No. 38188

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

No.: 500-10-005886-153 (C.A.)
500-01-013474-082 (C.Q.)

MITRA JAVANMARDI
APPLICANT (Appellant)

v.

HER MAJESTY THE QUEEN
RESPONDENT (Respondent)

and

ATTORNEY GENERAL OF QUEBEC
RESPONDENT (Mis-en-cause)

APPLICATION FOR LEAVE TO APPEAL
(Section 40 of the *Supreme Court Act,* Section 25 of the *Rules of the Supreme Court of Canada,* and Section 691(2)c) of the *Criminal Code*)

VOLUME I

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TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

i. Facts

[1] The Applicant, Mitra Javanmardi, holds a doctorate in naturopathic medicine from an accredited university in the United States. Her four-year training included a year on the basics of medical sciences and 1,500 hours of clinical work in which she was taught intravenous injection techniques.[1] Although Mrs. Javanmardi was not authorized by Quebec law to administer nutrients intravenously, she was, according to the trial judge, competent to do so.[2] In fact, she had been administering intravenous injections for the last 16 years to approximately ten patients a week.[3]

[2] Mr. Roger Matern, was an 84-year-old man, who suffered from congestive heart failure, coronary heart disease and had water in his lungs, for which his physicians could not provide further treatments.[4] His condition was one that he could have died at any moment. On June 12, 2008, he went to Mrs. Javanmardi's clinic. Mr. Matern was aware that she was a naturopath and not a physician. After discussing his state of health with Mrs. Javanmardi for about one hour and providing her with a list of his medications, she recommended that he take some nutrients.

[3] After some discussion and at the insistence of Mr. Matern, Mrs. Javanmardi agreed to start an intravenous injection treatment that day, and prepared the nutrients. The trial judge concluded from the medical evidence that these nutrients were safe and suitable to his heart condition.[5] Mrs. Javanmardi began the intravenous infusion and asked her secretary to check up on him.

[4] Approximately ten minutes following the commencement of the intravenous, Mr. Matern began to complain that he was hot. Mrs. Javanmardi came to check up on him straight away and immediately discontinued the IV. She accompanied him to an adjacent room so that he could lie down. Mr. Matern was shivering, so she put a blanket on him. Mrs. Javanmardi checked his vital

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[1] Trial judge's decision at para 433.
[2] Trial judge's decision at para 449.
[3] Trial judge's decision at paras 236, 347, 437, 449.
[4] Trial judge's decision at para 5.
[5] Trial judge's decision at paras 183, 297-98, 402, 404, 410, 444.

signs. His blood pressure, temperature, pulse, respiratory rate, blood sugar and blood saturation were all normal. Since there was no fever, no confusion at the time and no sign of infection on the site of the injection, Mrs. Javanmardi eliminated the possibility of a septic shock.

[5] Mrs. Javanmardi recommended to Mr. Matern that he drink some tea, which he in turn vomited. She told his daughter that he might have had a hypoglycemic reaction, given that he had not eaten since breakfast. As a result, she recommended that he ingest some sugar and honey.

[6] A little while later, Mr. Matern left the clinic with his wife and daughter. They sat him on a rolling chair and took him to his daughter's car. While they were in her car, Mr. Matern's daughter asked him if he wanted to go to the hospital, and he shook his head no.

[7] During the evening, Mr. Matern's appeared to be confused. He ate little, did not speak and had few reactions. He was hot and his heart was beating hard. His daughter asked him, while he was lying in bed, if he wanted to go to the hospital, and he shook his head no. During this period, one or two telephone conversations took place between Mr. Matern's daughter and Mrs. Javanmardi. At one point, Mr. Matern's condition seemed to have somewhat improved.[6] Around 3 am, Mr. Matern's daughter noticed that her father did not look well. She called an ambulance and he was taken to Hôpital Saint-Luc against his will. In total, Mr. Matern refused on three different occasions to go to the hospital.[7]

[8] Upon his arrival at the hospital, Mr. Matern was seen by an emergentologist. According to him, the patient's condition was extremely severe. A few hours later, Mr. Matern passed away.

[9] According to the Crown's theory, which was accepted by the trial judge, the death of Mr. Matern was attributable to an endotoxic shock caused by the presence of a bacteria (*Pantoea*) in one of the substances (L-Carnitine) injected by Mrs. Javanmardi.

[10] But for the presence of the bacteria and endotoxins, the solution injected by the appellant to Mr. Matern was safe and appropriate for his heart condition.[8] Mrs. Javanmardi purchased her nutrients from a pharmacy in Ontario that complied with the highest of standards. According to

[6] Trial judge's decision at para 446.
[7] Trial judge's decision at para 426.
[8] Trial judge's decision at paras 183, 297-98, 402, 404, 410, 444.

the trial judge, compliance with the rules of asepsis was a concern of Mrs. Javanmardi and the measures that were put in place at her clinic were appropriate.[9] The single use vial of L-Carnitine contained three punctures. Mr. Matern was the third individual to receive L-Carnitine from the vial that day. Thus, the trial judge concluded that the bacteria could have been introduced in the vial following the second injection.[10] From the moment of the injection, the death of Mr. Matern was inevitable given the number of endotoxins.[11]

[11] Mrs. Javanmardi was charged with criminal negligence causing death[12] and manslaughter.[13]

[12] At the end of a forty-day trial, Villemure J. of the Court of Quebec acquitted the appellant on both charges.

[13] On appeal by the Crown, the Court of Appeal of Quebec set aside the acquittals, ordered a new trial on the count of criminal negligence causing death, and substituted a verdict of guilty for manslaughter.

ii. National Importance

[14] The Applicant advances two grounds which are of national importance:

a) <u>The requisite *mens rea* for the offence of criminal negligence causing death</u>

[15] This Court has yet to clearly take a position on the requisite *mens rea* for the offence of criminal negligence causing death.

