villeneuve Ménard and Rose-Mélanie Drivod, for the appellant.

Christian Jarry, for the respondent Her Majesty The Queen.

Julien Bernard, Jean-Vincent Lacroix and Alexandre Duval, for the respondent the Attorney General of Quebec.

Michel Marchand and Christian Desrosiers, for the intervener Association des avocats de la défense de Montréal.

Giuseppe Battista, for the interveners the Québec Association of Naturopathic Medicine and Association des naturopathes agréés du Québec.

Benjamin Grant, Marion Sandilands and David Wilson, for the intervener the Canadian Association of Naturopathic Doctors.

Anil K. Kapoor and Dana C. Achtemichuk, for the intervener the Criminal Lawyers' Association.

The judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

ABELLA J. —

[1] Mitra Javanmardi opened a naturopathic clinic in Quebec in 1985. She has a degree in science from McGill University, a doctorate in naturopathic medicine

from the National College of Naturopathic Medicine in Portland, Oregon, and a related diploma which involved 500 hours of further courses. Ms. Javanmardi's education included classes and clinical training about intravenous injection techniques. She has treated between 4,000 and 5,000 patients at her clinic since it opened and, starting in 1992, has administered nutrients to approximately ten patients per week by way of intravenous injection. Intravenous administration of nutrients by naturopaths is not legal in Quebec but is lawful in most provinces.

[2] On June 12, 2008, Roger Matern and his wife visited Ms. Javanmardi's clinic. Mr. Matern was 84 years old and had heart disease. He was frustrated with the treatment he had received at conventional medical clinics and hoped that naturopathy would improve his quality of life. After an hour-long consultation, Ms. Javanmardi recommended intravenously administered nutrients. Despite Ms. Javanmardi's telling him that she did not normally administer intravenous injections on a first visit, Mr. Matern insisted on having an intravenous treatment that day.

[3] Ms. Javanmardi prepared the nutrient solution for Mr. Matern's intravenous injection. It contained magnesium chloride, manganese chloride, potassium chloride, L-Taurine, L-Carnitine, and sterile water. To create the solution, Ms. Javanmardi combined nutrients from separate vials. One vial contained L-Carnitine. Mr. Matern was the third patient to whom L-Carnitine from the same vial had been administered that day. The other two patients did not have adverse reactions to their injections. The vial turned out to be contaminated.

[4] Mr. Matern reacted negatively to the injection almost immediately. He complained of being hot and nauseous. Ms. Javanmardi stopped the intravenous injection and checked Mr. Matern's vital signs, which were stable. Mr. Matern had no fever, was not experiencing confusion, and there was no sign of infection on the site of the injection.

[5] Throughout Ms. Javanmardi's career, no patient had ever been infected during an intravenous injection. She thought that Mr. Matern could be having a hypoglycaemic reaction and suggested he eat some sugar. Mr. Matern consumed a spoonful of honey and orange juice.

[6] Despite his symptoms, Mr. Matern said that he did not want to go to the hospital. His wife and daughter took him home. In a call later that day with Mr. Matern's daughter, Ms. Javanmardi explained that Mr. Matern needed to stay hydrated and advised his daughter to take him to the hospital if she was unable to keep him hydrated.

[7] That night, Mr. Matern's daughter called an ambulance because she was concerned that her father's condition was worsening. Doctors at the hospital noted signs of endotoxic shock. Mr. Matern's symptoms continued to worsen and he died of endotoxic shock some hours later.

[8] Ms. Javanmardi was charged with criminal negligence causing death contrary to s. 220(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, and manslaughter, contrary to ss. 234 and 236(b) of the *Criminal Code*.

[9] At trial, the Crown identified several of Ms. Javanmardi's acts or omissions as the bases for criminal negligence causing death and as predicate offences for unlawful act manslaughter. Of these, only one act, the intravenous injection administered contrary to s. 31 of Quebec's *Medical Act*, CQLR, c. M-9, was argued before this Court as the basis for both charges.¹

[10] The trial lasted for 39 days. In a 50-page, 453-paragraph judgment which thoroughly and carefully canvassed the evidence, Villemure J. made the following findings of fact:

¹ Section 31 states:

31. The practice of medicine consists in assessing and diagnosing any health deficiency in a person in interaction with their environment, in preventing and treating illness to maintain or restore health or to provide appropriate symptom relief.

The following activities in the practice of medicine are reserved to physicians:

- (1) diagnosing illnesses;
- (2) prescribing diagnostic examinations;
- (3) using diagnostic techniques that are invasive or entail risks of injury;
- (4) determining medical treatment;
- (5) prescribing medications and other substances;
- (6) prescribing treatment;
- (7) using techniques or applying treatments that are invasive or entail risks of injury, including aesthetic procedures

- According to the expert evidence, the nutrients Ms. Javanmardi selected for Mr. Matern’s intravenous injection were “benign” and “potentially helpful”;
- Ms. Javanmardi had the required skills to administer intravenous injections. She has a degree in science from McGill University and a doctorate in naturopathic medicine from the National College of Naturopathic Medicine. This university is recognized in its field. Her four-year education there included one year of courses based on traditional medicine. She was also trained in the administration of intravenous injections, pharmacology, and the interaction of nutrients with other medications. In addition, she got a diploma from the Homeopathic Academy of Naturopathic Physicians, which involved 500 hours of courses. Ms. Javanmardi acquired further skills by practicing naturopathy at her clinic since 1985, and she had almost two decades of experience in administering intravenous injections to patients;
- While Quebec does not regulate naturopathy, Ms. Javanmardi aligned her professional standards with the regulations in other provinces;
- Ms. Javanmardi purchased her nutrients from a reputable Ontario pharmacy that complied with provincial health and safety regulations. As a naturopath, Ms. Javanmardi was authorized to purchase those nutrients in Ontario;
- Ms. Javanmardi was knowledgeable about nutrients. This enabled her to identify which ones correspond to the specific needs of different patients. The information Mr. Matern gave to Ms. Javanmardi about his medical condition was sufficient for Ms. Javanmardi to determine which nutrients could ameliorate his condition;
- Ms. Javanmardi was alive to the need to observe sterilization protocols for administering intravenous injections and had taken sufficient precautionary measures to prevent contamination. The way she stored and preserved the vials used for intravenous injections, including in this case, aligned with the specific properties of each vial and with the instructions of the pharmacist who supplied them;

