

IN THE YOUTH COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and –

L.M.

REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT GORIN

Heard at: Yellowknife, Northwest Territories

Date of Application: March 20, 2018

Date of Decision: March 29, 2018

Counsel for the Crown: Annie Piche and Brendan Green

Counsel for the Accused: Peter Harte and Alanhea Vogt

[Sections 236(b) and 272(1)(c) of the Criminal Code]

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1. Introduction

[1] L.M., a young person, is on trial for manslaughter. He is charged with unlawfully killing E.H.B., contrary to section 236(b) of the *Criminal Code* in the fall of 2015, when he was 13 years of age.

[2] At the conclusion of the Crown's case against him, prior to electing whether or not to call evidence in his defence, he applied to have the charge in question dismissed. He submitted that there was insufficient evidence before the court on which a reasonable and properly instructed jury could convict him. L. also submitted that E.'s voluntary choice to consume alcohol amounted to an intervening event that relieves him of criminal responsibility for E.'s death. He submits that the charge should be dismissed for that reason as well.

2. Analysis

A. The General Facts

[3] The evidence that I have heard from D.S., a youth who was present throughout the events giving rise to the within charge, was that on the evening in question L. supplied alcohol to the deceased, E.H.B., a 12 year old, while the three

were walking around Fort Liard, a community located in the Northwest Territories. He continued to do so after the three had sat down by the riverbank in Fort Liard at a location where they would not be seen or discovered by adults.

[4] According to D.'s testimony, E. lost consciousness while at the riverbank and never regained it. D. then suggested that he and L. get help for E. However, rather than doing so, L. took the opportunity to have full intercourse with the unconscious E. The forensic evidence establishes that E.'s vagina was torn in the process of an object such as a penis being inserted into it. After L. finished, he encouraged D. to also have intercourse with E. D. testified that he then simulated sexual intercourse with her, but did not actually penetrate her.

[5] Afterward, instead of getting help for E., who was still unconscious, L. and D. left her in the same location where the sexual assaults had just occurred, close to the river bank in Fort Liard where she would not be seen by passersby. The two returned to L.'s home.

[6] When D. went to check up on E. the following morning, he found her in the same location where he and L. had left her. She was dead.

[7] The expert witness, who testified during the Crown's case, Dr. Brooks-Lim, stated that E. died from alcohol poisoning. Her blood alcohol level was around 400 milligrams percent at the time of death.

[8] I should add that the evidence that I have referred to was considerably more detailed than what I have set out in this general outline. A number of police witnesses also testified for the Crown about the evidence that was observed and collected at and around the scene of the crime as well as the layout of the crime scene. I will have more to say about the details of the evidence that I have referred to later in this judgment when dealing with specific issues.

B. The Charge and the Crown's Alternate Theories of Criminal Liability

[9] In particularizing the charge against L., the Crown alleges that L. "unlawfully killed" E., thereby committing manslaughter. The Crown has not further particularized the count by specifically alleging unlawful act manslaughter or

manslaughter through criminal negligence. It relies, as it is entitled to, on the general wording of the charge to cover both possibilities.

[10] At the hearing of the accused's no evidence motion, the Crown set out two principal ways in which it submits the *Sheppard* test has been satisfied. Firstly, the Crown argues "L.'s conduct of providing E. with alcohol to the point of passing out, and then sexually assaulting and leaving her unattended constituted a marked and substantial departure from the norm and thus criminal negligence". Secondly, the Crown submits that L. committed unlawful act manslaughter by providing the 12 year old E. the liquor that killed her, contrary to section 77(1) of the *Liquor Act* of the Northwest Territories, a strict liability offence.

[11] In order for me to find that there is sufficient evidence upon which a properly instructed and reasonable trier of fact could convict L., it is necessary only that the Sheppard test be satisfied on one of the alternative routes advanced by the Crown.

C. The Sheppard Test as Applied to the Current Charge

[12] The test which applies to no evidence motions is set out in the case of *United States of America v. Sheppard*, [1977] 2 SCR 1067, as follows: whether or not there is some evidence upon which a reasonable jury properly instructed could return a verdict of guilty. In order for L. to be successful in this application, there would have to be no evidence of an essential element of either criminally negligent manslaughter or unlawful act manslaughter.¹ In other words there must be no evidence upon which a reasonable jury could find that one or more of those essential elements has been proven beyond a reasonable doubt.

[13] As will be seen, unlawful act manslaughter, which relies on a provincial/territorial offence of strict liability, contains an element of negligence, as, of course, does criminally negligent manslaughter. Both routes to manslaughter require a departure from the standard of a reasonable person albeit in different degrees.