[16] The required fault for criminal negligence is an issue that has fuelled much debate.[14] The Court had the opportunity to pronounce itself in *R v Tutton*[15] and *R v Waite*[16], two cases involving criminal negligence causing death. However, the Court split 3-3 on whether the *mens rea* for this

[9] Trial judge's decision at paras 422-23.
[10] Trial judge's decision at para 416.
[11] Trial judge's decision at paras 426, 428-29.
[12] *Criminal Code*, RSC 1985, c C-46, s 220(b) [*Cr.C.*].
[13] *Ibid*, s 234, 236(b).
[14] *R v A.D.H.*, [2013] 2 SCR 269 at para 61.
[15] [1989] 1 SCR 1392.
[16] [1989] 1 SCR 1436.

offence should be objective or subjective. The following year, this Court left the matter unresolved in *R v Anderson*[17]. Finally, in 2008, *R v J.F.*[18], was interpreted as confirming that criminal negligence requires a modified objective test rather than a subjective one. The question of whether the fault element with respect to the consequence is the same as that developed for unlawful act manslaughter in *Creighton*[19]—objective foreseeability of the risk of bodily harm—remains unresolved, some authors having convincingly argued that criminal negligence should require that a higher level of harm—death or serious bodily harm—was foreseeable.[20]

[17] Furthermore, the Applicant argues that because the offence of criminal negligence causing death is notoriously complex, as noted by Sopinka J. in *R v Anderson*[21], the offence requires a specific test for requisite *mens rea* which must include personal characteristics.

[18] It is the Applicant's position that it is time for the Supreme Court of Canada to review the criteria required in the evaluation for *mens rea* for the offence of criminal negligence causing death and pronounce itself once and for all.

b) <u>The modified objective test established in *R v Creighton* is not applied uniformly</u>

[19] The modified objective test for *mens rea* established in *Creighton* is not being applied uniformly throughout the country. More specifically, some provinces are personalizing the modified objective tests while others are not.

[20] The British Columbia Court of Appeal appears to be rigidly applying the modified objective test with no consideration of personal experiences or circumstances.[22] However, courts of the other provinces have been taking into account personal experience and characteristics into their analysis:

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[17] [1990] 1 SCR 265.
[18] 2008 SCC 60, [2008] 3 SCR 215 at para 9.
[19] [1993] 3 SCR 3.
[20] See Stanley Yeo, "The Fault Elements for Involuntary Manslaughter: Some Lessons from Downunder" (2000) 43 Crim LQ 291; Isabel Grant, Dorothy E Chunn, Christine Boyle, *The Law of Homicide* (Scarborough: Carswell, 1994) (loose-leaf) at 4-27. *Contra R v M.R.*, 2011 ONCA 190 at para 31; *R v Kerr*, 2013 BCCA 506 at para 36.
[21] [1990] 1 SCR 265 at p 269.
[22] *R v Ubhi*, 1994 CanLII 514 (BC CA) at para 33; *R v A.J.N.*, 2004 BCCA 629.

- In *R v Schoenthal*, the Court of Appeal of Saskatchewan did not correct the trial judge's consideration of the accused's participation in a course on shaken baby syndrome to demonstrate that the accused "knew, or ought to have known, the danger and potential consequences of her handling Samuel the way she did the morning of March 17, 2003".[23]
- In *R v Laine*, the Ontario Court of Appeal held that age is a circumstance that must be considered.[24]
- In *Salame v R*, the Court of Appeal of Quebec took into account the accused's past experience making arak and how he learnt/who taught him to make the alcohol.[25]
- In *R c G.S.*, the Court of Quebec took into account the fact that the accused was a mother who had a history of taking good care of her son when evaluating the *mens rea* of criminal negligence causing bodily harm.[26]
- In *R v Vantroba*, the Ontario Superior Court of Justice considered the accused's history as a trainer for police dogs and as a dog walker as well as the dog's demeanour during the past four years in his evaluation of the *mens rea* before acquitting him of criminal negligence causing bodily harm.[27]
- In *R v J.L.* of the Court of Appeal of Ontario, a case involving criminal negligence causing death, Weiler J.A. ultimately ruled that youthfulness must be taken into account in the circumstances and acquitted the accused.[28]

[21] It is fundamentally unjust that persons living in different parts of the country can be convicted or acquitted on similar charges based on their province of residence. It is imperative that the law be applied uniformly and a revision of *Creighton* is necessary.

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[23] *R v Schoenthal*, 2007 SKCA 80 at para 317.
[24] *R v Laine*, 2015 ONCA 519 at para 67.
[25] *Salame v R*, 2010 QCCA 64 at para 52.
[26] *R c G.S.*, 2013 QCCQ 2108 at para 402.
[27] *R v Vantroba*, 2015 ONSC 1569 at paras 55, 59, 69.
[28] *R v J.L.*, 2006 CanLII 805 (Ont CA) at para 20.

c) <u>The as of Right Appeal on the Charge of Manslaughter</u>

[22] The Applicant has an appeal as of right on her conviction for manslaughter. The accusations were heard together on identical facts and many of the arguments were the same or very similar, notably with regards to causation. It is submitted that leave should be granted and the charges be heard together in order to avoid contradictions and inconsistent judgments.

[23] The questions A, B and D of this Application are also being raised on similar grounds in the as of right appeal.

PART II: STATEMENT OF THE QUESTIONS IN ISSUE

A. Did the Court of Appeal of Quebec err in law in substituting its view of the evidence to the trial judge's findings of fact?

B. Did the Court of Appeal of Quebec err in law in concluding that the trial judge personalized the modified objective standard for criminal negligence?