- Mr. Matern knew that Ms. Javanmardi was not a physician. Mr. Matern immediately wanted an intravenous injection of nutrients and validly consented to the procedure; and
- Mr. Matern died of endotoxic shock attributable to the presence of bacteria in the L-Carnitine vial from which Ms. Javanmardi drew nutrients for his injection. Due to the high concentration of bacteria in the injected solution, Mr. Matern's death was inevitable from the moment he was given the intravenous injection.

[11] Villemure J. was satisfied that Ms. Javanmardi had the necessary skills to administer intravenous injections, had observed the required protocols and had taken sufficient precautions at every stage of the process.

[12] Based on these findings, Villemure J. acquitted Ms. Javanmardi of both charges. As to the charge of criminal negligence causing death, Villemure J. concluded that Ms. Javanmardi's conduct did not show a marked departure from the standard of care that a reasonable person in her circumstances would have exercised. Villemure J. was not satisfied that a reasonable person would have been aware of any risk inherent in Ms. Javanmardi's conduct and therefore concluded that the Crown had not proved beyond a reasonable doubt that Ms. Javanmardi's conduct showed wanton or reckless disregard for Mr. Matern's life or safety.

[13] In dealing with the unlawful act manslaughter charge, and focusing on the "unlawful act" of administering an intravenous injection contrary to Quebec's *Medical Act*, Villemure J. concluded that the intravenous injection was not objectively dangerous. A reasonable person in Ms. Javanmardi's circumstances

would not have foreseen that intravenously administering a benign solution, in accordance with proper procedures, would create a risk of harm.

[14] Having acquitted Ms. Javanmardi, Villemure J. declined to consider supplementary arguments made by Ms. Javanmardi's counsel about the constitutionality of the offences under which she had been charged.

[15] The Court of Appeal set aside both acquittals. It concluded that Villemure J. misstated the elements of unlawful act manslaughter and criminal negligence causing death, and further erred by considering the training that Ms. Javanmardi had received in the course of her education to become a naturopath. In the Court of Appeal's view, the intravenous injection was objectively dangerous and Ms. Javanmardi's conduct constituted a marked departure from the reasonable person standard. The Court of Appeal substituted a conviction on the charge of unlawful act manslaughter and ordered a new trial on the criminal negligence charge.² The Court of Appeal briefly considered — and rejected — Ms. Javanmardi's arguments that the provisions under which she was charged were unconstitutional.

[16] For the following reasons, I would allow Ms. Javanmardi's appeal on both charges and restore the acquittals.

² The Court of Appeal declined to substitute a conviction on the criminal negligence charge because, in its view, without [TRANSLATION] “an overall assessment of the evidence” (para. 124), it was not possible to determine whether Ms. Javanmardi's conduct amounted to a marked *and substantial* departure from the reasonable person standard.

Analysis

[17] The charges for both criminal negligence causing death and unlawful act manslaughter were based on the same conduct: administering an intravenous injection contrary to Quebec's *Medical Act*. As the facts of this case demonstrate, there is a great deal of overlap between unlawful act manslaughter and criminal negligence causing death. Nonetheless, to begin the analysis, the offences must be approached separately.

[18] The relevant *Criminal Code* provisions dealing with criminal negligence are:

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.

(2) For the purposes of this section, duty means a *duty* imposed by law.

...

220 Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

[19] The *actus reus* of criminal negligence causing death requires that the accused undertook an act — or omitted to do anything that it was his or her legal duty to do — and that the act or omission caused someone’s death.

[20] The fault element is that the accused’s act or omission “shows wanton or reckless disregard for the lives or safety of other persons”. Neither “wanton” nor “reckless” is defined in the *Criminal Code*, but in *R. v. J.F.*, [2008] 3 S.C.R. 215, this Court confirmed that the offence of criminal negligence causing death imposes a modified objective standard of fault — the objective “reasonable person” standard (paras. 7-9; see also *R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1429-31; *R. v. Morrissey*, [2000] 2 S.C.R. 90, at para. 19; *R. v. Beatty*, [2008] 1 S.C.R. 49, at para. 7).

[21] As with other negligence-based criminal offences, the fault element of criminal negligence causing death is assessed by measuring the degree to which the accused’s conduct departed from that of a reasonable person in the circumstances.³ For some negligence-based offences, such as dangerous driving, a “marked” departure satisfies the fault element (*J.F.*, at para. 10; see also: *Beatty*, at para. 33; *R. v. Roy*, [2012] 2 S.C.R. 60, at para. 30; *R. v. L. (J.)* (2006), 204 C.C.C. (3d) 324 (Ont. C.A.), at para. 15; *R. v. Al-Kassem*, 2015 ONCA 320, 78 M.V.R. (6th) 183, at para. 6). In the context of criminal negligence causing death, however, the requisite degree of departure has been described as an elevated one — marked *and* substantial (*J.F.*, at

³ In *J.F.*, this Court held that the determination of whether the accused’s conduct departed to the requisite degree is properly viewed as an assessment of fault, not *actus reus* (see Hamish Stewart, “*F.(J.)*: The Continued Evolution of the Law of Penal Negligence” (2008), 60 C.R. (6th) 243, at p. 246).

para. 9, applying *Tutton*, at pp. 1430-31, and *R. v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.).