¹ *R. v. Rowbotham; R. v. Roblin*, [1994] 2 SCR 463.

[14] The case of *R. v. Charemski*, [1998] 1 SCR 679 did not deal with criminal negligence. However, McLachlin, J., cited with approval the Sheppard test as it applies to negligence as set out by the House of Lords in the case of *Metropolitan Railway Company v. Jackson* (1877), 3 App. Cas. 193 (H.L.). At paragraph 24 of *Charemski* she stated:

24 This limited judicial weighing at the stage of a motion for a directed acquittal does not infringe the jury's role of determining as a matter of fact whether that guilt has been established. Lord Cairns put it well in *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 (H.L.), at p. 197:

The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. [Emphasis in original.]

Lord Cairns' statement of the law was adopted by this Court in *R. v. Morabito*, [1949] S.C.R. 172, at p. 174, as governing both criminal and civil cases.

[15] Although McLachlin J. was dissenting, she did not differ from the majority on the test to be applied when a trial judge is deciding a no evidence motion. Rather she was disagreeing primarily on the correct outcome of the test when applied to the facts of *Charemski*.

[16] Although *Metropolitan Railway* was a civil case, the same rational applies to criminal cases. In *Morabito*, (supra), a case of the Supreme Court where at trial the judge had also withdrawn a charge from the jury, Kellock J., after referring to the same paragraph of *Metropolitan Railway*, stated:

This statement of the law is, of course, not limited to civil actions. It is equally applicable to a criminal as to a civil proceeding; *Regina v. Lloyd* [(1890) 19 O.R. 352 at 357.]; *The King v. Hopper* [(1915) 2 K.B. 431.].

[17] As well, foreseeability of nontrivial bodily harm is also an essential element of both criminally negligent manslaughter and unlawful act manslaughter. In the case of *R. v. Maybin*, [2012] 2 S.C.R. 30, the trial judge had found that the violent actions of a third party could not have been foreseen by the accused and therefore entered acquittals. The Supreme Court ultimately disagreed stating:

61 . . . *based upon the trial judge's findings of fact, it was open to him to conclude that the general nature of the intervening act and the accompanying risk of harm were reasonably foreseeable* . . . [Emphasis mine]

[18] Based on the foregoing, it seems clear that it is for the trier of fact to determine whether, based on certain given facts, a risk of bodily harm is reasonably foreseeable.

D. Unlawful Act Manslaughter

[19] The seminal case setting out the requirements of unlawful act manslaughter is *R.v. Creighton* (1993) 3 SCR 3. In that case, the majority judgment stated unlawful act manslaughter contains three general essential elements:

- 1) *Actus Reus*;
- 2) *Mens Rea*; and
- 3) Capacity

[20] The majority judgment in *Creighton* provides that those general elements in turn have specific requirements, some of which have been further developed by subsequent jurisprudence.

- 1) The *actus reus* component of unlawful act manslaughter, requires:

- a) that the accused commit an act which is unlawful pursuant to a federal or provincial/territorial statute and is not an absolute liability offence;²
- b) which is objectively dangerous;³ and
- c) which causes the death of the deceased.

2) The *mens rea* component of unlawful act manslaughter requires that:

- a) the *mens rea* of the predicate offence is made out; and
- b) a reasonable person would have foreseen that a risk of bodily harm that is more than transitory or trifling would result from the unlawful act in question.

3) If both *actus reus* and *mens rea* are found to have been proved beyond a reasonable doubt, the court must then determine whether or not there is evidence concerning the accused's personal characteristics that gives rise to a reasonable doubt that he had the capacity of appreciating the risk flowing from the unlawful act he committed.

[21] The foregoing are the requirements that must be established at trial. In determining whether the Sheppard test is made out on unlawful act manslaughter, I must find that there is some evidence upon which a reasonable trier of fact could find that each of the necessary elements of that offence have been proven beyond a reasonable doubt.

E. Is There Sufficient Evidence on the *Actus Reus* of Unlawful Act Manslaughter?

i. *S. 77 of the Liquor Act, SNWT 2007, c.15 (as amended)*

[22] I find that there is some evidence that would adequately support the conclusion that the offence of unlawfully supplying liquor to a minor contrary to s. 77 of the *Liquor Act* of the Northwest Territories is made out in the present case.

² *DeSousa*, (supra) at paras. 19,39, 22 & 39; *R. v. Gosset*, [1993] 3 SCR 76 at para. 45

³ *R. v. Haas*, 2016 MBCA 42, at para. 32.

[23] Section 77 of the *Liquor Act* states:

77. (1) Except as provided in this Act or the regulations, no person shall

- (a) sell liquor to a minor; or
- (b) supply liquor to a minor.

