

**CHILDREN: NON-ACCIDENTAL
DEATH AND THE LACUNA OF
PROSECUTION**

**A Critical Analysis of the Law
Commission's Proposals and a
Re-Evaluation of the Underlying
Case Law**

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January 2006

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Acknowledgments

I would like to take this opportunity to thank both my directors of studies, Stuart Toddington, and Barbara Hudson for their support, encouragement, belief and words of wisdom.

I would also like to thank, Carol-Anne Jakeman and Bernard McNaboe, for their tireless efforts proof-reading the numerous drafts produced.

Finally I would like to thank Debra and Michael Greenhalgh who have been immensely supportive in such multifarious capacities that I could never fully acknowledge my indebtedness to them, to attempt to do so would be to short-change their efforts and friendship.

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ABSTRACT

The aim of this dissertation is to examine the Law Commission's proposals in respect of their final report on CHILDREN: Non-Accidental Death and Serious Injury, Law Com 282 and to determine whether the proposals are capable of meeting the criteria set by the Law Commission; i.e. that any recommendations must be justifiable on their own terms.

In order to do this a strict literal legal methodology will be employed. This is not because of its suitability to meet the social malaise that is the cause of the problem, or because of the fact that it identifies how that problem might be resolved, it is utilised because it is regarded as the primary method of interpretation.

The dissertation is split into two distinct chapters and both of these chapters are equally sub-divided into two parts. In chapter one part I, the proposed Bill is analysed clause by clause and subjected to imminent critique. Part II of chapter one then utilises the cases identified by the Law Commission to determine whether the provisions of the new Bill would substantially alter the out-come of any of the cases demonstrative of the identified lacuna. Reference is also drawn to the partial enactment of the Bill within the Domestic Violence Crime and Victims Act 2004; however this Act is not the main focus within the dissertation.

The Second and last chapter re-evaluates the pre-existing case law in this area. Again the methodology employed is one of literal legal interpretation, the reason for this being the fact that during the research for this paper it became apparent that there was a commonly held misinterpretation as to the extent and focus of the legal principles found within the substantive cases in this area of law. For instance, the case of *Lowe* 1973 is the substantive case on the distinction between an unlawful act and an omission within the offence of unlawful act manslaughter, omissions not being considered sufficient for this offence. *Lowe* is still considered good law despite being overruled by the House of Lords in *Sheppard* 1981. Reconciliation of these two cases and the earlier case of *Senior* 1899 is employed to demonstrate this misinterpretation.

Introduction

Children are being killed or seriously injured at an alarming rate, three a week in fact.¹ But, this is only part of the tragedy, because it is not happening in some war-torn third world country ruled by a tyrannical despotic regime. This unwholesome atrocity is occurring in England. The National Society for the Prevention of Cruelty to Children's (NSPCC) Working Group reported that of these children more than half were less than six months old.² What is even worse is that those responsible are non-other than the child's parents or primary carers and it is happening in the child's home; a place that should be safe. Unfortunately this tragedy is further compounded by the fact that the law appears to be unable to obtain a successful prosecution in the majority of cases; 75% of cases are reported as not even being prosecuted³. The media and lobbyists are quick to point out that 'someone is literally getting away with murder'.⁴

These statistics and the fact that the law appears to have become intractable, by virtue of the procedural and evidential constraints placed upon the courts, particularly by the decision in *Lane and Lane*,⁵ has led to the Law Commission being asked to make recommendations to the Government to close this unacceptable lacuna.

So, what exactly is the problem? This impasse, or lacuna, can best be expressed by re-iterating the Law Commission's enunciation of the problem:

¹ Judge Isobel Plumstead, Papers for the NSPCC "Which of you did it?" Conference in Cambridge, 2 November 2002, Introduction and Background, para 8; as reported in Law Commission Consultative Report, CHILDREN: NON-ACCIDENTAL DEATH OR SERIOUS INJURY (CRIMINAL TRIALS), Law Com 279, para 2.2 and the Law Commission's Final Report, CHILDREN: NON-ACCIDENTAL DEATH OR SERIOUS INJURY (CRIMINAL TRIALS), Law Com 282, para 2.29

² Judge Isobel Plumstead, Papers for the NSPCC "Which of you did it?" Conference in Cambridge, 2 November 2002, Introduction and Background, para 8

³ Law Com 279, para 1, Executive Summary p.iv; of the remainder only a small percentage result in a conviction for Homicide (murder or manslaughter) or Grievous Bodily Harm; Law Com 282 para 2.29

⁴ Law Commission's Reports, Law Com 279, para 2.2 and Law Com 282 para 2.29; Esam, B., Why should killer parents be allowed to escape justice, *The Times*, Oct 29, 2002; Dyer, C., Parents 'get away with murder', *The Guardian* (London) November 1, 2002

⁵ *R v Lane and Lane* (1986) 82 Cr App R 5

A child is cared for by two people (both parents, or a parent and another person). The child dies and medical evidence suggests that the death occurred as a result of ill-treatment. It is not clear which of the two carers is directly responsible for the ill-treatment which caused death. It is clear that at least one of the carers is guilty of a very serious criminal offence but it is possible that the ill-treatment occurred while one carer was asleep, or out of the room.⁶

Obviously this situation is intolerable but the law is very clear on the point, as expressed by Croom-Johnson LJ when giving his judgement in *Lane and Lane*,⁷ although the reasoning has its roots in the judgement of Lord Goddard CJ in *Abbott*⁸ who stated that:

If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of Not Guilty in the case of both because the prosecution have not proved the case. [Because], in those circumstances, [if] it is left to the defendants to get out of the difficulty if they can, that would put the onus on the defendants to prove themselves not guilty. My brother Finmore J. remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time of the murder; but the prosecution could not show that sister A or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which one.⁹

The problem of course is not a new one, the case of *Abbott*¹⁰ was decided fifty years ago, but the sheer scale of the problem and the attention that accompanied it brought about the need for a change in the law. However it has always been the author's contention that despite eminent judicial and academic reasoning to the contrary, the

⁶ Law Com 279 & 282 para 1.1

⁷ R v Lane and Lane (1986) 82 Cr App R 5 at p.11

⁸ R v Abbott (1955) 39 Cr App R 141

⁹ *Ibid.* at p.148 and p.503 respectively

¹⁰ R v Abbott (1955) 39 Cr App R 141

law has been and still is capable of bringing a just result¹¹ which is apparently denied by the existence of this lacuna.