C. Did the Court of Appeal of Quebec err in law in holding that the verdict would not necessarily have been the same had the errors imputed to the trial judge not occurred and in setting aside the Applicant's acquittal?

D. Did the Court of Appeal of Quebec err in law in holding that there was evidence upon which a trier of fact could reasonably find that it had been established beyond a reasonable doubt that the acts or omissions of the Applicant were a significant contributing cause of the death?

PART III: STATEMENT OF ARGUMENT

A. Did the Court of Appeal of Quebec err in law in substituting its view of the evidence to the trial judge's findings of fact?

[24] This ground of appeal will be submitted in the Applicant's appeal as of right on the manslaughter conviction. As a result, should this Application for Leave be granted, the Applicant will elaborate further on this argument in the appeal as of right since the facts are identical. By hearing these arguments together, the Court would be ensuring uniformity in the judgments.

[25] When appealing an acquittal, the Crown is limited to appealing on a question of law

alone.[29] It follows that the appellate court, when deciding a case where there was an acquittal, cannot substitute "its own assessment of the facts for that of the trial judge."[30]

[26] The Court of Appeal erred by departing impermissibly from the trial judge's appreciation of the evidence by omitting certain findings of fact which were appreciated by her at trial and thus interfering with the findings of fact made.

[27] The Court of Appeal contends that following Mr. Matern's reaction to the intravenous injection, the Applicant provided her patient with tea, honey and fruit juice and did not call an ambulance.[31] Meanwhile, the decision failed to include several important facts which contextualize the events of that day, such as that the applicant took Mr. Matern's vital signs and that they were within a normal range[32], that Mr. Matern refused to go to the hospital three times[33], and that he had mentioned that this type of state of fatigue had already happened to him on another occasion.[34]

[28] All of these facts must necessarily have been included in the Court of Appeal's analysis of the *actus reus* and *mens rea* of the offence. They demonstrate that the Applicant's conduct did not display a wanton or reckless disregard for the lives or safety of others nor did it demonstrate a marked and substantial departure from the conduct of a reasonable person in the same circumstances.

B. Did the Court of Appeal of Quebec err in law in concluding that the trial judge personalized the modified objective standard for criminal negligence?

(i) Personalization of the objective test vs. contextualization

[29] The Court of Appeal of Quebec found that the trial judge personalized the modified objective test for *mens rea* by taking into account the Applicant's education and professional experience, contrary to *Creighton*[35].

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[29] Section 676 (1) a) *Criminal Code*.
[30] *R v Guttman*, 2001 SCC 8, [2001] 1 SCR 363 at para 1.
[31] Judgment appealed from at para 87 (9).
[32] Trial judge's decision at paras 269, 272 and 273.
[33] Trial judge's decision at paras 262-265.
[34] Trial judge's decision at para 270.
[35] *R v Creighton*, [1993] 3 SCR 3 at p 65.

[30] The trial judge did not personalize the modified objective test for *mens rea*. Instead, she took into consideration the Applicant's education and professional experience to account for her state of mind as well determine the circumstances in which the "reasonable person" would have found themselves in to determine whether a reasonable person in the same position would have been aware of the risk created by her conduct.

[31] Following a series of cases at the Supreme Court of Canada which discussed the standard requisite test for determining the *mens rea* for various negligence-based offences[36], McLachlin J. (as she then was), for the majority, held in *R v Creighton*–an unlawful act manslaughter case–that the modified objective test should not take into account the personal characteristics of the accused such as age, experience, and education, short of incapacity to appreciate the risk.[37]

[32] Several years later, the Court in *R v Beatty* reiterated that the requisite *mens rea* for penal negligence is determined by a "modified objective test".[38] In this assessment, Charron J. proposed the following evaluation:

> In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. [Emphasis added][39]

Thus, once the trier of fact is "convinced beyond a reasonable doubt that the objectively dangerous conduct constitutes a marked departure from the norm, the trier of fact must consider evidence about the actual state of mind of the accused, if any, to determine if whether it raises reasonable doubt about whether a reasonable person in the accused's position would have been aware of the risk created by this conduct. If there is no such evidence, the court may convict the accused".[40]

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[36] *R v Tutton*, [1989] 1 SCR 1392; *R v Waite*, [1989] 1 SCR 1436; *R v Anderson*, [1990] 1 SCR 265; *R v Hundal*, [1993] 1 SCR 867.
[37] *R v Creighton*, [1993] 3 SCR 3 at p 61.
[38] *R v Beatty*, 2008 SCC 5, [2008] 1 SCR 49.
[39] *Ibid* at para 43.
[40] *Ibid* at para 49.

[33] The approach to be adopted when determining the merits on a charge of criminal negligence was retaken by the Court of Appeal of Quebec in *Salame v R*:

> It is first of all important to remember that the analysis must be contextual and that the conduct of the accused must reveal a marked departure, which is what distinguishes a criminal fault from a civil fault. ... The personal characteristics of the accused, such as age and education level, are not relevant, but the judge "must consider evidence about the actual state of mind of the accused, if any, to determine whether it raises a reasonable doubt about whether a reasonable person in the accused's position would have been aware of the risk created by this conduct". [Emphasis added.][41]

[34] In *Salame*, the accused had sold some arak, an aniseed-flavoured beverage that he had manufactured to a convenience store. The arak was then purchased from the convenience store and served at a dinner party where several people who consumed the beverage were severely poisoned and one of them died. The accused was found guilty of criminal negligence causing death in first instance. In appeal, Gendreau J.A., writing unanimously for the Court of Appeal of Quebec, evaluated the accused's mental state, as per Charron J. in *Beatty*, in the analysis of the modified objective test for *mens rea*:

> [51] As Charron J. stated in *Beatty*, "the accused's mental state is relevant in a criminal setting". She added that "the objective test must be modified to give the accused the benefit of any reasonable doubt about whether the reasonable person would have appreciated the risk or could and would have done something to avoid creating the danger". In the present case, I believe, with respect for his opinion, that the trial judge did not properly take into account the *mens rea*. Of course he does mention that Mr. Salame did not seek the result obtained or [TRANSLATION] "seek to harm these people", but he did not consider or, above all, weigh this observation and the other elements relating to the mental state of the accused before forming an opinion about criminal fault.
>
> [Emphasis added.][42]

[35] In evaluating the accused's state of mind, he took into account the following factors:

> [52] Would a reasonable person in an identical situation have been aware of the risk created by the production of arak? In my opinion, the evidence, as it was presented, makes it possible to seriously doubt this. The description of the accused's state of mind at the time of the judgment *a quo* shows that he was certain that his conduct did not endanger his own health or that of his loved ones or the public. This is based on three undisputed facts. First, he always followed the same production process he was taught by people he had adequate reasons to

[41] *Salame v R*, 2010 QCCA 64 at para 42.
[42] *Ibid* at para 51.

> trust. Second, each time he tasted the product himself and served it to his friends and family, and no one felt unwell after tasting it, on the contrary. Third, the experience of his initial effort or efforts (it is not clear whether he produced the drink two or three times) could only have reassured him that he was acting correctly and was providing a healthy drink in December 1990. In my opinion, a person in such a situation could have a reasonable objective conviction of not endangering the safety of others, even though the containers displayed a pictogram illustrating the danger of wood alcohol.[43]

[36] Finding that the *mens rea* required to convict an accused of a criminal act was not present on the basis of the accused's state of mind, the Court of Appeal of Quebec entered acquittals on the criminal negligence causing death and bodily harm charges.

[37] It is the Applicant's position that when the trier of fact considered her education and professional experience, it was not in the context of personalizing the modified objective test for *mens rea* as per *Creighton*, but to evaluate the state of mind of the accused as per *Beatty* in order to determine whether a reasonable person in the same position would have been aware of the risk created by her conduct.

[38] A similar evaluation done in *Salam*e can and should be applied to the Applicant in order to evaluate her state of mind:

Salame v R	***R v Javanmardi***
He always followed the same production process he was taught by people he had adequate reasons to trust.	The Applicant followed the same process for administering the IV taught to her during her four-year training in a university, including during clinical work.
Each time he tasted the product himself and served it to his friends and family, and no one felt unwell after tasting it, on the contrary.	The Applicant had administered approximately 10 IV's per week since 1992 and had never had a patient contract an infection or die as a result of one of her IV's.
The experience of his initial effort or efforts (it is not clear whether he produced the drink two or three times) could only have reassured him	The Applicant's 16 years of experience giving IV therapy and never having a patient infected or die as a result could only have reassured her

[43] *Ibid* at para 52.

that he was acting correctly and was providing a healthy drink in December 1990.	that she was acting correctly and was providing her patients a harmless treatment.

[39] The Applicant's training to perform an intravenous injection procedure is not something that should be grouped in with McLachlin's category of personal characteristics, such as age, education and experience. Instead, it is an element that must be included to demonstrate what factors a reasonable person with this type of training, would take into account–in the same way that the "reasonable person" would take into account the fact that one is a doctor or a nurse and the training they would have received.

[40] The fact of having been trained is not a personal characteristic but an essential component of a decision that a reasonable person might make.

[41] Further to the accused's state of mind, Charron J. in *Beatty* noted that the requisite *mens rea* in negligence-based offences should also include an analysis that is contextualized and thus consider all of the circumstances of the case when evaluating "whether a reasonable person in his or her position would have been aware of the risks".[44]

[42] McIntyre J., in *R v Tutton*, was also of the opinion that surrounding circumstances must be considered alongside the accused's perception of facts when applying the objective test for criminal negligence causing death:

> The application of an objective test under s. 202 of the *Criminal Code*, however, may not be made in a vacuum. Events occur within the framework of other events and actions and when deciding on the nature of the questioned conduct, surrounding circumstances must be considered. The decision must be made on a consideration of the facts existing at the time and in relation to the accused's perception of those facts. Since the test is objective, the accused's perception of the facts is not to be considered for the purpose of assessing malice or intention on the accused's part but only to form a basis for a conclusion as to whether or not the accused's conduct, in view of his perception of the facts, was reasonable.[45]

[44] *R v Beatty*, 2008 SCC 5, [2008] 1 SCR 49 at para 8.
[45] *R v Tutton*, [1989] 1 SCR 1392 at p 1432.

[43] Weiler J.A. of the Court of Appeal of Ontario determined in *R v J.L.*[46] that circumstances of the accused included age in a charge of criminal negligence causing death. Consequently, the accused was acquitted.

[44] In *R v Vantroba*, Shaw J. considered the accused's history as a trainer for police dogs, a dog walker and the dog's demeanour during the past four years in his evaluation of the *mens rea* when he acquitted the accused of criminal negligence causing bodily harm[47].

[45] Thus, the trial judge in the present file does just that. Just before she goes on to cite the Applicant's education and professional experience, she explains that for her evaluation of the *mens rea*, the criteria she must apply is the following:

> If Mitra Javanmardi gives an explanation, the judge must be convinced beyond a reasonable doubt that a reasonable person, placed in the same circumstances would have been aware of the risk and danger inherent to her actions and did not take the steps necessary to avoid creating this danger.
>
> [Our translation. Emphasis added.][48]

[46] This hypothetical "reasonable person" finding herself in the "same circumstances" of the accused would necessarily be an individual who was:

- Educated as a doctor in naturopathic medicine;
- Had taken several courses and was trained by qualified instructors on how to give an IV;
- Had 16 years of experience giving IV's to patients 10 times per week and had never had a patient contract an infection as a result of one of her IV's and had never had a patient die;
- Followed the rules of practice in Ontario, a province that regulates naturopathy;
- Purchased the vitamins from a reputable pharmacy in Ontario which exercised the highest standards of care.