(2) This section does not apply to supplying liquor to a minor

- (a) in a residence, if the person supplying the liquor is the minor's parent;
- (b) for sacramental purposes; or
- (c) for medicinal purposes, if the liquor is prescribed or administered by a medical practitioner or nurse practitioner.

[24] L.'s counsel initially suggested that the offence created by the foregoing section is one of absolute liability and is therefore insufficient to make out the requirement of an unlawful act. He now resiles from that position. I find his concession to be appropriate since regulatory offences are presumed to be strict liability offences unless there is clear evidence of legislative intent to create an absolute liability offence.⁴ As pointed out by the Crown, the wording of s. 77 does not suggest absolute liability. Moreover, the legislature is presumed to have intended to adopt Charter complaint legislation.⁵ Absolute, liability offences are only Charter compliant if, among other things, there is no possibility of imprisonment as punishment.⁶ Pursuant to s. 127(a) of the Act, supplying liquor to a minor is, in the case of an adult, punishable by a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 30 days, or to both. I find that s. 77 of the *Liquor Act* clearly creates a strict liability and not an absolute liability offence.

[25] As far as the elements of the *actus reus* of the predicate offence are concerned, there is some evidence that L. was controlling the bottle of alcohol throughout the evening in question. There is evidence that he was the one who initially obtained it before he and D. began on the walk where they were joined by E. There is evidence that he was located between E. and D. when they were

⁴ *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299

⁵ *R. v. Sharpe*, [2001] 1 SCR 45, para. 33

⁶ *RE B.C. Motor Vehicle Act*, [1985] 2 SCR 486

sitting by the river bank before E. lost consciousness and that when either E. or D. drank from the bottle, the bottle would go back to L. who would then pass it on or drink from it. There is evidence that E. was 12 years old at the time, well below the legal age for drinking. In determining whether the underlying offence is made out, the fact that L. himself was underage at the time is irrelevant.

[26] There is sufficient evidence upon which a reasonable jury properly instructed could find that L. committed the offence of unlawfully supplying liquor to a minor contrary to s. 77 of the *Liquor Act*.

ii. Objective Dangerousness

[27] The British Columbia Supreme Court, in *R. v. Tremblay*, [2013] BCJ No. 959 (BCSC), when considering similar legislation in a case where the charges included criminal negligence and failing to provide the necessities of life, stated:

82 The *Liquor Control and Licensing Act* prohibits a person from possessing liquor for the purpose of supplying it to a minor and, of course, from actually supplying liquor to a minor. This reflects society's concern that minors must be protected from the direct and indirect harmful consequences of the consumption of liquor.

. . .

86 . . . Society regards children to be vulnerable and thus in need of care and attention. The consumption of illicit drugs and alcohol by teen-aged children is unquestionably a high-risk activity which the statutory prohibitions seek to prevent. These prohibitions indicate the importance of the societal objective.

[28] As noted by the Crown, the evidence of Dr. Brooks-Lim referred to the particular susceptibility of children to the effects of alcohol.

[29] The exemptions that are referred to in s 77(2) of the *Liquor Act* all refer to situations where the risk associated with minors consuming alcohol is substantially attenuated by the supervision or oversight of responsible adults such as parents, religious officials, or medical professionals.

[30] In deciding the question of whether L.'s actions were objectively dangerous, the question I have to ask myself is whether a reasonable person in the same circumstances would have realized that he or she was exposing E. to a

risk of nontrivial bodily harm. The bodily harm that must be foreseeable is any hurt or injury that interferes with a person's health or comfort and is more than just brief or minor. The Crown does not have to prove objective foreseeability of death.⁷

[31] The test for determining the objective dangerousness component of the *actus reus* of unlawful act manslaughter is, in fact, the same as the 2nd component of the *mens rea* which requires that a reasonable person would have foreseen that a risk of bodily harm that is more than transitory or trifling would result from the unlawful act in question.

[32] L.'s counsel argues that in spite of the majority judgment in *Creighton*, the standard of a reasonable adult should not be applied to a thirteen year old. He argues that the standard should be that of a reasonable person the same age as L. He further argues that it should not only be a reasonable person of L.'s age, but also a person with the same general personal characteristics, such as intelligence and experience, as L. He has made these submissions when referring to the objective foreseeability of bodily harm. However, it would seem that these same submissions would apply when determining whether a marked departure from the standard of a reasonable person is made out.

[33] Since I really have little to no evidence concerning L.'s intelligence and experience, it would stand to reason that even if I were to accept Mr. Harte's submissions on this point, I would need to apply the test of a reasonable 13 year old. However, I find that I do not need to determine whether the standard is that of a reasonable adult or reasonable 13 year old, since I find that L.'s actions as described in the evidence I have before me could be found to constitute a marked departure from both standards.