This research intends to demonstrate that the rationale for the judgement in *Lane and Lane*¹² and the reasoning, taken from the judgement of Lord Goddard CJ in *Abbott*¹³ have been misapplied in subsequent cases culminating in legal consequences for the justice system that should never have been allowed to develop.

In presenting this argument the themes to be examined will be divided in two core chapters. In chapter one the focus will be on the recommendations made by the Law Commission and their partial enactment within sections 5 and 6 of the **Domestic Violence Crime and Victims Act 2004**. It is intended to analyse the recommendations, in order to determine whether they achieve the desired result, namely a closing of the identified lacuna. The form this analysis will take is one of comparison. By first asking the question: Does the proposed provision meet any of the elements that are identifiable as forming part of the lacuna? And secondly, by using the factual scenarios taken from those cases identified by the Law Commission as demonstrable of the lacuna and utilising them to determine whether the proposed provisions would result in a substantially different result than that which was actually obtained? The aim being to examine the effectiveness of the proposed legislation to close the lacuna and thereby bring a just result. This second limb is also pursued because as the Law Commission rightly assert:

A new offence must be justifiable on its own terms.¹⁴

Chapter two will be concerned with a reappraisal of the law that exists, and which pre-existed the recommendations; notwithstanding their partial enactment within the Act of 2004. It is intended to show that those offences categorised as involuntary manslaughter, gross negligence and unlawful act manslaughter, are capable of

¹¹ A 'just result', the existence of this problem and the fact that no one is being brought to account means that Justice and society is suffering a wrong, the law exists to ensure accountability of action and responsibility, the idea of a 'just result' is the bringing of these people to account.

¹² R v Lane and Lane (1986) 82 Cr App R 5

¹³ R v Abbott (1955) 39 Cr App R 141

¹⁴ LC 282 para 1.18

addressing this problem to a much greater extent than is currently the case. In order to justify the argument it will be necessary to discuss not only these two offences of manslaughter¹⁵ but also the scope of the 'duty of care' within the offence of gross negligence manslaughter, and the concept and scope of joint enterprise for the offence of unlawful act manslaughter, where more than one person is being prosecuted.

¹⁵ There is debate as to whether subjective reckless manslaughter exists as a substantive offence or whether it is subsumed by unlawful act manslaughter; or gross negligence manslaughter, notwithstanding this debate any overlap will be highlighted where necessary. A full discussion on the point is beyond the scope of this paper.

Chapter 1: A Critical Analysis of the Law Commission's Proposals

As stated in the introduction, it is intended in this chapter of the dissertation to discuss the recommendations proposed by the Law Commission, in order to determine whether they achieve the desired result. Following this a case study will be undertaken using the same cases as those identified by the Law Commission to demonstrate the alleged intractability of the lacuna. The result of this analytical study is to determine if the proposals are 'justifiable on their own terms'.¹

Clause 1: Cruelty contributing to death

The Law Commission assert that the first clause is the main mechanism for determining the culpability of the defendant, and they state in paragraph 6.6 of the final report, their belief that the clause achieves their aims. As such, the defendant's culpability under clause 1 can be determined when the defendant has been found guilty under section 1 of the **Children and Young Persons Act 1933**,² i.e. wilfully neglects etc... a child which is likely to cause unnecessary suffering or injury. But where the likely and unnecessary suffering or injury either results in or significantly contributes to the death of the child. The Law Commission in their commentary also state that it matters not whether the suffering or injury was caused directly by the defendant or by a third party. The main crux of the culpability lies in the fact that the defendant has breached his duty of care, under section 1 of the 1933 Act, and that this breach is connected to the child's death.

Problems exist however in respect of both the Law Commission's reasoning and the offence proposed. The lacuna identified the problem as being one where, 'there is no evidence capable of establishing that the defendant committed the act directly, or was a party to a joint enterprise'. The proposed clause does not address either of these identified problems. Neither does it advance the prosecutions' case in respect of the breach of 'duty of care', because presence alone does not establish guilt; per the *ratio*

¹ Law Com para 1.18

² Section 1 of the **Children and Young Persons Act 1933** is set out in full in appendix 2, as are all other statutes cited with the main body of the text when that provision does not accompany the reference.

in *Richardson*³, *Abbott*⁴ and *Forman and Ford*.⁵ The latter of these three cases concerned an alleged assault by one police officer against a suspect whilst in the presence of a fellow officer. It was held that passive assistance or encouragement by failure to exercise a duty of control did not amount to aiding and abetting, etc., within section 8 of the **Accessory and Abettors Act 1861**. Further to this, the House of Lords held in the case of *Sheppard*⁶ that the word 'wilfully' in section 1 of the 1933 Act was not to be interpreted as restricted to the physical acts or the omission of neglect, but extended to the consequences. Therefore the accused had to be found to have realised that his action or failure would lead to a likelihood of suffering or injury to health. The consequence of this is that the prosecution, for a charge under clause 1, or section 1A of the 1933 Act as it would be, must prove to the requisite standard of proof⁷ that the accused was aware that the child under his care was, at the very least, likely to suffer injury or harm and that as a consequence of that injury or harm, the child was likely to die. The clause does not state how the prosecution can establish the nexus between the wilful neglect in the first part and the significant, and foreseeable, contribution in the second.

Even if the usual course of presentation is dispensed with and the prosecution attempt to prove part one first and then build the second part, there must still be some evidence for the jury to at least infer the requisite foresight. But this takes us, or more accurately the prosecution, back to the fact that the lacuna states that there is no evidence to establish this. Equally, if there is evidence to state that the defendant wilfully neglected the child, even by omission, to such an extent that the jury can determine that the defendant either foresaw, or was reckless to, the infliction of harm or injury likely to cause death, why prosecute under this offence and not under manslaughter, or even murder.⁸

³ *Richardson* (1785) 1 Leach 387

⁴ *R v Abbott* (1955) 39 Cr App R 141

⁵ *R v Forman and Ford* [1988] Crim LR 677

⁶ *R v Sheppard* [1981] AC 394, HL

⁷ 'Beyond reasonable doubt', per *Woolmington v DPP* [1935] AC 462

⁸ This question is also raised by Professor Ormerod as editor of Smith and Hogan, *Criminal Law*, 11th Ed., Ormerod, D., 2006, Oxford Press, Oxford, p.502; however, Jefferson, *Criminal Law*, 7th Ed., 2006, Pearson, Harlow, p157, identifies both the difference between the offence within the **Domestic Violence Crime and Victims Act 2004**, and the offence proposed by the Law Commission, but there is an element to his findings that questions whether negligence is an appropriate level of mental culpability in a criminal law.