[22] These standards have much in common. They both ask whether the accused's actions created a risk to others, and whether "a reasonable person would have foreseen the risk and taken steps to avoid it if possible" (see *Roy*, at para. 36; *Stewart*, at p. 248). The distinction between them has been described as a matter of degree (see *R. v. Fontaine*, 2017 QCCA 1730, 41 C.R. (7th) 330, at para. 27; *R. v. Blostein*, 2014 MBCA 39, 306 Man. R. (2d) 15, at para. 14). As Healy J.A. explained in *Fontaine*:

These differences of degree cannot be measured by a ruler, a thermometer or any other instrument of calibrated scale. The words "marked and substantial" departure are adjectives used to paraphrase or interpret "wanton or reckless disregard" in section 219 of the Code but they do not, and cannot, indicate any objective and fixed order of magnitude that would have prescriptive value from one case to another. As with the assessment of conduct in cases of criminal negligence, the assessment of fault by the trier of fact is entirely contextual. [para. 27]

[23] In *J.F.*, Fish J. did not fully explain how to distinguish between a "marked" and a "marked and substantial" departure, as the case did not "turn on the nature or extent of the difference between the two standards" (paras. 10-11). In this appeal, as well, the differences in etymology are not dispositive and need not be resolved. In any event, the parties argued on the basis that the proper threshold for criminal negligence causing death is a "marked and substantial" departure, and that is the basis on which these reasons approach the issue. A conviction for criminal

negligence causing death therefore requires the Crown to prove that the accused undertook an act, or omitted to do anything that it was her legal duty to do, and that the act or omission caused the death of another person (the *actus reus*). Based on *J.F.*, the Crown must also establish that the accused's conduct constituted a marked and substantial departure from the conduct of a reasonable person in the accused's circumstances (the fault element).

[24] Turning to unlawful act manslaughter, the following *Criminal Code* provisions apply:

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;

(b) by criminal negligence;

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(d) by wilfully frightening that human being, in the case of a child or sick person.

...

234 Culpable homicide that is not murder or infanticide is manslaughter.

[25] The *actus reus* of unlawful act manslaughter under s. 222(5)(a) requires the Crown to prove that the accused committed an unlawful act and that the unlawful act caused death (*R. v. Creighton*, [1993] 3 S.C.R. 3, at pp. 42-43; *R. v. DeSousa*, [1992] 2 S.C.R. 944, at pp. 959 and 961-62). The underlying unlawful act is described as the “predicate” offence (*DeSousa*, at p. 956; *Creighton*, at p. 42). The predicate offence in Ms. Javanmardi’s case is administering the intravenous injection contrary to s. 31 of Quebec’s *Medical Act*, a strict liability offence.

[26] There has been some uncertainty around whether the Crown must prove that the predicate offence was “objectively dangerous” (see Larry C. Wilson, “Too Many Manslaughters” (2007), 52 *Crim. L.Q.* 433, at p. 459 citing Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (1994), at pp. 4-15, 4-16 and 4-20; Stanley Yeo, “The Fault Elements for Involuntary Manslaughter: Some Lessons From Downunder” (2000), 43 *Crim. L.Q.* 291, at p. 293). In my view, the “objective dangerousness” requirement adds nothing to the analysis that is not captured within the fault element of unlawful act manslaughter — objective foreseeability of the risk of bodily harm that is neither trivial nor transitory (*Creighton*, at pp. 44-45). An unlawful act, accompanied by objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, is an objectively dangerous act.

[27] Support for this position is found in *DeSousa*, which has been cited as the definitive statement of the fault element of unlawful act manslaughter (*Creighton*, at

pp. 44-45). In *DeSousa*, Sopinka J. considered the meaning of “unlawful act” for the purposes of the offence of unlawfully causing bodily harm, concluding that the unlawful act must be objectively dangerous in the sense that there is objective foreseeability of bodily harm:

English authority has consistently held that the underlying unlawful act required by its manslaughter offence requires proof that the unlawful act was “likely to injure another person” or in other words put the bodily integrity of others at risk (see also *R. v. Hall* (1961), 45 Cr. App. R. 366 (C.C.A.); *R. v. Church* (1965), 49 Cr. App. R. 206 (C.C.A.); *Director of Public Prosecutions v. Newbury* (1976), 62 Cr. App. R. 291 (H.L.), and *Director of Public Prosecutions v. Daley* (1978), 69 Cr. App. R. 39 (P.C.)). This position has also been adopted by most Canadian courts. [p. 959]

[28] Subsequent cases and academic writing confirm that there is no independent *actus reus* requirement of objective dangerousness. As Patrick Healy observed, this Court in *Creighton* agreed that the element of dangerousness connotes an element of fault (“The *Creighton* Quartet: Enigma Variations in a Lower Key” (1993), 23 C.R. (4th) 265, at pp. 271-73). Others too have suggested that “dangerousness can be seen as entirely subsumed within the concept of foreseeability of harm, and should be discarded as unnecessarily complicated” (Grant et al., at pp. 4-15 and 4-16; see also *R. v. Plein*, 2018 ONCA 748, 50 C.R. (7th) 41, at para. 30; *R. v. Kahnpace*, 2010 BCCA 227, 76 C.R. (6th) 38, at para. 28; *R. v. L.M.*, 2018 NWTTC 6, at para. 31 (CanLII); *R. v. P.S.*, 2018 ONCJ 274, at paras. 205-6 (CanLII)).