[34] In this case L.'s actions in committing the predicate offence, as described by D., were very dangerous. He supplied a large amount of alcohol to the 12 year old E. in what appears to have been a short amount of time. He continued to supply her with alcohol after she was showing clear and obvious signs of being heavily intoxicated such as lack of balance, motor impairment, reduced coordination,

⁷ *Creighton*, *supra* at p. 373.

behavioural changes and altered speech. There is sufficient evidence from which a reasonable trier of fact could conclude that not only was the predicate offence committed, it was objectively dangerous on either standard.

[35] I agree with the Crown that one could find that it was reasonably foreseeable that a 12 year old girl would pass out given the large amount of alcohol L. supplied to her and the short time frame in which she consumed it. As stated in the case of *R. v. A.(J.)*, 2010 ONCA 226, rendering someone unconscious and unrousable for a significant period of time can meet the definition of bodily harm that is more than trifling.⁸ It would be open to a reasonable jury to conclude that whatever the standard, it was foreseeable, given E.'s alcohol consumption, that there was a risk that she would be rendered unconscious and unrousable for an extended period of time.

[36] On D.'s evidence L. told him, "It's your only chance.", immediately after E. had passed out and L. had suggested getting her help and immediately before L. raped her. These words and actions could be considered as evidence showing that L. was aware that E. would not be rousable following her loss of consciousness due to alcohol consumption. It would therefore be reasonable to find that he would have foreseen that same possibility when he was providing her alcohol after she was displaying indicia of heavy intoxication.

[37] Similarly, D. testified after the sexual assault, L. put E. on her side to prevent her from choking on her vomit. This could be considered as evidence that he was in fact aware of the danger of her passing out and choking on her vomit. This knowledge can also be considered as evidence that some of the real dangers of excessive alcohol consumption that can cause bodily harm including death were known to L. and that they were generally foreseeable while he was supplying alcohol to E.

[38] I conclude that the fact that someone can lose consciousness and be unrousable for an extended period of time is something that a reasonable trier of fact could find as being foreseeable by a reasonable 13-year-old. So is the possibility of a passed out intoxicated person choking on their own vomit. I find

⁸ See also *A.N. v. R.*, 2015 QCCA 1109; and *R. v. McKenna*, 2017 ABPC 167.

that the fact that children are more susceptible to the effects of alcohol consumption is also something that could legitimately be found to be foreseeable by a reasonable 13-year-old.

[39] There are also other dangers of bodily harm that a properly instructed trier of fact might find reasonably foreseeable in L.'s actions in supplying alcohol to an already intoxicated 12-year-old. It was reasonably foreseeable on either standard that she might lose balance and seriously injure herself. It matters not that this route to bodily harm is different from that which was actually experienced by E. Some form of foreseeable risk of bodily harm that is beyond transitory or trifling is all that is required.

[40] Furthermore, given the prevalence of sexual assaults on unconscious victims that exists in the Northwest Territories, a reasonable juror might conclude that as a result of E.'s alcohol consumption, there was a foreseeable risk that she would be rendered unconscious and then assaulted in some manner with nontrivial bodily harm of some form resulting. Once again, it does not matter that that form of bodily harm was not directly related to her ultimate death from alcohol poisoning. So long as some form of nontrivial bodily harm was objectively foreseeable that is enough to constitute objective foreseeability.

[41] As will later be seen when examining the decision of the Supreme Court in *Maybin*, [2012] 2 SCR 30, and the facts of that case, both of which I will review later on in this judgment, the route to foreseeable bodily harm need not be direct.

[42] It may be true there was evidence that L., who at 13 years of age was also consuming alcohol, faced a level of danger that was somewhat similar to that of E. However, that evidence cannot alter the objective dangerousness of his actions.

[43] I find there is some evidence upon which a reasonable and properly instructed trier of fact could find that the *actus reus* of unlawful act manslaughter has been proven beyond a reasonable doubt.

F. Is There Sufficient Evidence on the *Mens Rea* of Unlawful Act
Manslaughter?

i The Mens Rea Required for Providing Liquor to a Minor contrary to S.77 of the Liquor Act as a Predicate Offence to Unlawful Act Manslaughter – A Marked Departure from the Standard of a Reasonable Person.

[44] As noted, unlawful act manslaughter requires that the *mens rea* of the predicate offence be proven beyond a reasonable doubt. In this case the predicate offence relied upon by the Crown is a strict liability offence.