The Law Commission states however that this connection is clear, and that:

“...it is not necessary for a conviction under the proposed new section that the person who is guilty of the basic section 1 offence *causes* the child’s death in a sense sufficient to justify a conviction for manslaughter.”⁹

Any prosecution under the proposed section must surely be open to challenge. Because if the jury determine that a conviction for unlawful act manslaughter fails, they must obviously be saying that the prosecution have not proffered sufficient evidence to prove to them, that the defendant did the act directly or was a party to a joint enterprise; i.e. that he aided or abetted the crime by a failure to exercise control as *per* the cases of *Forman and Ford*¹⁰ and *Dytham*.¹¹ If the charge was one of gross negligence manslaughter and the charge fails then the jury is equally saying that there is insufficient evidence to show that the defendant failed to do that which he ‘ought’ to have done. The word ought, is emphasised because, according to the House of Lords’ decision in *Adomako*:¹²

...[in] regard to the risk of death involved, the conduct of the defendant was so bad as in all the circumstances as to amount in the jury’s judgement to a criminal act, or omission.”¹³

This means that while this test is described as objective in nature the jury must have considered that the defendant had at least some knowledge of the circumstance that contributed to the death, because the defendant’s conduct must be so significant as to warrant criminal liability. In every case, the jury is going to assess the knowledge of the defendant and weigh that knowledge against the circumstances. Notwithstanding the objective test, the jury must be forbidden to find a case of gross negligence manslaughter against those defendants who are stupid, ignorant or personally inadequate, just as they must be forbidden to find them guilty under section 1 of the

⁹ Law Com 282 para 6.6 emphasis is *per* the original

¹⁰ R v Forman and Ford [1988] Crim LR 677

¹¹ R v Dytham [1979] QB 722

¹² R v Adomako [1995] AC 171

¹³ *Ibid.* at p.171, see also p.187; see further, Smith and Hogan, Criminal Law, 11thEd., Ormerod, D., 2006, Oxford Press, Oxford, p.133

Children and Young Persons Act 1933: See *Sheppard*.¹⁴ The *Adomako*¹⁵ test will be examined in greater detail in chapter 2. The assessment of liability under either clause 1 (section 1A) or manslaughter, in either guise, thus becomes circular.

In relation to the **Domestic Violence Crime and Victims Act 2004** section 5, the requirements would appear to fall on the same grounds, although they are in some respects explicitly drawn in narrower terms. Whilst this section encompasses a wider range of victims and can take a multifarious route to find liability, it is narrower because it is explicit to the requirement 'that the circumstance surrounding death must be of the same kind as that foreseen by the defendant.'¹⁶ Professor Ormerod notes that the victim's death must occur in the same circumstances, as he ought to have foreseen.¹⁷ However a similar restriction can be implicitly interpreted into clause 1. This has the effect of being more restrictive than gross negligence manslaughter in circumstances similar to that found in the case of *Stone and Dobinson*;¹⁸ this case too will be examined more fully in chapter 2.

Clauses 2 & 3: Failure to protect a child and the effect of intoxication

In short, this clause states that the defendant will be culpable if at the material time the defendant was aged 16 or over, had responsibility for the child and was connected to the child by a number of specific ties¹⁹ and is aware, or ought to be aware, that there is a real risk that a specific and serious offence might be committed against the child and fails to take reasonable steps to prevent that specific offence being committed.

The Law Commission state that they envisage that a person with responsibility is to be criminally liable for failure to protect a child from a 'real risk' of serious harm (as

¹⁴ R v Sheppard [1981] AC 394, HL at p.418E

¹⁵ R v Adomako [1995] AC 171

¹⁶ See section 5 (1)(d)(iii); Appendix Six p.96 post

¹⁷ Smith and Hogan, Criminal Law, 11thEd., Ormerod, D., 2006, Oxford Press, Oxford, p.502

¹⁸ R v Stone and Dobinson [1977] QB 354

¹⁹ The specific ties are, blood relationship, co-habitation in the same household (undefined), or looks after the child by arrangement, whether paid or not, but takes care of the child wholly or mainly in the child's home.

in the case of *Re H*²⁰) and that the responsibility does not cease, nor the liability terminate, merely because the care arrangement ends.²¹ The Law Commission state:

[W]e see great importance in making it clear that a person who has responsibility and has a connection with the child should not be able, with impunity, to expose the child to an anticipated abusive situation simply because the arrangement or the visit has come to an end. We believe that it is proper that such a person should be under an obligation to take reasonable steps to avoid further abuse. Depending on the circumstances ...²²

This statement is both logical and reasonable, especially given the nature and seriousness of the problem, and especially in relation to one parent handing control of a child back to the other, because it is accepted that parental responsibility does not end in this circumstance,²³ just as it does not end by the parent leaving the room: *Marsh and Marsh*²⁴ and *Russell and Russell*.²⁵ It logically follows that it is reasonable to place a similar liability upon any other person having a responsibility for that child, whether acquired by this section or any other statutory provision or by virtue of the common law. It does however raise a number of further questions. What is the extent of liability for those parents, or carers, who take a child to a contact session with a known abusive or violent parent? Because, while it is acknowledged that a reasonable person might not consider this to be a 'risk situation that ought not to be ignored',²⁶ the Law Commission state quite specifically that:

It is what the him or herself "ought to be aware of" which will determine whether they are potentially culpable.²⁷

²⁰ *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, see Law Com 282 para 6.22

²¹ Law Com 282 para 6.19

²² *Ibid.*

²³ Children Act 1989 s2

²⁴ *Marsh and Marsh v Hodgson* [1974] Crim LR 35

²⁵ *R v Russell and Russell* (1989) 85 Cr App R 388

²⁶ *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 per Lord Nicholls at p585, see Law Com 282 para 6.22

²⁷ Law Com 282 para 6.23, emphasise in the original.