[29] There is little benefit, in my view, to inviting judges or juries to first consider the objective “dangerousness” of the accused’s actions in a vacuum, and

then duplicate that exercise with the benefit of context when they reach the fault element of the offence. Model jury instructions already avoid this repetition, which introduces unnecessary complexity into the offence of unlawful act manslaughter, increasing the risk of confusion and legal error (the Hon. Justice David Watt, *Watt's Manual of Criminal Jury Instructions* (2nd ed. 2015), at p. 739; Gerry A. Ferguson and the Hon. Justice Michael R. Dambrot, *CRIMJI: Canadian Criminal Jury Instructions* (4th ed. (loose-leaf)), vol. 2, at p. 6.39-6; National Judicial Institute, Model Jury Instructions (online, at D.6)).

[30] As a result, the *actus reus* of unlawful act manslaughter is satisfied by proof beyond a reasonable doubt that the accused committed an unlawful act that caused death. There is no independent requirement of objective dangerousness.

[31] The fault element of unlawful act manslaughter is, as noted, objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, coupled with the fault element for the predicate offence (*Creighton*, at pp. 42-43, *DeSousa*, at pp. 961-62). I agree with the Court of Appeal that where the predicate offence is one of strict liability, as 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 (see also *Grant et al.*, at pp. 4-14 and 4-15; Larry C. Wilson, “*Beatty, J.F., and the Law of Manslaughter*” (2010), 47 *Alta L. Rev.* 651, at pp. 663-64; Kent Roach, *Criminal Law* (7th ed. 2018), at p. 466; *R. v. Curragh Inc.* (1993), 125 N.S.R. (2d) 185 (Prov. Ct.); *R. c. Fournier*, 2016 QCCS 5456, at paras. 62-70 (CanLII); and

L.M., at paras. 44-49). This approach aligns with *Creighton*, where McLachlin J. clarified that predicate offences involving carelessness or negligence must be read as requiring a marked departure from the standard of the reasonable person (p. 59).

[32] Both charges against Ms. Javanmardi, therefore, required her conduct to be measured against the standard of a reasonable person in her circumstances — as part of the fault element of both criminal negligence and the predicate offence for unlawful act manslaughter.

[33] This leads me to the Court of Appeal’s reasons for overturning Ms. Javanmardi’s acquittals.

[34] The Court of Appeal held that in acquitting Ms. Javanmardi of both charges, Villemure J. misapplied the “reasonable person” standard. According to the Court of Appeal, Villemure J. erred by referring to Ms. Javanmardi’s training and experience in intravenous injections when deciding whether her conduct constituted a marked departure from that of a reasonable person. In the Court of Appeal’s view, evidence of Ms. Javanmardi’s academic training was not relevant to the nature and circumstances of the activity.

[35] With respect, I see no error in how Villemure J. assessed the reasonableness of Ms. Javanmardi’s conduct.

[36] This Court most comprehensively considered how to assess and apply the reasonable person standard in *Creighton*. In that case, a woman died as a result of a cocaine injection given to her by Marc Creighton, a drug dealer. McLachlin J. clarified that the modified objective standard “is that of the reasonable person in all the circumstances of the case” (p. 41). She endorsed the “reasonable person” standard in order to maintain “a uniform standard for all persons ... regardless of their background, education or psychological disposition” (p. 60). In her view, “[w]ithout a constant minimum standard, the duty imposed by the law would be eroded and the criminal sanction trivialized” (p. 70). She concluded that Mr. Creighton’s habitual drug use was not to be considered in setting the “reasonable person” standard.

[37] McLachlin J. explained, however, that greater care may be expected of the “reasonable person” on the basis of the nature and circumstances of the activity (p. 72). Certain activities, for example, require special attention and skill. An accused undertaking such an activity may be found to have breached the reasonable person standard if he or she is not qualified to provide the special care that the activity requires, or negligently failed to exercise such care while engaged in the activity. In this way, the law maintains a “constant minimum standard” for *every* person who engages in an activity requiring special care and skill: they must be both qualified *and* exercise the special care that the activity requires.

[38] *Creighton*’s activity-sensitive approach to the modified objective standard has been applied in a variety of contexts, including in cases involving

driving, hunting and parenting (*Beatty*, at para. 40; *R. v. Gendreau*, 2015 QCCA 1910, at para. 30 (CanLII); *J.F.*, at paras. 8-9). These decisions confirm that while the standard is not determined by the accused's personal characteristics, it *is* informed by the activity. In this case, the activity is administering an intravenous injection, and the standard to be applied is that of the reasonably prudent naturopath in the circumstances.

[39] In measuring Ms. Javanmardi's conduct against this standard, Villemure J. was not only entitled, she was obliged to consider her prior training, experience and qualifications as a naturopath. Where the Crown's theory is, as it is in this case, that the accused engaged in an activity without the requisite training and knowledge, the accused's activity-specific knowledge and experience are clearly relevant to determining whether the applicable standard of care was met. An accused's training and experience may, for example, be used to rebut an allegation of being unqualified to engage in an activity. Evidence of training and experience may also be used to show how a reasonable person would have performed the activity in the circumstances.

[40] In this case, Ms. Javanmardi's professional experience and her education were relevant in determining whether she was qualified for the activity in which she was engaged and were, as a result, relevant in determining whether she met the applicable standard of care. I see no error in Villemure J.'s treatment of this evidence, which the defence adduced to rebut the allegation that Ms. Javanmardi was not

qualified to administer an intravenous injection. The Court of Appeal, with respect, erred in overturning Ms. Javanmardi's acquittals on this basis.