[47] It is these "circumstances" and "context" that the trial judge applies the Applicant's education and professional experience. Not to personalize the modified objective standard, but to contextualize the circumstances of the "reasonable person". She concludes that within the "contextual analysis, the Accused's conduct was not found to be a marked departure with regards

[46] *R v J.L.*, 2006 CanLII 805 (Ont CA) at para 20.
[47] *R v Vantroba*, 2015 ONSC 1569 at paras 55, 59, 69.
[48] Trial judge's decision at para 433.

to the reasonable standard of care and that the reasonable person, in the circumstances, would have been aware of the risk and the inherent danger of her actions." [49]

[Our translation. Emphasis added.]

[48] Therefore, the Court of Appeal erred in concluding that the trial judge considered the Applicant's education and experience as a personalization of the modified objective test.

(ii) *Creighton* does not apply to criminal negligence causing death

[49] Furthermore, should this Court conclude that the trial judge did in fact personalize the modified objective test for *mens rea*, the Applicant respectfully submits that the standard set out in *Creighton* which does not leave room for personal characteristics in the modified objective test for penal negligence should not apply to criminal negligence.

[50] In *R v Tutton*[50] and *R v Waite*[51], two cases involving criminal negligence causing death, the Court split 3-3 on whether the *mens rea* for criminal negligence causing death should be objective or subjective. The following year, this Court left the matter unresolved in *R v Anderson*[52].

[51] In *R v J.F.*[53], Fish J. noted in *obiter* for a unanimous Court that the fault element for criminal negligence was "a *marked and substantial departure* (as opposed to a *marked departure*) from the conduct of a reasonably prudent parent in circumstances where the accused either recognized and ran an obvious and serious risk to the life of his child or, alternatively, gave no thought to that risk". This decision was interpreted as confirming that criminal negligence requires a modified objective rather than a subjective test. Similarly, the majority in *R v A.D.H.*[54] also suggested, in *obiter*, that criminal negligence requires an objective test, relying on *J.F.*

[49] Trial judge's decision at para 438.
[50] [1989] 1 SCR 1392.
[51] [1989] 1 SCR 1436.
[52] [1990] 1 SCR 265.
[53] 2008 SCC 60, [2008] 3 SCR 215 at para 9.
[54] 2013 SCC 28, [2013] 2 SCR 269 at para 61.

[52] However, Fish J. pointed out in *J.F.* that "[t]his case [did] not turn on the nature or extent of the difference between the two standards"[55], namely penal negligence and criminal negligence. He was therefore silent as to whether the personal characteristics of an accused can be considered in the application of the modified objective test for criminal negligence, contrary to what was held for penal negligence in *Creighton*.

[53] It is worth recalling that, as Sopinka J. pointed out in *R v Anderson*, the choice of terms used by Parliament to define criminal negligence in s. 219 of the *Criminal Code* suggests both an objective and subjective standard:

> The use of the word "negligence" suggests that the impugned conduct must depart from a standard objectively determined. On the other hand, the use of the words "wanton and reckless disregard" suggests that an ingredient of the offence includes a state of mind or some moral quality to the conduct which attracts the sanctions of the criminal law.[56]

Although objectively assessed, the *mens rea* for criminal negligence is a higher standard of fault than that required for penal negligence offences.[57]

[54] The higher level of moral blameworthiness attached to criminal negligence causing death requires that the circumstances in which the conduct occurred be closely considered. As explained by McIntyre J. in *Tutton*, the objective *mens rea* for criminal negligence requires to consider "the accused's perception of the facts … to form a basis for a conclusion as to whether or not the accused's conduct, in view of his perception of the facts, was reasonable."[58] The accused's perception of the facts is inseparable from his age, experience, education. These personal characteristics will inevitably shape his perception and the consequences that can be foreseen.

[55] Since 1993, many scholars have critiqued the majority position in *Creighton* that, short of incapacity, personal characteristics should not be taken into account when applying the modified objective test for *mens rea*.

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[55] 2008 SCC 60, [2008] 3 SCR 215 at para 10.
[56] [1990] 1 SCR 265 at p 269.
[57] *R v Palin*, 135 CCC (3d) 119, 1999 CanLII 9834 at paras 21-24 (CA Qc); *R v J.L.*, 204 CCC (3d) 324, 2006 CanLII 805 at paras 14-17 (Ont CA).
[58] *R v Tutton*, [1989] 1 SCR 1392 at p 1432.

[56] Firstly, it is difficult to apply this objective norm in practice as it is too rigid. It is difficult, if not impossible, for trial judges and juries across the country not to take into account the personal characteristics of the accused. Professor Marie-Eve Sylvestre and Manon Lapointe point out that this Court itself has difficulty ignoring these personal characteristics.[59] In *R v Roy*, Cromwell J. refers to the accused's driving history of having driven a stretch of road at least 500 times.[60] The authors can only justify the decision to include the driver's history of driving that area to conclude that it was relevant in the Court's analysis of the objective standard of the reasonable person.[61]

[57] In addition to *Roy*, as the Applicant has pointed out above, in the cases of *Salame*, *J. L.*, *G.S.*, *Laine* and *Vantroba*, the judges all considered personal characteristics and history in their evaluation of the modified objective test for *mens rea*.