While the liability in such a situation as this might seem slight and only potential, there still exists the possibility of culpability, especially if the primary parent has not raised, or has ceased to raise, the issue with the authorities.²⁸ The problem of abuse within this scenario is by no means rare, the NSPCC report that:

At least fifteen children in England and Wales have been killed by separated parents or step-parents, since 1998 as a result of contact arrangements.²⁹

Such culpability would appear harsh if not cruel given the circumstance. There also remains the question of liability in respect of the young baby-sitter, who whilst sitting becomes aware that the child being cared for is being abused by at least one parent. To refrain from returning the child to its parents potentially brings liability for the offence of kidnapping.³⁰ The answer would appear to lie in the natural and automatic response that the prosecution would naturally indict the parents, but this then raises the issue of degrees of liability and superior or inferior responsibility, which is contrary to the theory that we are all equal in law. There is also the further question as to whether a person with responsibility has a duty to protect others from an abusive or violent child in their care. This question is posed not only because it is linked to the last, but because Professor Glanville Williams uses such an example when talking about duty of care and joint liability in his paper "Which of you did it".³¹ This is one of the papers referred to by the Law Commission in their reports, which highlights the complex problem contained within the lacuna. It is acknowledged that this question would at first blush appear to be outside the remit of the lacuna. However, the author would submit that it forms a distinct part of the identified lacuna, because of the duty to control. This matter will also be examined in chapter 2 when dealing with omission and joint enterprise.

²⁸ Consider the fate of Vandana Patel who entered a 'risk situation' at Stoke Newington Police Station, and was stabbed twelve times; see *The Independent* 3 March 1992; Aileen McColgan, *In Defence of Battered Women Who Kill*, (1999) OJLS 508 at 520

²⁹ Report by the NSPCC, *Legislative Loophole is Risking Lives of Children*, June 14, 2004, <http://www.nspcc.org.uk/html/home/informationresources/palegislativeloopholeendangeringchildren.htm>

³⁰ The charge might equally be one of false imprisonment, or child abduction under s2 of the **Child Abduction Act 1984**, depending on the facts and circumstance. Interestingly however, is that fact that should she be found to have a lawful excuse, then the parents themselves might be found guilty of kidnapping; *D* [1984] AC 778

³¹ Glanville Williams, *Which of you did it?*, (1989) 52 MLR 179

As a fundamental 'stand alone' offence, there appears to be nothing that distinguishes clause 2 from the existing offence under section 1 of the **Children and Young Persons Act 1933**. As stated earlier the word 'wilfully' requires a level of subjective knowledge equal to that in clause 2 and referring back to the quotation made earlier,³² the Law Commission are equally not concerned with those persons who are described as 'stupid, ignorant or personally inadequate'; notwithstanding that there is a reference to what might be equally described as the stereotypical defendant in these type of offences:

...the defendant will be an, often inadequate, individual with few material or mental resources. [sic]³³

Therefore, when 'wilfully' is connected to the consequence of the offence by the verb 'exposes', then the person with responsibility for the child becomes liable. Clause 2 might equally be considered to be of more limited scope than section 1 by virtue of the person having responsible being restricted to those who only have care of the child wholly or mainly at the child's home,³⁴ in which case there is an even stronger argument that the offence does not meet the Law Commission's own standard that the offences be 'justifiable on their own terms',³⁵ because a person with responsibility should be liable if they act with the requisite knowledge irrespective of where they 'care' for the child.

The specific incorporation of voluntary intoxication (clause 3) of any substance, which the defendant realised would impair his, or her, judgement is merely the importation of common law into statute. The case of *Majewski*³⁶ indicates that where intoxicants are taken voluntarily then any crime described as being one of basic intent, which includes crimes where the mental element is subjective recklessness, is proved in respect to that mental element; i.e. in respect to the subjective recklessness.

³² Law Com 282 para 6.23; first para p.8 *ante*

³³ *Ibid.* para 6.30 ~ Note: The use of 'often inadequate' was probably meant to be in single inverted commas, however the quote was typeset as appears above.

³⁴ *Ibid.* para 6.11; Offences Against Children Bill 2004 Clause 2(6)(b); see Appendix 1 at page 82 *post*

³⁵ *Ibid.* para 1.18

³⁶ DPP v *Majewski* [1977] AC 443; See also *Lipman* [1969] 3 All ER 410

The rationale is best expressed by reiteration the finds of Lord Mustill in *Kingston*:³⁷

[The problem of establishing *mens rea*] is cured by the intentional taking of drink without regard to its possible effects as [being] a substitute for the mental element ordinarily required by the offence. The intent is transferred from the taking of drink to the commission of the prohibited act. The ... defendant cannot be heard to rely on the absence of the mental element when it is absent because of his own voluntary acts. Borrowing an expression from a far distant field it may be said that the defendant is stopped from relying on his self-induced incapacity.³⁸

The exception to this common law presumption is the same as that found in sub-clause (2)(b), medically prescribed drugs, and any lack of knowledge that being the negative of (2)(a). The effects of the common law on a section 1 offence are therefore the same as the effects of this clause on either clause 1 or 2 as such nothing is added to the law by its inclusion.

Clause 4: The statutory responsibility

Clause 4 is the recommendation of a statutory statement to give account of how the injury or death occurred by a person having responsibility for a child at the time of those injuries. A number of respondents raised the question as to the statement's effectiveness³⁹ and this author would have to concur. The lacuna identified is one where there is at least an inference of presence at the relevant time by the person, or persons, having responsibility for the child. This is coupled to an absence of proof as to who did the actual act and a lack of proof that they were a party to a joint enterprise. Obviously the statement is not going to change that. Neither can it change the knowledge of any of those persons who are accused. Thus the question would have to be asked, as it was, 'what effect would making such a statement have?' The answer would appear to be very little. The accused that stays silent because of guilt is

³⁷ R v Kingston [1994] 3 All ER 353

³⁸ *Ibid.* at p.364, per Lord Mustill, when speaking on the case of *R v O'Connor* (1979) 146 CLR 64

³⁹ Judge Jeremy Roberts QC, the Association of Chief Police Officers, the Criminal Bar Association; see Law Com 282 para 6.36

exempt from saying anything, *per* the general rule against self-incrimination,⁴⁰ notwithstanding the erosion of this general privilege by Parliament.⁴¹ However, if contrast is made between this statement and any of the statutory provisions⁴² that qualify the privilege, it is apparent that the statement would amount to nothing more than one of ‘moral perfection’. Further, if they are silent through fear then irrespective of any moral obligation, or statutory statement, nothing is going to change unless some positive form of protection is both supplied and strong enough to overcome that fear⁴³. The comments made by Baroness Hale of Richmond in *Hasan*⁴⁴ in respect of duress have equal applicability in this regard. The recommendations by the Law Commission in the consultation report⁴⁵ at 6.12 under safeguards, appears wholly inadequate:

Where the carer claims to be fearful of another suspect, it would be desirable for some consideration to be given to what could be done to allay such possible fears and to emphasise the importance of the responsibility to give an account despite these fears.