[45] Strict liability offences do not require proof of *mens rea*. Once the *actus reus* has been proved a *prima facie* case is established and in order for the accused to be acquitted, the evidence must establish that the he was duly diligent at the time he committed the *actus reus*. If however, one takes such an approach, where a strict liability offence is the predicate offence to unlawful act manslaughter, one effectively reduces the requirements that the Crown would be required to establish if a criminal offence were the predicate offence.

[46] In the case of criminal offences where carelessness is an element of the offence, the offence must be read as requiring a *marked departure from the standard of a reasonable person* as the objective *mens rea* of the offence, in order for it to be Charter compliant.⁹ Clearly the same can be said for cases of unlawful act manslaughter, where such a criminal offence is relied upon as the predicate offence.¹⁰ It would seem reasonable that the same requirement should apply where the predicate offence for unlawful act manslaughter is a provincial offence of strict liability. As stated by Curran J., in *R. v. Curragh* (1994), 25 CR (4th) 377 (NSPC):¹¹

12 On this issue I would disagree with the Crown even on *Occupational Health and Safety Act* charges, but certainly when the charge is manslaughter. The Crown has acknowledged that the manslaughter counts are charges of penal negligence. To say the accused would have the onus of proving the absence of negligence on the balance of probability is inappropriate and wrong. It might be argued that the words "without

⁹ *R. v. Hundal*, [1993] 1 SCR 867.

¹⁰ *Creighton*, *supra*.

¹¹ See also: *Fournier c. R.*, [2016] JQ no 15652

taking systematic steps to prevent explosions of coal dust" at least impliedly adopt the "reasonable precautions" provision of s. 9(1) (f). In any event, the Supreme Court of Canada in *Creighton*, supra, has made it clear that, in all unlawful act manslaughter charges based on underlying offences of penal negligence, failure by a marked degree to take the care a reasonable person would take in the circumstances is an element of the offence. Like all other elements, it is something that must be proved by the Crown. The Crown itself recognized that to be the state of the law when it said, in para. 62 of its brief, that "lack of reasonableness must be proved beyond a reasonable doubt". The manslaughter charge against *Curragh*, therefore, fails to include an essential element of the charge.

. . .

23 The manslaughter charges are valid, although the charge against Curragh must be read as including an allegation that the company failed to take every precaution that was reasonable in the circumstances against health or safety hazards and both charges must be read as requiring the Crown to prove a marked departure from the care that would have been taken by a reasonable person.

[47] In an article entitled "Beatty, J.F., and the Law of Manslaughter" (2010), 47 Alta. L. Rev. 651., Professor Wilson succinctly explained the logic of requiring the elevated standard where the predicate offence is one of strict liability stating:

Since the unlawful act for unlawful act manslaughter may be any offence other than an offence of absolute liability, a provincial strict liability offence would qualify. When a person is charged with a strict liability offence that person, rather than the Crown, carries the legal burden of proof with regard to the fault element. The accused is required to show, on a balance of probabilities, that he or she acted as a reasonable person; that is, he must demonstrate due diligence. This is a standard of civil negligence. Thus, there are both conceptual and practical problems when the unlawful act alleged by the Crown is an offence of strict liability. With regard to this predicate offence, does the accused have the legal burden of proof on a balance of probabilities? Or does the burden shift to the Crown, and if so, what is the standard of proof, balance of probabilities or beyond a reasonable doubt?

The Supreme Court did not have to directly address these questions in the *Creighton* decision since the predicate offence was "trafficking" under the federal Narcotic Control Act, not a strict liability offence. However, McLachlin J. (as she then was) did state that "a predicate offence involving carelessness or negligence must also be read as requiring a 'marked departure' from the standard of the reasonable person." That comment played an important role in the subsequent decision of *R. v. Curragh Inc.*, better known as the Westray Mining case. In that case the alleged unlawful acts consisted of

violations of provincial occupational health and safety as well as mine safety regulations. These were provincial strict liability offences that, if prosecuted on their own, would require the accused to establish due diligence on a balance of probabilities. However, because the charge was manslaughter, the Court held that the Crown was required to prove all elements of the offence beyond a reasonable doubt, including the fault element, a "marked departure" from the standard of a reasonable person. The elevation in status of the unlawful act from provincial offence to predicate offence was highlighted by the Court's finding that a manslaughter charge could proceed even where the predicate offence itself could not be prosecuted due to the expiration of a limitation period.

Thus, in those cases where the predicate offence is a strict liability offence, the fault element will be elevated from simple negligence to a "marked departure" and the Crown will be required to prove that *mens rea* beyond a reasonable doubt. Where the unlawful act has a fault element of penal negligence or subjective fault, the Crown will be required to prove that particular fault element beyond a reasonable doubt. Examples of offences that have a subjective fault requirement and have served as an unlawful act on a manslaughter charge include assault, mischief, unlawful confinement, and trafficking in a controlled substance.