[58] In *J.F.*, the court evaluates the reasonable person as the "reasonable parent"[62] and even the Court of Appeal subject to this very appeal asks itself if the Applicant's behaviour represented a marked departure from that which would be respected by a "reasonable naturopath" in the same circumstances.[63]

[59] Secondly, the maintenance of a single, uniform legal standard favouring a strict reasonable person, short of incapacity, is too strict. Nor does it account for those who act negligently through no fault of their own, as explained by Morris Manning and Peter Sankoff:

> More than anything else, making allowances for relevant factors personal to the accused is simply consonant with reality. … Still, where the accused's traits are relevant to the overall assessment of the conduct of risk, it only makes sense to use these characteristics to provide context for the overall reasonableness determination.[64]

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[59] Marie-Eve Sylvestre & Manon Lapointe, "Élément mental de l'infraction : *mens rea* objective", in *JurisClasseur Québec — Collection droit pénal —Droit pénal général* (loose-leaf), vol 1, by Marie-Pierre Robert & Simon Roy, ed, fasc 4, at para 19.
[60] *R v Roy*, 2012 SCC 26, [2012] SCR 60 at para 6.
[61] Sylvestre & Lapointe, *supra* note 59 at para 19.
[62] *R v J.F.*, 2008 SCC 60, [2008] 3 SCR 215 at para 9.
[63] Judgment appealed from at para 176.
[64] Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham: LexisNexis, 2015) at para 4.139.

[60] Thirdly, who is the reasonable person? Wilson J. in *R v Lavallee* stated, with regard to the objective standard for self-defence, that "[t]he definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'".[65] Similarly, in *R v Hibbert*, this Court unanimously held that, for the defences of self-defence, duress and necessity, "the appropriate objective standard to be employed is one that takes into account the particular circumstances and human frailties of the accused."[66] If such is the case, then personal characteristics should also be taken into account in determining whether or not a reasonable person in the same circumstances would have foreseen the risk. Factors such as age, gender, experience, and formation can be relevant to assess what is reasonable.

[61] Since criminal negligence causing death requires, as a matter of statutory interpretation, a higher level of fault than offences of penal negligence, personal characteristics such as age, education, and experience should be relevant to assess the objective *mens rea*. The majority position in *Creighton* is difficult to apply in practice for it is based on a claim of false universality and should not be adopted for criminal negligence offences. In using the words "criminally negligent" and "wanton or reckless disregard" in s. 219 *C.cr*., Parliament confirmed its intention to create an objective standard nearing the subjective standard presumed for crimes. While the focus is not on what the accused thought, but on what a reasonable person would have foreseen in the same circumstances, these circumstances must include the accused's perception of the facts, which is inseparable from his training and experience. It is only if such a perception is unreasonable and shows a marked and substantial departure from the standard of care that a reasonable person would have observed, that the accused had the requisite *mens rea*.

C. Did the Court of Appeal of Quebec err in law in holding that the verdict would not necessarily have been the same had the errors imputed to the trial judge not occurred and in setting aside the Applicant's acquittal?

[62] The Court of Appeal of Quebec erred when it determined that the errors in law committed by the trial judge satisfied the threshold of materiality and were sufficient to set aside the acquittal.

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[65] *R v Lavallee*, [1990] 1 SCR 852 at p 874.
[66] [1995] 2 SCR 973 at para 60.

[63] According to the Court of Appeal of Quebec, the trial judge made two errors in law which it deemed "permissible to conclude with a reasonable degree of certainty that these errors of law, which relate to an essential element of the offence, had a significant impact on the verdict of acquittal."[67] These errors of law would be:

> a) The trial judge erred in holding that the legal standard applicable to the determination of the mental element of the offence was that of a marked departure from the standard expected of the reasonable person in similar circumstances as opposed to a marked and substantial departure, and
>
> b) The trial judge erred in taking into account the Applicant's professional training in her evaluation of the mental element of the offence.[68]

[64] For an acquittal to be overturned, not only must the appellate court be satisfied that there was an error in law, but they must also show that without that error, the verdict would have been different.[69] The threshold for overturning an acquittal was described in *R v George*:

> If the dissent was implying that an appellate court can overturn an acquittal where it is merely possible that the verdict would have changed, that is too low a threshold. This Court has used various phrasings to articulate the threshold of materiality required to justify appellate intervention in a Crown appeal from an acquittal. An "abstract or purely hypothetical possibility" of materiality is below the threshold (*Graveline*, at para. 14). An error that "would necessarily" have been material is above the threshold (*ibid.*, at paras. 14-15; *R. v. Morin*, 1988 CanLII 8 (SCC), [1988] 2 S.C.R. 345, at p. 374). And an error about which there is a "reasonable degree of certainty" of its materiality is at the required threshold (*Graveline*, at paras. 14-15; *Morin*, at p. 374).[70] [Emphasis added.]

[65] In this case, the threshold for materiality was not met with a reasonable degree of certainty and therefore, the Court of Appeal of Quebec exceeded its jurisdiction when it overturned the acquittal and ordered a new trial.

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[67] Judgment appealed from at para 182 [our translation].
[68] Judgment appealed from at para 181.
[69] *R v George*, 2017 SCC 38, [2017] 1 SCR 1035 at para 27.
[70] *Ibid*.

(i) The Marked Departure vs. Marked and Substantial Departure of the Reasonable Person

[66] When carrying out her analysis, the trial judge asked herself whether or not the conduct of the Applicant represented a marked departure from the standard to be observed by a reasonable person.[71] She concluded that it did not. As a result, it follows reason that there was no need for her to push her analysis further and determine whether or not the Applicant's conduct also represented a marked *and substantial* departure since the lower of the two tests had not been met. If she applied the wrong test, it had no impact on the verdict as she held that there was not even a marked departure. Logically, therefore, she would not have found that the same conduct shown a marked *and substantial* departure.