In respect of the lacuna and any effectiveness upon it, with the utmost respect, such a statement achieves nothing.

Clauses 5 and 6: Investigations by Police and Responsibility of Witness in Criminal Proceedings

These Clauses deal with the procedural changes that are necessary to incorporate Clause 4. Having dealt with clause 4 and the remoteness of applicability to the lacuna, nothing further will be said in respect of Clauses 5 and 6; other than to note

⁴⁰ Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; *Salabiaku v France* (1988) 13 EHRR 379, ECHR; AG’s Ref (No.2 of 2004) [2004] UKHL 43, [2005] All ER 273, see paras 9 and 21 at pp.246-247 and p.251 respectively, per Lord Bingham

⁴¹ The guaranteed right is not absolute but and statutes imposing a duty to give evidence have been found to be compatible; e.g. Civil Evidence Act 1968 s14, Road Traffic Act 1988 s5; see *Sheldrake v DPP* [2004] UKHL 43, [2005] All ER 273

⁴² **Criminal Evidence Act 1898**, s1; **Children Act 1989** s98; *et al*; see also Law Com 279 paras 3.38 – 3.52 and more specifically the comments of Elizabeth Lawson QC in *Re M (Care Proceedings: Disclosure and Human Rights)* [2001] 2 FCR 1316, Law Com 279 para 3.49

⁴³ See Law Com 279 para 3.49 – 3.52 and the comments of Elizabeth Lawson QC in *Re M (Care Proceedings: Disclosure and Human Rights)* [2001] 2 FCR 1316

⁴⁴ *R v Hasan* [2005] EWHL 22, [2005] 4 All ER 685 at pp.712-713 and 715

⁴⁵ Law Com 279

that Clause 6(4)(a) preserves the right of privilege, which is therefore pertinent to the comments just made in respect of clause 4.

Clause 7: Special procedure during trial (Removal of the 'Half-Time' rule)

In order for Clause 7 to come into operation it must be proved that a serious crime has been committed against a child and that a defendant who has responsibility for that child is identifiable, either individually or as being one amongst an identifiable group of defendants (or potential defendants). The reason for the inclusion of this definition will become apparent. Should the defendant with responsibility be entitled to an acquittal then clause 7 would cease to operate; but then equally charges under s1 of the 1933 Act, the aggravated s1A offence (proposed) and gross negligence manslaughter would founder also.

The aim of this provision is however to give effect to the Law Commission's desire that where ordinarily a submission of no case to answer would bar the court from further enquiry, then this 'half-time rule' should be postponed in order for the defendants to give an account. The problem is that without the operation of something further, other than the injury or death of the child and the identification of the group, the rule at the root of the lacuna continues to be operative and silence by each and every defendant will remain a defiant hurdle.

In their commentary on the operation of this clause, the Law Commission dismiss the recommendations of Ms Laura Hoyano⁴⁶ who suggests that the test ought to be the same as that which operates to take the case beyond the 'half-time rule'. The Law Commission rejected this because:

These conditions are the trigger to the operation of a special procedure which will, amongst other things, deny the defendant the facility of seeking to have the case dismissed at the close of the prosecution case.⁴⁷

⁴⁶ Ms Laura Hoyano is a Fellow and Tutor at Wadham College Oxford; specialising in the "legal responses to allegations of child abuse, particularly in relation to the evidence in criminal prosecutions, and vicarious and primary tort liability for institutional abuse."

⁴⁷ Law Com 282 para 6.58

Thus, to set the test which applies in all 'normal' cases would defeat the purpose of this 'special procedure'. The Law Commission however then go on to state that it is only the first condition of the clause that has to be proved to the requisite standard, namely, that:

...the offence charged or any alternative offence has been committed (but it is not necessary for it to have been proved which of those offences was committed).⁴⁸

So, provided there is a defendant who has a responsibility and provided that at least s1 of the **Children and Young Persons Act 1933** appears on the charge sheet, then the 'half-time rule' is to be postponed. There is however an additional hurdle in sub-clause 3 and according to the Law Commission it is a 'substantial' one. In paragraph 6.62 of their final report it is stated that the mechanism when operative will take the prosecution a long way down the road to establishing that it must have been one or the other, or the entire identified group who committed the offence. The Law Commission state that:

It imposes the obligation on the prosecution to narrow the field of suspects so that they can all be described either by name, or by personal characteristics, or by their relationships [to the victim. ...but, it] will not apply where the question for the court is "are we sure it was the defendant, chosen from the whole world, who did it".⁴⁹

But surely this is the prosecution's remit anyway and if the evidence is available to show that it is either an individual or the entire group who committed the offence then they have satisfied the court that there is a case to answer and Ms Hoyano's recommendation is surpassed, irrespective of any postponement of the 'half-time rule'.

⁴⁸ Law Com 282 Clause 7(2) of the Offences Against Children Bill 2004

⁴⁹ Law Com 282 para 6.61

The Law Commission when talking on the operation of the expansive adverse inference at paragraph 6.98, state that section 35A(5)(b) of the 1994 Act,⁵⁰ as it would be, operates to remove the fourth technical requirement of the *Cowan*⁵¹ direction, to such extent that it might be characterised as ‘establishing a case to answer’ but the inference can not be drawn without a case to answer; *Abbott*⁵², *Cowan*⁵³, *Doldur*⁵⁴, *Milford*⁵⁵ and *per* the Law Commission’s Consultation Report at paragraphs 6.36 ~ 6.39.⁵⁶

The problem existent within the lacuna thus continues to return. If the prosecution have a number of defendants, even if one has a responsibility to the victim, the prosecution will fail to surmount the defence hurdle unless they can proffer either greater legal argument or evidence against the defendant. The first condition, clause 7(2) as stated above, does not bolster the prosecution’s case or their evidence. Silence remains a substantial defence, especially against the higher charges of manslaughter or an aggravated s1 offence. Suspicion of a defendant’s guilt remains just that suspicion.

Thus, the mechanism of clause 7 to abolish the ‘half-time rule’ is defective in these circumstances and will only operate to further burden the ‘over-laden and underfed camel’ that is the criminal justice system.