[41] The Court of Appeal also erred in disturbing Ms. Javanmardi's acquittals based on its conclusion that her conduct markedly departed from that of a reasonable person. This conclusion, with respect, cannot be squared with Villemure J.'s findings of fact. Based on these findings, which the Court of Appeal inexplicably replaced with its own, Villemure J. concluded that Ms. Javanmardi's conduct did not constitute a marked departure from that of a reasonable person in her circumstances. As explained above, Villemure J. found that Ms. Javanmardi was properly qualified to administer intravenous injections; aligned her practice with established professional standards in other jurisdictions; purchased nutrients from a reputable Ontario pharmacy; chose nutrients that were appropriate for Mr. Matern's condition; stored and preserved the vial used for the intravenous injection in a manner consistent with the properties of the vial and the instructions of the supplying pharmacist; and took the necessary precautions at every stage of administering the intravenous injection, including observing sufficient protocols to prevent sepsis.

[42] This Court has frequently cautioned against appellate courts transforming their opposition to a trial judge's factual findings and inferences into attributed legal errors (*R. v. George*, [2017] 1 S.C.R. 1021, at para. 17). There is no basis for overturning Villemure J.'s findings or her conclusion that the marked departure

threshold was not met. It was not open to the Court of Appeal, with respect, to reweigh the evidence or substitute its own factual findings on this critical issue.

[43] Nor was the Court of Appeal justified in interfering with the acquittal for criminal negligence causing death because Villemure J. had misstated the applicable legal standard. The Court of Appeal concluded that by applying the marked departure instead of the marked *and substantial* departure standard, Villemure J. erred. She did, but since Villemure J. found that Ms. Javanmardi's conduct did not meet the *lower* threshold of a marked departure from the reasonable person standard, she would not have found that the conduct satisfied the *higher* standard of a marked and substantial departure. The erroneous articulation of the fault element for criminal negligence causing death was therefore irrelevant to the outcome.

[44] With respect to the acquittal for unlawful act manslaughter, the Court of Appeal held that Villemure J. erred in law by failing to recognize that intravenous injections are objectively dangerous. As I have explained, objective dangerousness is no longer an independent requirement of unlawful act manslaughter — it has been subsumed in the fault element of whether there was an objectively foreseeable risk of bodily harm. All of Villemure J.'s factual findings, which were based on the evidence, amply support the conclusion that an intravenous injection, performed properly by a naturopath qualified to administer such injections, did not pose an objectively foreseeable risk of bodily harm in the circumstances. Villemure J. considered both the act being performed and the person performing it, as she was

required to do when assessing whether a risk of bodily harm is objectively foreseeable in the context of an activity requiring special care. The Court of Appeal erred in substituting its view that an intravenous injection is objectively dangerous regardless of the circumstances in which it is administered.

[45] I do, however, agree with the Court of Appeal that Villemure J. erred in her articulation of the fault element for unlawful act manslaughter by stating that it required objective foreseeability of a risk of death. The proper test is objective foreseeability of a risk of bodily harm that is neither trivial nor transitory. But this error was immaterial, because even had Villemure J. applied the proper test, she would still have acquitted Ms. Javanmardi based on her conclusion that the intravenous injection was not objectively dangerous, because a reasonable person in these circumstances would not have foreseen a risk of *harm*.

[46] I would therefore allow the appeal and restore the acquittals for both criminal negligence causing death and unlawful act manslaughter. In view of these conclusions, it is unnecessary to consider the constitutional issues.

English version of the reasons of Wagner C.J. and Rowe J. delivered by

THE CHIEF JUSTICE —

I. Introduction

[47] Is administering an injection to another person an objectively dangerous act? Does the answer to this question depend on the training or experience of the person performing the act? These are the questions raised by this appeal. Like the Court of Appeal, I would answer the first in the affirmative and the second in the negative. I would order a new trial on both charges.

[48] Ms. Javanmardi, who practised naturopathy in Quebec, administered injections to her clients without being legally authorized to do so. It is admitted that she did so knowingly and regularly for several years, thereby committing the offence of practising medicine illegally, a provincial penal offence of strict liability.

[49] In 2008, a vial in Ms. Javanmardi's clinic was, unbeknownst to her, contaminated by a bacterium. Ms. Javanmardi drew a substance from that vial to administer an injection to Roger Matern, which caused him to develop septic shock that proved to be fatal. She was charged with criminal negligence causing death and unlawful act manslaughter. Ms. Javanmardi was initially acquitted of both charges by the trial court (C.Q., No. 500-01-013474-082, April 8, 2015). The Crown then appealed to the Court of Appeal, which convicted Ms. Javanmardi of the latter charge and ordered a new trial on the former (2018 QCCA 856, 47 C.R. (7th) 296). Ms. Javanmardi is asking this Court to restore the initial acquittals.

[50] The two charges in question are based on the unlawful injection given by Ms. Javanmardi to Mr. Matern on June 12, 2008. The uncontested evidence shows that such an act is objectively dangerous because the injection of a substance across physiological barriers poses inherent risks. In addition, the contaminated vial used by Ms. Javanmardi was a “single-dose” vial and contained no preservative. In spite of this, she had previously used it for two other clients the morning of June 12, contrary to the recommended practice.

[51] The trial court nonetheless acquitted Ms. Javanmardi, stating that it had a reasonable doubt as to whether the unlawful injection was objectively dangerous and as to whether her conduct amounted to a *marked departure* from the standard of care that applied in the circumstances.