[48] I agree with the foregoing reasoning. Unlawful act manslaughter can be based on a predicate offence of strict liability so long as the accused's conduct in committing the offence amounts to a marked departure from the standard of a reasonable person and, of course, it is objectively dangerous. I note that the Crown in its written materials has submitted that a marked departure is an essential element of the offence of unlawful act manslaughter. While I disagree that that is generally the case, I agree that it is so in the case before me.

[49] I conclude that in order to establish the *mens rea* for unlawful act manslaughter in a case where the Crown relies on a strict liability offence as the unlawful act, a trier of fact must find that the accused's conduct in committing the offence constituted a marked departure from the standard of a reasonable person.

[50] Much of what I have already said about the facts when dealing with the question of objective reasonableness is relevant to this issue. Based on the evidence, L. supplied E. with the alcohol that killed her. The alcohol in question appears to have been hard liquor as opposed to beer or wine. The description of the bottle is consistent with the shape and size of a 26-ounce bottle of hard liquor. D.'s description of the taste is also consistent with that of hard liquor.

From the forensic evidence concerning E.'s blood alcohol readings at the time of death, and D.'s evidence on how E. drank it, a jury could concluded that L. supplied the 12 year old E. with a great deal of hard alcohol in a short amount of time. He continued to do so, and in fact encouraged her to drink more when she displaying clear indicia of heavy intoxication.

[51] The last alcohol that was provided to E. was at a location where the three young persons would not be seen by adults, who would therefore not be in a position to intervene. This was the location where L. sexually assaulted E. by raping her after she lost consciousness. I find that the location where L. provided E. with the last of the alcohol that killed her is something that can be taken into account when determining whether his conduct makes out a marked departure from the standard of a reasonable person.

[52] What I previously said concerning the standard of reasonableness that applies to objective dangerousness, also applies to the "marked departure" test. In my view, providing a large amount of hard liquor to a 12-year-old in a short time, without any moderation or control, encouraging E. to consume alcohol even after she showed signs of heavy intoxication, and continuing to do so in a location where it would be difficult to detect her presence, is evidence on which a jury could find that L.'s conduct in supplying the liquor to E. constituted a marked departure from the standard of both a reasonable adult or reasonable 13-year-old. Once again, since I have not heard evidence concerning L.'s personal characteristics, I can only apply the more general standard of a reasonable 13-year-old.

ii Objective Foreseeability of a Risk of Bodily Harm which is neither Trifling nor Transitory.

[53] The test for the *mens rea* requirement of objective foreseeability of nontrivial bodily harm is the same as the objective dangerousness component of the *actus reus*. Therefore my reasons for finding objective dangerousness also apply to the second requirement of the *mens rea* of unlawful act manslaughter. I find that there was objective foreseeability of a risk of bodily harm, which was neither transitory nor trifling. As stated earlier, objective foreseeability of that

risk is made out regardless of which of the three standards proposed by the Crown and L.'s counsel apply.

G. Capacity

[54] I have concluded that I should not consider the issue of capacity on a no evidence motion. In a sense the issue of capacity is analogous to a defence in that at trial capacity need be addressed only after trier of fact has already determined that the offence is otherwise made out. It is also analogous to a defence in the sense that when determining capacity, the trial judge must determine whether or not the evidence gives rise to a reasonable doubt as to whether the accused lacked the capacity to appreciate the risk of nontrivial harm that flowed from his conduct.

[55] Some evidence of the accused's personal characteristics would be necessary for a judge to carry out that task. In a case where there is no evidence on capacity, a trial judge cannot make a finding of incapacity. Because some evidence would be required along with an assessment of that evidence, capacity in this sense is not something that can be determined when applying the Sheppard test.

[56] In any event, I have little to no evidence, other than perhaps L.'s age at the time, that is relevant to L.'s personal characteristics. I conclude that it would therefore be impossible for a trier of fact to conclude that a reasonable doubt exists that L. had the capacity to foresee the risk of nontrivial bodily harm that flowed from his conduct.

H. *Novus Actus Interveniens*

[57] Counsel for L. submits that E.'s decision to drink the alcohol supplied to her by L. constituted a *novus actus interveniens* and therefore interrupted the chain of legal causation so as to relieve L. of responsibility for supplying liquor to E.