Clause 8: Inferences from the accused’s silence

Clause 8 amends the **Criminal Justice and Public Order Act 1994**, in order to allow the jury to make an adverse inference against a defendant who has a responsibility to the child victim over and above a ‘normal’ s35 adverse inference. Once the court is satisfied that the defendant meets the requirements of responsibility and the ‘half-time rule’ has been postponed then this mechanism is automatically

⁵⁰ Criminal Justice and Public Order Act 1994; See Appendix 5 at pp.93-94

⁵¹ R v Cowan [1996] QB 373

⁵² R v Abbott [1955] 2 QB 497

⁵³ R v Cowan [1996] QB 373

⁵⁴ R v Doldur [2000] Crim LR 178

⁵⁵ R v Milford [2001] Crim LR 330

⁵⁶ Law Com 279

triggered. The Law Commission believe that the expanded adverse inference should operate because:

...the defendant bears the statutory responsibility [which is an] important element in enabling a jury to say that the circumstances disclosed by the evidence “call for an explanation from that defendant”.⁵⁷

The mechanisms that trigger the operation of this clause would, according to the Law Commission, negate the strict requirements of *Cowan*⁵⁸ but it has already been shown that where there is sufficient evidence to satisfy the court then there is already a case to answer. Thus the requirements of *Cowan*⁵⁹ are equally already met. The Law Commission, however, appreciate that if there is not a case to answer and a non-responsible defendant is released and a defendant with responsibility is left ‘in the frame’, then the jury may have sympathy for that defendant and without further and more expansive amendments the Law Commission accept that this brings about an anomaly.⁶⁰ But if there is no case to answer then surely it is perverse to convict a person of an offence; are we not reminded of the words Lord Goddard CJ in *Abbott*?⁶¹

[A]lthough it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and the law maintained that the prosecution should prove its case.⁶²

Therefore, if the lacuna exists then it exist here as it exists in all these types of cases and for this very reason. The anomaly that would be created is one of circularity in relation to a ‘lack of proof’.

⁵⁷ Law Com 282 para 6.80

⁵⁸ R v Cowan [1996] QB 373

⁵⁹ *Ibid.*

⁶⁰ Law Com 282 para 6.80

⁶¹ R v Abbott [1955] 2 QB 497

⁶² *Ibid.* at pp.503 - 504

To give two contrasting examples: If the prosecution can prove that three people were in the house, where a child died an unnatural death and that one or two of the defendants had responsibility to the child, then they cannot satisfy the court to the requisite standard. Suspending the ‘half-time’ rule and placing those with responsibility under a duty to answer adds nothing to the prosecution’s case. There remains sufficient doubt that no reasonable jury could bring a guilty verdict against any of them irrespective of whether the non-responsible party is removed. If however, the prosecution can prove that all three were in the same room as the child victim at the necessary time, then there is a natural inference that those with responsibility should give account, regardless of any statutory statement to that effect. But if there is no other evidence then the prosecution still fails despite these changes to the criminal process. The most that can be proved is a section 1 child cruelty charge under the 1933 Act, but *only if there is a catalogue of abuse*. In the circumstance of a single incident then there remains doubt in the face of silence or lies, as *per the ratio* in both *Lane and Lane*⁶³ and *Strudwick*.⁶⁴ The rationale within these examples is effectively confirmed by the Law Commission when they state in their commentary that:

It means that the judge will have to consider, where asked, whether in the circumstances of the case it would be “proper” for the jury to be permitted to draw such an inference.⁶⁵

The expansion of the adverse inference under s35 of the 1994 Act does nothing more than a ‘normal’ adverse inference; either practically, logically or linguistically.

Clauses 9 ~ 13: Savings and interpretation

Clause 9 limits the procedural and evidential effects of the Offences Against Children Bill 2004 to those mentioned within it, the remaining clauses are interpretive, as such no further discussion will advance this dissertation beyond that which has already been made.

⁶³ R v Lane and Lane (1986) 82 Cr App R 5; see also *R v Wattam* (1952) 36 Cr App R 72

⁶⁴ R v Strudwick (1994) 99 Cr App R 326

⁶⁵ Law Com 282 para 6.86

A Case Study: A Critical Analysis of the Law Commission's Proposals

The following as stated in the introduction is a case study based on those cases identified by the Law Commission as being demonstrable of the lacuna. The incorporation of this case study is two-fold; the first is to determine the scope of the identified lacuna and the second, is to assess the effectiveness of the proposed provisions. In each of these cases the trial judge has always accepted the prosecution argument that there is a case to answer.

R v Lane and Lane¹

The child at the centre of this case was the subject of a violent attack between the hours of noon and 8.30pm. The only defendants were those having a duty towards the child and neither defendant gave evidence. Thus the jury had to determine their decision based on their assessment of the prosecution case given the facts presented and the lack of any explanation from the defendants. Although, it was an established fact, that the defendants both had a 'general' custody of the child throughout the day, notwithstanding that they were individually but occasionally absent. Both defendants were found guilty of unlawful act manslaughter and cruelty of a child; "wilfully ill-treats" under s1(1) of the 1933 Act.² The cruelty charge was based on three incidents occurring on the 30th April, 17th June, the 1st July 1983, the fatal assault occurring on the 1st September formed no part of the cruelty charge.

These facts would appear to bring the case of *Lane and Lane*³ well within the criteria proposed by the Law Commission. However, as stated when examining the proposals, silence or lies do not advance the prosecution's case or evidence and any adverse inference can already be seen to be operative in the decision of the jury when they found the Lanes guilty. The problem however is that while a general duty of care was admitted, the police investigation proved the absences claimed and as such a continual joint custody, as in *Marsh and Marsh*,⁴ could not be established. Further to this the prosecution specifically claimed that the cruelty incidences were not adduced

¹ R v Lane and Lane (1986) 82 Cr App R 5

² The maximum sentence of imprisonment under s1(1) at this time was 2 years

³ R v Lane and Lane (1986) 82 Cr App R 5

⁴ Marsh and Marsh v Hodgson [1974] Crim LR 35

as similar fact evidence and rightly so. Lord Justice Croom-Johnson specifically states that the fatal injury was probably inflicted by a single blow, possibly as a single incident and no doubt in a very short space of time.⁵ The effects of a statutory statement are non-existent for the reasons stated earlier in respect of lies and privilege. Besides this his Lordship also states that for any lack of explanation to point to guilt it has to be in circumstances that point to knowledge and therefore to the defendant's own fault.⁶

The case of *Lane and Lane*⁷ foundered due to the extremely wide 'window of opportunity' in respect of when the injury was inflicted and the fact that it was, almost undoubtedly a single incident. In fact Lord Croom-Johnson J makes this very point:

At all times the prosecution were unable to show when it was inflicted, by whom it was inflicted, or how many people were present.⁸

Even the medical opinion supporting the cruelty charge is now open to some doubt. But to say that this creates a lacuna in the law is excessive. There is a deficiency of evidence, although not a complete absence of it, as such the case is one of misapplication of law *per* the second *ratio*. The provisions proffered by the Law Commission are highly unlikely to alter the decision in this case.