[52] With respect, by refusing to find that the unlawful injection was objectively dangerous, the trial court failed to arrive at the legal conclusion that was necessary in light of the facts as found. This was an error of law (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197), whose impact is such that it requires a new trial (*Vézeau v. The Queen*, [1977] 2 S.C.R. 277; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021). Although the court made other errors, this one was the most important because it was made earlier in the decision and therefore magnified the impact of the errors that followed it.

[53] I will begin by discussing the essential elements of the offence of manslaughter in order to expand slightly on my colleague's review of this subject. I will then consider the two main errors made by the trial court, focusing particularly on the objective dangerousness of the act in question.

II. Unlawful Act Manslaughter

[54] The offence of unlawful act manslaughter is quite particular. Because it requires proof of an underlying unlawful act, the offence has two cumulative fault elements: the *mens rea* of the underlying act and the *mens rea* specific to manslaughter. This two-tiered structure also makes the offence more complicated in nature. It is therefore important, first and foremost, to identify each of its elements with precision.

A. *Actus Reus*

[55] The *actus reus* of unlawful act manslaughter has three elements: (1) an underlying unlawful act; (2) the objective dangerousness of that act; and (3) a causal connection between the act and the death.

(1) Unlawful Act

[56] In my view, a verdict of manslaughter can validly be based on either a federal underlying offence or a provincial underlying offence. This is in fact implicit

in my colleague's reasons. As she notes, absolute liability offences are clearly excluded, whether they were enacted by Parliament or by a legislature (*R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 957).

[57] Once an unlawful act is proved, the first element of the *actus reus* (the underlying unlawful act) is therefore satisfied. The court must then consider the second element, that is, the requirement that the unlawful act be objectively dangerous. It is this element that is central to these proceedings.

(2) Objectively Dangerous Conduct

[58] In addition to being unlawful, the impugned act must be objectively dangerous; in other words, it must be an act that a reasonable person would know is likely to subject another person to a risk of bodily harm (*DeSousa*, at p. 961). My colleague is of the view that this element is superfluous in the case of manslaughter because it duplicates the fault element, that is, foreseeability of the risk of bodily harm (*R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 24).

[59] While the objectively dangerous conduct is relevant to the *actus reus* and to the fault element, it cannot be said that it is assessed from the same perspective at both stages of the analysis. The *actus reus* will be proved if the court is satisfied that the accused did something that a reasonable person would have known was likely to subject another person to a risk of harm. In considering the *actus reus*, the court is not to assess the extent to which the accused's conduct departed from this standard of

care or the accused's state of mind. Rather, the *actus reus* of penal negligence, like that of civil negligence, will be established where the court is satisfied that the impugned conduct deviated from the standard expected of a reasonably prudent person. This evidentiary threshold reflects the fact that, at this stage of the analysis, the court is considering whether the accused committed the physical element of the offence, not whether the accused had the state of mind required for a conviction.

[60] The second element of the *actus reus*, the objective dangerousness of the unlawful act, is therefore assessed without reference to the accused's personal characteristics. This does not involve the application of the modified objective test, which allows the court to consider limited contextual factors. That test is instead applied in analyzing *mens rea* and, where it is met, has the effect of exculpating an accused who has not breached the standard of care sufficiently for criminal liability to be imposed. It is important to note that the relevance of certain contextual factors that is described in *Creighton*, which I will discuss shortly, concerns the analysis of *mens rea*. The guidance provided by McLachlin J. (as she then was) on the consideration of such factors was in the context of the "debate about the degree to which personal characteristics should be reflected in the objective test for fault in offences of penal negligence" (*Creighton*, at p. 60 (emphasis added)).

(3) Causal Connection

[61] In addition to an underlying unlawful act that is objectively dangerous, one last element is required to establish the *actus reus*: a causal connection.

Ms. Javanmardi argues for a strict interpretation of this concept. In her submission, this requirement will not be met unless the death results from the unlawful nature of the impugned conduct. She therefore argues that it was not sufficient in the case at bar to connect the death to the injection. Rather, the death had to have been caused by the illegal practice of medicine. I disagree.

[62] To begin with, Ms. Javanmardi's arguments here are contradictory. At the stage where the causal connection is considered, she defines the act as being the illegal practice of medicine, but in her argument for uniform rules on the matter across provinces and territories, she focuses instead on the act of administering the injection (because, of course, the illegal practice of medicine is prohibited throughout the country). Furthermore, the emphasis she wishes to place on the connection between the unlawful nature of the act and the death is inconsistent with the detailed analytical approach used for negligence. The trial judge's finding that the injection given by Ms. Javanmardi caused the victim's death is therefore perfectly valid.

B. *Mens Rea*

[63] Unlawful act manslaughter has two cumulative fault elements: the *mens rea* of the underlying act and the fault element specific to manslaughter.

[64] With regard to the underlying act, it is important to note that a verdict of manslaughter can be based on a violation of a statute or of regulations. A number of such violations, whether under a federal or a provincial enactment, involve "strict

liability” and therefore lie midway between absolute liability offences, for which there is no fault element, and “*mens rea*” offences, for which the Crown must prove fault. Therefore, as Doyon J.A. wrote for the Quebec Court of Appeal with regard to strict liability:

[TRANSLATION] [P]roving *actus reus* (the material elements of the offence) has the effect of compelling the defendant to deny the presumed intent (or the moral aspect), either by demonstrating his reasonable diligence or by establishing the existence of an error of fact based on reasonable grounds that explains his conduct.