[67] The Supreme Court in *R v J.F*. commented on the illogicality of the accused having been found not guilty of failing to provide necessaries, which requires a marked departure from the norm of a reasonable person, but found guilty of criminal negligence causing death, which requires a marked and substantial departure of a reasonable person:

> It is undisputed, however, that criminal negligence, unlike failure to provide the necessaries of life, involves a marked *and substantial* departure from the norm of a reasonable person. In this light, the verdicts at trial—not guilty of failing to provide necessaries, yet guilty of criminal negligence—are not only inconsistent, but incomprehensible as well.[72] [Emphasis added.]

(ii) The Applicant's Professional Training in Her Evaluation of the *Mens Rea*

[68] Should this Court not accept the Applicant's previous arguments that the trial judge did not commit an error of law when taking into account her professional training, the Applicant argues that the trial judge would thus logically have held her to a higher standard of care than that of a reasonable person. As explained by McLachlin in *Creighton*, taking into account the extensive experience of an accused in an activity or his training will have the effect of holding him to a higher standard, not a lower one:

> The Chief Justice, while in principle advocating a uniform standard of care for all, in the result seems to contemplate a standard of care which varies with the background and predisposition of each accused. Thus an inexperienced, uneducated, young person, like the accused in *R. v. Naglik*, [1993] 3 S.C.R. 122, could be acquitted, even though she does not meet the standard of the reasonable

[71] Trial judge's decision at para 431.
[72] *R v J.F*., 2008 SCC 60, [2008] 3 SCR 215 at para 11.

> person (reasons of the Lamer C.J., at p. 000). On the other hand, a person with special experience, like Mr. Creighton in this case, or the appellant police officer in *R. v. Gosset*, *supra*, will be held to a higher standard than the ordinary reasonable person.[73]

[69] Even if the trial judge erred in law in taking into account the Applicant's training, she nonetheless found that a reasonable person would not have been aware of the risk involved in the Applicant's conduct and acquitted her. It follows then that if the Applicant met a higher standard associated with her specialized knowledge, logically she would have met the lower standard of the average reasonable person.

[70] In light of all of these arguments, even if this Court determines that the trial judge committed these two errors of law, it cannot be said that the threshold of materiality is met here. In retaking the conclusion stated in *George*[74], the Applicant concludes that there cannot be any reasonable degree of certainty that the trial judge's views relating to the degree of conduct of the Applicant and her professional training were material to the verdict. It follows that, even if these considerations had amounted to legal errors, they would not have justified appellate intervention and, as a result, the acquittal should have never been reversed and the case brought back to trial.[75]

D. Did the Court of Appeal of Quebec err in law in holding that there was evidence upon which a trier of fact could reasonably find that it had been established beyond a reasonable doubt that the acts or omissions of the Applicant were a significant contributing cause of the death?

[71] This ground of appeal will be submitted and heard by this Court in the Applicant's appeal as of right on the unlawful act manslaughter conviction. As a result, should this Application for Leave be granted, the Applicant will elaborate further on this argument in the appeal as of right since the facts and evidence are identical. By hearing these arguments together, the Court would be ensuring uniformity in the judgments.

[72] To briefly summarize this argument, the Applicant submits that the trial judge and the Court of Appeal erred in concluding that there was sufficient evidence to prove beyond a reasonable doubt that Mr. Matern died of an endotoxic shock. The evidence demonstrates that

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[73] *R v Creighton*, [1993] 3 SCR 3 at p 60-61.
[74] *R v George*, 2017 SCC 38, [2017] 1 SCR 1036 at para 28.
[75] *Ibid*.

Mr. Matern's state of health was greatly deteriorated and that he suffered from severe heart disease which remained, according to the testimonies of defence experts, a probable cause of his death.[76] As a result, it was not possible for the courts to conclude, beyond a reasonable doubt, that the Applicant's actions caused the death of Mr. Matern.

[73] Should this Court decide not to intervene on the lower courts conclusion on the finding that Mr. Matern died from an endotoxic shock, then it should intervene because the Court of Appeal did not have jurisdiction to intervene in appeal on a question of mixed fact and law.

[74] More specifically, the trial judge found that there was factual causation: the injection of a contaminated substance caused the death of Mr. Matern. However, she did not find a legal causality between the injection and Mr. Matern's death for the Respondent had not proven beyond a reasonable doubt that the alleged illegal acts were dangerous and because some improvement was noted during the evening before Mr. Matern was admitted into the hospital.[77] The causation between the alleged unlawful acts and the contested facts and the death of Mr. Matern constitutes a mixed question of fact and law.[78]

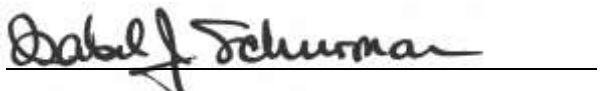
PART IV: SUBMISSIONS RESPECTING COSTS

[75] The Applicant is not seeking costs.

PART V: ORDER SOUGHT

[76] The Applicant requests that the Application for Leave to appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of August, 2018.



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[76] Trial judge's decision at paras 320-322.
[77] Trial judge's decision at para 446.
[78] *Smithers v R*, [1978] 1 SCR 506 at para 518; *R v Maybin*, [2012] 2 SCR 30 at para 17.

PART VI: TABLE OF AUTHORITIES

Cases **Paragraph(s)**

Other

PART VII: STATUTORY PROVISIONS

Criminal Code, RSC 1985, c C-46

Criminal negligence
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.

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

R.S., c. C-34, s. 202.

Causing death by criminal negligence
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.

R.S., 1985, c. C-46, s. 220; 1995, c. 39, s. 141.

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

R.S., c. C-34, s. 217.

Manslaughter
236 Every person who commits manslaughter 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

Négligence criminelle
219 (1) Est coupable de négligence criminelle quiconque :
a) soit en faisant quelque chose;
b) soit en omettant de faire quelque chose qu'il est de son devoir d'accomplir,
montre une insouciance déréglée ou téméraire à l'égard de la vie ou de la sécurité d'autrui.