[58] Certainly, there is limited support for his position in the applicable law from the United Kingdom. In the case of *R. v. Kennedy*, [2007] UKHL 38, the appellant had prepared a dose of heroin for the deceased and gave him a syringe ready for

injection. The deceased then injected himself and returned the empty syringe to the appellant. He died as a result of the injection. The cause of death was inhalation of gastric contents while acutely intoxicated by opiates and alcohol.

[59] In *Kennedy* the Court of Appeal of England and Wales certified the question “When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?”, for the opinion of the House of Lords. After reviewing the relevant British law surrounding *novus actus interveniens* in criminal cases, the House of Lords answered the question by stating, “In the case of a fully-informed adult, never.”

[60] However, E. was certainly not an adult. Of at least equal importance, *novus actus* in manslaughter cases is applied far more sparingly in Canada than in the United Kingdom. As pointed out by Ferguson J. in *R. v. Valiquette*, [2017] NBJ No. 50 (QB) in the following paragraphs:

191 The jurisprudence of this country has not followed that path. Instead, as well explained by Hamilton J.A. in *R. v. Haas* 2016 MBCA 42 (M.C.A.) (Leave to Appeal denied [2016] S.C.C.A. 306 (S.C.C.)), personal autonomy has not been attributed such a highly deferential status as it has been accorded in England and Wales. *Haas* was a case of unlawful act manslaughter. In summarizing the view of the Supreme Court in *Maybin* Justice Hamilton wrote at paragraphs 61-62:

To conclude, *Kennedy* is not consistent with the development of Canadian jurisprudence. The key issue in determining whether the unlawful act in question is objectively dangerous is the risk of harm, and not, as concluded in *Kennedy*, whether the actual harm flowed immediately from the unlawful act. The Supreme Court of Canada has directed that the determination of causation is to focus on the accused person's moral responsibility, as opposed to the autonomy of the victim and the victim's choices, as in *Kennedy*. Furthermore, the House of Lord's rejection of the reasonable foreseeability approach is contrary to *Maybin*, which accepted the use of such an approach as an analytical aid when determining whether or not an intervening act has severed the chain of causation.

Whether a deceased's voluntary consumption of drugs constitutes an intervening act will depend upon the facts and circumstances found by the trial judge, and the trial judge's assessment of those facts and circumstances in light of the legal principles regarding causation. In other words, voluntary consumption is simply one of many contextual considerations in the circumstances of any given case to determine whether or not the chain of causation has been broken.

192 The rationale for the Supreme Court's divergence from *Kennedy* was explained by Karakatsanis J. at paragraphs 28 in part and 29 of *Maybin*:

...Neither an unforeseeable intervening act nor an independent intervening act is necessarily a sufficient condition to *break* the chain of legal causation. Similarly, the fact that the intervening act was reasonably foreseeable, or was not an independent act, is not necessarily a sufficient condition to *establish* legal causation. Even in cases where it is alleged that an intervening act has interrupted the chain of legal causation, the causation test articulated in *Smithers* and confirmed in *Nette* remains the same: Were the dangerous, unlawful acts of the accused a significant contributing cause of the victim's death?

Depending on the circumstances, assessments of foreseeability or independence may be more or less helpful in determining whether an accused's unlawful acts were still a *significant contributing* cause at the time of death. Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a moral innocent. [Emphasis in original]

[61] In *Maybin*, [2012] 2 S.C.R. 30, the accused Maybin brothers, who were charged with unlawful act manslaughter, had together attacked the deceased during a dispute that occurred while playing pool in a bar. One of the brothers repeatedly punched the deceased in the face rendering him unconscious. A bouncer named Gains arrived seconds later and again struck the unconscious victim in the head. The medical evidence was inconclusive as to which blow or blows caused the death. Consequently, the trial court acquitted the bouncer and the brothers on the basis of “but for” causation not being made out in either case. The trial court held that this was so since it could not determine whether the blows first struck by the Maybin brothers or the subsequent blow struck by the bouncer - or for that matter all of them in combination - had created the medical cause of death.

[62] The Court of Appeal held that the trial judge had been too restrictive in his application of “but for” causation to the Maybin brothers’ actions and that their actions had indeed lead to the bouncer getting involved and striking the deceased. “But for” their actions, the deceased would not have died.¹² However, since the same could not be said for the bouncer, his acquittal was upheld on the basis of “but for” causation not being made out.

¹² *R. v. Maybin*, [2010] BCJ No. 2311

[63] The majority of the Court of Appeal also held that because the risk of bodily harm caused by an intervening actor could have been found to be foreseeable by the Maybin brothers at the time of the assault, it was necessary to order a new trial.

[64] However, the dissenting judge did not agree that the accused could have reasonably foreseen the bouncer's conduct and concluded that the bouncer's actions severed *legal* causation.