(*Québec (Autorité des marchés financiers) v. Patry*, 2015 QCCA 1933, 26 C.R. (7th) 166, at para. 59)

[65] Here, the Court of Appeal and the parties are agreed that, where such an offence forms the basis for a manslaughter charge, the reverse onus used in the case of strict liability offences is not appropriate. To ensure a minimum degree of moral blameworthiness, the Crown must therefore establish a negligent state of mind corresponding to a “marked departure”. The purpose is unquestionably a laudable one: to ensure that the accused had a culpable state of mind reflecting the seriousness of the crime. The fact that strict liability is a form of penal negligence explains the reliance on an objective fault element, that is, *marked departure*.

[66] I wish to be clear that, as this Court has repeatedly stated, “[s]hort of incapacity to appreciate the risk or incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant. The standard against which the conduct must be measured is always the same” (*R. v. Beatty*, 2008 SCC 5, [2008]

1 S.C.R. 49, at para. 40). Every person, regardless of his or her professional training, is required to act in accordance with the standard expected of a reasonably prudent person in the same circumstances.

[67] The fault element for manslaughter is objective foreseeability of the risk of bodily harm, regardless of how the death is caused (through an unlawful act or through criminal negligence) (*Creighton*, at p. 24). It is acknowledged that the trial judge erred in law in this regard, since she found that the fault element required foreseeability of the risk of death. She thus applied the more stringent test proposed by the dissent in *Creighton*, which has never been recognized according to the current state of the law on the matter.

[68] That error on its own might not be sufficient to warrant an order for a new trial, since it was made after the trial judge raised a doubt about the commission of the *actus reus* and can therefore be considered to have been made in *obiter*. However, as I will point out, because the analysis of the *actus reus* (dangerous act) is itself vitiated, the sum of the errors made by the judge warrants an order for a new trial.

III. First Error of Law: Objective Dangerousness of the Unlawful Act

[69] The Court of Appeal expressed the view that the trial judge's findings of fact led inevitably to the conclusion that the unlawful injection was objectively dangerous:

[TRANSLATION] The findings of fact on which this argument is based are not in dispute: (1) the respondent is not authorized by the laws of Quebec to administer nutrients intravenously to a human being, (2) the respondent administered contaminated substances to Roger Matern intravenously, (3) the contaminated substances were not filtered out by Mr. Matern's digestive system

Intravenous injections pose inherent dangers to humans, including with respect to infection caused by the sudden introduction of microbes and bacteria into the body.

This reasonably foreseeable danger of causing another person bodily harm that is neither transitory nor trivial is not unrelated to the fact that this therapeutic procedure is an act reserved by the provincial legislature to a limited group of health professionals [paras. 92-94]

[70] I am in complete agreement with these remarks, and I would add that it is also not in dispute that Ms. Javanmardi administered the injection that day by drawing, for the third time, from a single-dose vial that had already been used for two other patients, a practice that is contraindicated according to the expert evidence. Moreover, in analyzing the validity of Mr. Matern's consent, the trial judge stated that it could be inferred from the evidence that, before the injection, he and his family [TRANSLATION] "accepted the inherent risks" of the treatment proposed by Ms. Javanmardi knowing that she was not a physician in the traditional sense of the term and that she administered nutrients intravenously (para. 409). It therefore follows that there were indeed risks. All of this should have led the trial court to find that the act was objectively dangerous. The Court of Appeal's intervention was thus warranted.

[71] My colleague maintains that the requirement that the impugned act be objectively dangerous is superfluous and should not be considered when assessing the

actus reus. In my view, a two-stage analysis is helpful. If the prosecution cannot establish beyond a reasonable doubt that the act committed — considered without regard to the context — was objectively dangerous, then the court does not have to conduct the more thorough analysis required for *mens rea*, which could make it necessary for the accused to advance and prove a defence in order to exculpate himself or herself. However, the analytical framework proposed by my colleague also leads to the conclusion that the trial judge made an error earlier in her decision that magnified the impact of the errors that followed it. Were the *actus reus* of the offence to require only the commission of an unlawful act causing death, the physical element of the offence would clearly be established in the instant case. It is not in dispute that Ms. Javanmardi was not legally authorized to administer an injection to Mr. Matern and that that unlawful act caused his death. The trial judge therefore erred in finding that the *actus reus* had not been established in this case.

IV. Second Error of Law: Consideration of Personal Characteristics

[72] My colleague maintains that the trial judge, in her analysis, relied on Ms. Javanmardi's experience and training to find that a reasonable naturopath in the same circumstances would not have foreseen the risk of bodily harm and that her conduct was therefore not a *marked departure*. My colleague adds that, according to this Court's precedents, the standard of care against which an accused's conduct must be measured may vary depending on the activity performed.

[73] On this point, I agree. It is in fact clear from the reasons of McLachlin J. in *Creighton* that an ordinary day-to-day activity does not, *a priori*, require the same care as brain surgery.

[74] In *Creighton*, the majority stated that a person who engages in an activity that requires special care to be exercised may fail to meet the standard of care either (i) because the person is not qualified to exercise the required care, or (ii) because the person fails to exercise that care (pp. 72-73). At this stage in the analysis, the accused's training may become relevant, depending on what charges have been laid. Where the Crown argues that a person breached the standard of care by engaging in an activity without being qualified to exercise the required care, it is then for the court to consider any evidence adduced to show that the person was in fact qualified. However, the person's experience is not relevant in determining what is required by the standard of care or what special care is required by the activity in question. As McLachlin J. explained, "[a] brain surgeon performing surgery in a grossly negligent way might violate the standard in this second way" (*Creighton*, at p. 73).