Définition de *devoir*
(2) Pour l'application du présent article, ***devoir*** désigne une obligation imposée par la loi.

S.R., ch. C-34, art. 202.

Le fait de causer la mort par négligence criminelle
220 Quiconque, par négligence criminelle, cause la mort d'une autre personne est coupable d'un acte criminel passible :
a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;
b) dans les autres cas, de l'emprisonnement à perpétuité.

L.R. (1985), ch. C-46, art. 220; 1995, ch. 39, art. 141.

Homicide involontaire coupable
234 L'homicide coupable qui n'est pas un meurtre ni un infanticide constitue un homicide involontaire coupable.

S.R., ch. C-34, art. 217.

Punition de l'homicide involontaire coupable
236 Quiconque commet un homicide involontaire coupable est coupable d'un acte criminel passible :
a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de

four years; and

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

R.S., 1985, c. C-46, s. 236; 1995, c. 39, s. 142.

Right of Attorney General to appeal

676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

(b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;

(c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or

(d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

Summary conviction appeals

(1.1) The Attorney General or counsel instructed by the Attorney General may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a verdict of acquittal in a summary offence proceeding or a sentence passed with respect to a summary conviction as if the summary offence proceeding was a proceeding by indictment if

(a) there has not been an appeal with respect to the summary conviction;

(b) the summary conviction offence was tried with an indictable offence; and

(c) there is an appeal in respect of the indictable offence.

l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

L.R. (1985), ch. C-46, art. 236; 1995, ch. 39, art. 142.

Le procureur général peut interjeter appel

676 (1) Le procureur général ou un avocat ayant reçu de lui des instructions à cette fin peut introduire un recours devant la cour d'appel :

a) contre un jugement ou verdict d'acquittement ou un verdict de non-responsabilité criminelle pour cause de troubles mentaux prononcé par un tribunal de première instance à l'égard de procédures sur acte d'accusation pour tout motif d'appel qui comporte une question de droit seulement;

b) contre une ordonnance d'une cour supérieure de juridiction criminelle qui annule un acte d'accusation ou refuse ou omet d'exercer sa compétence à l'égard d'un acte d'accusation;

c) contre une ordonnance d'un tribunal de première instance qui arrête les procédures sur un acte d'accusation ou annule un acte d'accusation;

d) avec l'autorisation de la cour d'appel ou de l'un de ses juges, contre la peine prononcée par un tribunal de première instance à l'égard de procédures par acte d'accusation, à moins que cette peine ne soit de celles que fixe la loi.

Appel d'une déclaration de culpabilité par procédure sommaire

(1.1) Si la cour d'appel ou l'un de ses juges l'y autorise, le procureur général ou son substitut sur ses instructions peut, conformément au paragraphe (1), interjeter appel du verdict d'acquittement ou de la peine qui a été infligée à l'égard d'une infraction poursuivie par procédure sommaire, comme s'il s'agissait d'une infraction poursuivie par voie de mise en accusation, si les conditions suivantes sont

Acquittal
(2) For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 730 of any other offence.

Appeal against verdict of unfit to stand trial
(3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.

Appeal against ineligible parole period
(4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

Appeal against decision not to make section 743.6 order
(5) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under section 743.6.

Appeal against decision not to make s. 745.51(1) order
(6) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under subsection 745.51(1).

R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; 2002, c. 13, s. 65; 2008, c. 18, s. 28; 2011, c. 5, s. 3.

réunies :

a) l'infraction de procédure sommaire ne fait pas déjà l'objet d'un appel;
b) l'infraction de procédure sommaire a été jugée en même temps qu'un acte criminel;
c) l'acte criminel fait déjà l'objet d'un appel.

Acquittement
(2) Pour l'application du présent article, est assimilé à un jugement ou verdict d'acquittement un acquittement à l'égard d'une infraction spécifiquement mentionnée dans l'acte d'accusation lorsque l'accusé a, lors du procès, été déclaré coupable ou absous en vertu de l'article 730 de toute autre infraction.

Appel d'un verdict d'inaptitude à subir son procès
(3) Le procureur général ou le procureur constitué par lui à cette fin peut interjeter appel devant la cour d'appel d'un verdict portant qu'un accusé est inapte à subir son procès pour tout motif d'appel qui comporte une question de droit seulement.

Appel en matière de délai préalable à la libération conditionnelle
(4) Le procureur général ou un avocat ayant reçu de lui des instructions à cette fin peut interjeter appel, devant la cour d'appel, de tout délai préalable à la libération conditionnelle inférieur à vingt-cinq ans, en cas de condamnation pour meurtre au deuxième degré.

Appel relatif à l'ordonnance prévue à l'article 743.6
(5) Le procureur général ou un avocat ayant reçu de lui des instructions à cette fin peut interjeter appel, devant la cour d'appel, de la décision du tribunal de ne pas rendre l'ordonnance prévue à l'article 743.6.

Appel relatif à l'ordonnance prévue au paragraphe 745.51(1)
(6) Le procureur général ou un avocat ayant reçu de lui des instructions à cette fin peut

interjeter appel, devant la cour d'appel, de la décision du tribunal de ne pas rendre l'ordonnance prévue au paragraphe 745.51(1).

L.R. (1985), ch. C-46, art. 676; L.R. (1985), ch. 27 (1er suppl.), art. 139, ch. 1 (4e suppl.), art. 18(F); 1991, ch. 43, art. 9; 1995, ch. 22, art. 10, ch. 42, art. 74; 1997, ch. 18, art. 93; 2002, ch. 13, art. 65; 2008, ch. 18, art. 28; 2011, ch. 5, art. 3.