[65] On appeal, the Supreme Court of Canada upheld the majority decision of the Court of Appeal. After reviewing and analyzing the law on *novus actus* in Canada, Karakatsanis J. concluded:

60 Courts have used a number of analytical approaches to determine when an intervening act absolves the accused of legal responsibility for manslaughter. These approaches grapple with the issue of the moral connection between the accused's acts and the death; they acknowledge that an intervening act that is reasonably foreseeable to the accused may well not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible. In my view, these approaches may be useful tools depending upon the factual context. However, the analysis must focus on first principles and recognize that these tools do not alter the standard of causation or substitute new tests. The dangerous and unlawful acts of the accused must be a significant contributing cause of the victim's death.

61 I agree with the majority of the Court of Appeal that based upon the trial judge's findings of fact, it was open to him to conclude that the general nature of the intervening act and the accompanying risk of harm were reasonably foreseeable; and that the act was in direct response to the appellants' unlawful actions. The judge could have concluded that the bouncer's assault did not necessarily constitute an intervening act that severed the link between Timothy and Matthew Maybin's conduct and the victim's death, such that it would absolve them of moral and legal responsibility. The trial judge could have found that the appellants' actions remained a significant contributing cause of the death.

[66] Based on the foregoing passage, I think it is quite apparent that the question of whether the intervening act referred to by L.'s counsel absolves L. of legal responsibility is for the trier of fact after having weighed the evidence in front of him. This is particularly so given the nature of the intervening act argued by the defence as well as E.'s age at the time.

[67] An earlier case decided by the British Columbia Court of Appeal, *R. v. Jordan* (1991) 4 BCAC 121, involved facts which bear some similarity to the alleged facts before me. In *Jordan*, the accused had provided the deceased with a large amount of alcohol, following which she died as a result of alcohol poisoning. The accused was convicted of manslaughter by criminal negligence. The accused appealed arguing that the trial judge had failed to consider whether the deceased's voluntary consumption was an intervening cause, which relieved the accused of legal responsibility for her death. The Court of Appeal held:

19. In my opinion even if all the alcohol consumed by [the deceased] was consumed without direct glass by glass persuasion and was in that sense voluntary, that would not prevent the creation by the appellant of an environment in which [the deceased] was sure to drink excessively from being a continuing contributing cause of her death. *Particularly, the provision of alcohol in that closed environment, as well as the provision of the alcohol in itself, remained acts which were done in wanton or reckless disregard for the safety of [the deceased] and were continuing causes of death outside the de minimis range.*
[Emphasis mine]

[68] A reasonable jury might well come to the same conclusion based on the evidence I have heard in the present case.

3. Conclusion

[69] There exists evidence upon which a reasonable trier of fact could find that all of the essential elements of unlawful act manslaughter - identity, place, jurisdiction, *actus rea* and *mens rea* - have been proven beyond a reasonable doubt. I therefore deny L.'s application for a directed verdict of not guilty.

[70] Having denied the no-evidence motion on that basis, it is, strictly speaking, not necessary to determine whether the Sheppard test has been satisfied on the other pathways to conviction identified by the Crown.

[71] However, I will say that it would seem logical that much of what I have said would also apply to whether there is some evidence on the requisite elements of

criminally negligent manslaughter, since some of its elements are precisely the same or related to those of unlawful act manslaughter. The evidence of D.S., concerning the manner in which L. provided the alcohol to E., clearly constitutes some evidence of factual “but for” causation of death. As I have said, it also constitutes some evidence that nontrivial bodily harm was reasonably foreseeable.

[72] The only additional element required to make out criminally negligent manslaughter is a “marked and substantial departure” from the standard of a reasonable person as opposed to the mere “marked departure test” required by unlawful act manslaughter where the predicate offence is one of carelessness. I find that just as a reasonable and properly instructed jury could conclude that L.’s conduct in supplying E. with the alcohol that killed her constituted a marked departure from the standard of a reasonable person, whether he or she be a reasonable adult or reasonable 13 year old, it could also conclude that that same conduct constituted a “marked and substantial departure” from that same standard.

[73] The adequate evidentiary basis exists and it would be for the trier of fact to make the ultimate determination. In saying this, I do not foreclose the possibility of there being yet further routes to conviction available on the evidence presented thus far.

[74] As stated, the application is denied.

Robert D. Gorin
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 29th day of
March, 2018.

R. v. L.M., 2018 NWTTC 06

Date: 2018 03 29
File: Y-1-YO-2017-000020

**IN THE YOUTH COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

L.M.

**REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT GORIN**

[Sections 236(b) and 272(1)(c) of the Criminal Code]