[75] The guidance provided by the majority in *Creighton* concerning the ways in which a person may fail to meet an elevated standard of care — either by not being qualified to exercise the care required by the specialized activity or by failing to exercise that care — is relevant in the instant case. According to the evidence, the activity in issue poses inherent risks to health and therefore logically entails an elevated standard of care, including the holding of a permit and the use of multi-dose

vials where such a measure is required. Consideration of Ms. Javanmardi's qualifications at the *mens rea* stage was therefore not an error as such. However, I am of the view that the trial judge erred in confining herself to the argument that because Ms. Javanmardi had the training required to administer injections and was accustomed to doing so without any complications occurring, a reasonable person in her position could not have anticipated the risk of bodily harm. In making that finding, the trial judge improperly combined the analyses of the two ways in which a person may fail to meet an elevated standard of care. I will explain.

[76] A review of Ms. Javanmardi's qualifications was necessary because the prosecution alleged that she had failed to meet the standard of care by engaging in a specialized activity without being qualified to do so. This did not obviate the need to analyze the second possibility for breaching the standard of care, that is, failure to exercise the required care. Although it was established that Ms. Javanmardi was qualified to exercise the care required to administer an intravenous injection, that training could not affect the level of care she had to meet.

[77] The act performed in the instant case was objectively dangerous, and Ms. Javanmardi's experience does not alter this. The dangerousness of the act would have been established even if it had been performed by a health professional who was authorized to do so: the difference lies rather in Ms. Javanmardi's qualifications to perform the act in question and in the care exercised in performing it. Injecting a

substance across physiological barriers is an “inherently dangerous activity”, like driving (*Beatty*, at para. 31). On this point, the trial judge erred.

[78] Because it was of the view that conduct amounting to a *marked departure* relative to that of a reasonable person had been proved, the Court of Appeal convicted Ms. Javanmardi of the offence of manslaughter. It found only that there was a *marked departure*, because it did not think that the evidence led inevitably to a finding of *marked and substantial* departure. It therefore ordered a new trial on the offence of criminal negligence causing death.

[79] By making Ms. Javanmardi’s training the main point of her analysis, the trial judge failed to consider certain undisputed facts that might establish a marked departure regardless of the experience of the person performing the act in question. I note, for example, the conduct set out below, on which the Court of Appeal relied in finding a marked departure. I agree with the Court of Appeal that, in the same circumstances, a reasonable person would not have:

[TRANSLATION]

- injected a product intravenously into a client without the required medical prescription, but would instead have administered authorized substances orally, in accordance with the provisions of Quebec’s *Medical Act*;
- drawn a product from a single-dose vial three times and then injected it into three different clients;
- violated his or her normal treatment protocol, rather than deviating from it at the insistence of a patient being seen for the first time;
- left it to an untrained member of his or her administrative staff to monitor the client during such a treatment;

- recommended to a patient who was having alarming reactions within minutes of starting treatment (sudden hot flashes followed by shivering, confusion, erratic behaviour, vomiting and generalized weakness) that the patient ingest tea, honey or sweetened juice or be given a massage;
- failed, when faced with symptoms unknown to the person, to refer the client to a physician's care;
- failed, when advised a few hours later that the patient's condition was worsening, to recommend that the patient be taken to a hospital. [para. 120]

It should also be noted that the vial used had no date of manufacture or expiration date on it, that the label showed a concentration that was not the actual concentration and that Ms. Javanmardi did not wear a smock or other proper clothing when she administered the injection (C.A., at para. 87).

[80] Entering a conviction on an appeal from an acquittal is an exceptional measure, and the error of law at issue here is also a rare occurrence. While it is a palpable error as regards the dangerous act, it is not as palpable as regards the *marked departure* standard. I am of the view that Ms. Javanmardi's conduct constitutes a marked departure, particularly because she used a single-dose vial three times, although I acknowledge that the trial judge reached the opposite conclusion and that she had evidence tending to support that conclusion, namely testimony to the effect that public institutions sometimes use single-dose vials more than once despite official recommendations to the contrary (A.F., at para. 17).

[81] Moreover, presumably because she considered the post-offence conduct irrelevant given her key finding of fact on the causal connection, the trial judge failed

to consider whether Ms. Javanmardi was qualified to deal with any complications, a point that had been vigorously argued before her. As a result, the Court of Appeal could not assume that Ms. Javanmardi was unqualified in this respect, especially since the trial judge described Ms. Javanmardi's entire testimony — in which she defended her post-injection qualifications — as credible (C.Q., at paras. 425-29). In other words, while a conviction for manslaughter was undoubtedly reasonable in this case, it was not so inevitable as to justify the measure ordered by the Court of Appeal.

[82] The fact remains that the trial judge erred in failing to find that the unlawful injection given by Ms. Javanmardi was objectively dangerous. She also applied the wrong standard of proof concerning the *mens rea* of manslaughter, since she required objective foreseeability of the risk of death rather than of the risk of bodily harm. Finally, the judge erred in considering Ms. Javanmardi's professional training when assessing the objective nature of the risk posed by the injection. Those errors, whose effect is to invalidate most of the legal conclusions reached on the essential elements of the offence of manslaughter, had a sufficient impact. In light of their number and scope, I am of the view that the analysis must be carried out again for both charges.

V. Disposition

[83] If Ms. Javanmardi were convicted of both charges, the sentencing judge would, of course, stay one of the charges (*Kienapple v. The Queen*, [1975] 1 S.C.R. 729). But this does not mean that one of them must be dropped at this stage,

especially since criminal negligence causing death, as the more serious offence, is usually the charge that will stand (*R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, at para. 13). The order for a new trial therefore applies to both.

[84] Finally, I will not deal with the constitutional questions raised in the alternative by Ms. Javanmardi, which were not considered at trial. I would allow the appeal in part solely to set aside the conviction for manslaughter entered by the Court of Appeal and to order a new trial on this charge.

Appeal allowed, WAGNER C.J. and ROWE J. dissenting.

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