R v Aston and Mason⁹

As with the case of *Lane and Lane*¹⁰ the prosecution based their case on a single incident; namely a rear body blow, consistent with a slam on to a hard surface or wall rather than with a fall. But at least in this case the defendants were in the flat at the relevant time, although not in the same room. The Court of Appeal upheld the appeal

⁵ R v Lane and Lane (1986) 82 Cr App R 5 at pp.9 & 14

⁶ *Ibid.* at p.14: See also the Law Com 282 paras 6.62, 6.65 and 6.67 for commentary which also points to this essential matter.

⁷ R v Lane and Lane (1986) 82 Cr App R 5

⁸ *Ibid.*

⁹ R v Aston and Mason (1992) 94 Cr App R 180

¹⁰ R v Lane and Lane (1986) 82 Cr App R 5

and again emphasized that there was insufficient evidence for the jury to properly conclude that:

either A or M expressly or tacitly agreed that D should suffer physical harm; or that either had wilfully and intentionally encouraged the other to cause injury to her.¹¹

Equally:

...there was no evidence that there was any opportunity for one to intervene in an attempt to stop the activities of the other *vis-à-vis* the baby.¹²

However Lord Lane CJ, who delivered the judgement, comments heavily on the trial judge's summary of the case to the effect that he erred in his assessment of the evidence. Looking at the facts presented in the case report, there is a strong indication that the mother was the principal and that she acted alone. The assault took place between 10.15am and 12.15pm¹³ thus, she had the opportunity and she had expressed a desire to be rid of the child.¹⁴ There is also 'similar fact' evidence existent in the injuries inflicted on her previous child, Karl, who suffered broken ribs and a subdural haemorrhage.¹⁵ Therefore, while the decision remains steadfast in its application of the *Abbott*¹⁶ principle (because of the way the case was pursued by the prosecution) actual analysis places it outside of the lacuna because there is evidence to show that potentially one rather than the other, or both, committed the crime.

One element does need to be noted, the court whilst relying on the case of *Abbott*¹⁷ only considered the case of, and therefore the principle in, *Lane and Lane*.¹⁸ As such it must be asked whether there is a difference in the decisions of these two cases and the applicability of the principles to the facts; especially as Lord Justice Croom-

¹¹ R v Aston v Mason (1992) 94 Cr App R 180 at p.181

¹² *Ibid.*

¹³ *Ibid.*, at p.182, narrowed down from 12 hours by the occurrence of petechial haemorrhaging of the eyes

¹⁴ *Ibid.* at p.185

¹⁵ *Ibid.* at p.182

¹⁶ R v Abbott (1955) 39 Cr App R 141

¹⁷ *Ibid.*

¹⁸ R v Lane and Lane (1986) 82 Cr App R 5

Johnson raised the question of why the prosecution had not pursued the case under 'neglect' rather than 'wilfully ill-treats'.¹⁹

R v S and C²⁰

This case also fails to fall within the lacuna, for the same reasons as *Aston and Mason*.²¹ The only difference here is that the jury acquitted the boyfriend and found the mother guilty. The convictions were found to be unsafe because the trial judge had erred in his summing-up. The reason no re-trial was ordered was because the Crown accepted that the acquittal of the boyfriend would have to be honoured, which would impact upon the presentation and effectiveness of evidence at any re-trial. Therefore to say that this case is one where there is no evidence and thus within the lacuna identified is erroneous. It might also be noted that Blackstone's Criminal Practice makes the following statement, which is supportive of the stance taken in relation to these two cases:

Whether the evidence really does leave the question of which accused committed the offence in total doubt or whether there is evidence just capable of pointing to one or the other as the person responsible will depend on close analysis of the evidence in the particular case.²²

R v Strudwick²³

As noted in *Lane and Lane*²⁴ for lies or any lack of explanation to carry adverse weight they must be said in a manner that points to knowledge or guilt.²⁵ In this case the trial judge rejected a plea of no case to answer, because:

¹⁹ *Ibid.* at p.7

²⁰ R v S and C [1996] Crim LR 346

²¹ R v Aston and Mason [1991] Crim LR 701

²² Blackstone's Criminal Practice, 2004, Oxford University Press, Oxford para D14.30

²³ R v Strudwick (1994) 99 Cr App R 326

²⁴ R v Lane and Lane (1986) 82 Cr App R 5

²⁵ *Ibid.* at p.14; see above p.19

S admitted some violence towards the child and had told manifest lies from which the jury could infer that he was guilty of manslaughter. Similarly, [the mother] had seen the violence used by S, and had lied.²⁶

The Court of Appeal of course point out that 'the fact that people lie' does not advance the prosecution case. Equally it does not turn 'no evidence' into 'some evidence' this can only be done with other evidence and the lacuna exists because of an absence of evidence. But the case for the prosecution was advanced on three fronts only one of which was based on the lies told, albeit to support the other two grounds. The first, being the contextual background of continual physical abuse by the defendants against the child. The second, being that there was an admitted assault by the first defendant against the child, which was witnessed by the second defendant. The fact that there is no definitive evidence to conclude that the 'tea-time' incident was in fact the actual incident when the fatal injuries were inflicted does not close the issue. The circumstantial evidence is strong and it is surely open to debate as to whether the jury would have drawn such a conclusion had it not been for the fact that the prosecution attempted to bolster this evidence by reliance on the lies told and the fact that the trial judge utilised this approach to reject the submission of 'no case to answer'. Further to this is the fact that Farquharson LJ states that the case has considerable similarities to the case of *Lane and Lane*²⁷ and in respect to the telling of lies this author accepts that that is certainly the case. However in respect of responsibility and culpability there is, respectfully, a question of doubt. His Lordship states in his judgement that:

There are cases in which the present problem is overcome if the presence of both accused can be established at the time the assaults took place. An example is to be found in *Lawson and Thompson* (unreported July 30, 1993) where the presence of both appellants was admitted at a time when the child victim was heard screaming by the next door neighbour. If of course evidence of that kind is available it avoids the problems which arise in the present appeal.²⁸

²⁶ R v Strudwick (1994) 99 Cr App R 326 at p.327

²⁷ R v Lane and Lane (1986) 82 Cr App r 5

²⁸ R v Strudwick (1994) 99 Cr App R 326 at p.331

The inference to be drawn from this passage is questionable; would a witness hearing the child scream have made such a difference to the outcome of the case? The answer to that is doubtful, because it too does not advance the case, unless it is accepted that the tea-time incident *was* the actual occasion on which the fatal injuries were inflicted, in which case the need for a witness adds very little, especially as according to the headnote:

[The defendants] admitted that the child was with them in their caravan during the period when her fatal injuries must have been inflicted²⁹

This according to the commentary on *Marsh and Marsh*³⁰ is sufficient to maintain a finding of joint enterprise and therefore a conviction of manslaughter, especially when the defendant's do not give a credible account of the injuries. Although this case was criticised by Croom-Johnson LJ in *Lane and Lane*³¹ the issue of presence at the time of the incident is substantially different as between these cases. The issue of presence and of previous acts perpetrated against the child is reinforced by the following case of *Russell and Russell*.³²

In relation to the proposals and the lacuna, as stated above, lies will apparently defeat the statutory statement as such the advancement of the case past the submission of 'no case to answer' would make no further headway unless there is other evidence which is contrary to the description of the lacuna. If however, we accept the argument just advanced that there is evidence from which the jury can legitimately find defendants guilty then that too defeats the need for the proposals. It is submitted that this argument is also true of the new s5 offence under the **Domestic Violence Crime and Victims Act 2004** because that offence stands or falls together with any charge for murder or manslaughter by virtue of section 6 subsections (3) and (4).³³

²⁹ *Ibid.* at p.326; see also p.329 re the first defendant, and p.331 in relation to the second defendant.

³⁰ *Marsh and March v Hodgson* [1974] Crim LR 35

³¹ *R v Lane and Lane* (1986) 82 Cr App R 5 at p.12, see Law Com 279 para 6.25

³² *R v Russell and Russell* (1987) 85 Cr App R 388

³³ See Appendix 6 p.97 post

*R v Russell and Russell*³⁴

This case concerns the conviction of both parents for unlawful act manslaughter by the administration of a lethal overdose of Methadone. Both parents were methadone addicts and had previously administered small amounts of the drug to their daughter. Unfortunately on the fatal occasion one of them administered an excessive amount of the drug, however it could not be proved which one. The conviction according to the principle of the cases stated above should have been struck-out, on a strict interpretation, but the contrary in fact occurred and the conviction was upheld. The Law Commission cite this case as one where a joint enterprise, aiding and abetting, is inferred at the time of the fatal incident by reference to the previous activities of the defendants against the victim. This was of course, the first ground of liability advanced by Mr Camden-Pratt QC, in *Strudwick*,³⁵ although it will be recalled that in that case the court held that there was no evidence once the reliance on lies was removed. Equally, a submission by one of the defendants that they were, or might have been, out of the room at the relevant time was rejected. The Lord Chief Justice actually states that Mr Russell:

...was almost certainly in the maisonette and almost certainly in the living room/bedroom when the drug was administered³⁶

A similar finding was made in *Marsh and Marsh*³⁷ where the court held that the conviction was still sound, because:

...the injuries had been caused by human agency and that the defendants were jointly in charge of the child at the material time.³⁸

This approach does raise problems in respect of the duty to give an account. If it is fulfilled, as *per* the Law Commission, when the person with responsibility says, '*I do not know what happened*' because:

³⁴ R v Russell and Russell (1987) 85 Cr App R 388

³⁵ R v Strudwick [1994] 99 Cr App R 326

³⁶ R v Russell and Russell (1987) 85 Cr App R 388 at p.394

³⁷ Marsh and March v Hodgson [1974] Crim LR 35

³⁸ *Ibid.* at p.35

“In our view this concern fails to give any, or any due, weight to the fact that the responsibility is to give such account *as they can*. Thus, if they were not present and are unaware of what occurred then they can discharge their responsibility by giving an account of where they were and why it is that they do not know what happened. It is the failure to do even that, particularly at trial, which may have adverse consequences for that person.”³⁹

The problem becomes compounded by a circularity of logic and a lack of proof if the defendants lie, because unless the prosecution can prove beyond reasonable doubt that they have lied, the defendants cannot be proved guilty as in *Strudwick*.⁴⁰

The principle of this case and its applicability to other case of this ilk is thrown into further confusion by the fact that the court not only reiterates the principle in *Abbott*⁴¹ but then goes on to states that:

...parents of a child were in no different position from any other defendants jointly charged with a crime, and that to establish guilt, the Crown must prove at least that the defendant aided, abetted, counselled or procured the commission of the crime by the other. The only difference in the position of parents was that one might have the duty to intervene in the ill-treatment of their child by the other, whereas a stranger would have no such duty.⁴²

The case is much criticised by Professor Glanville Williams in ‘Which of you did it?’⁴³ which is acknowledged by the Law Commission.⁴⁴ However it must be noted that Professor Williams’ comments appear to be influenced by the fact that the

³⁹ Law Com 282 para 6.36 (original emphasis)

⁴⁰ R v Strudwick [1994] 99 Cr App R 326

⁴¹ R v Abbott (1955) 39 Cr App R 141

⁴² R v Russell and Russell (1987) 85 Cr App R 388 at p393

⁴³ Glanville Williams, ‘Which of you did it?’ (1989) 52 MLR 179

⁴⁴ Law Com 279 para 1.31 and Law Com 282 para 2.16

defendants were in all other respects dutiful and doted over their daughter and by his own reading of the case⁴⁵ rather than for its *ratio* or general applicability.

The cases advanced by the Law Commission as being demonstrative of a lacuna which exists because there is no evidence to prove which of the two defendants committed the actual act, and equally, no evidence to prove a joint enterprise are, with respect, a disparate lot. In Lane and Lane⁴⁶ the defendants could not be shown to be at the scene of the crime at the relevant time. In Aston and Mason⁴⁷ the defendants were in the flat at the relevant time but not the same room, yet this fact is dismissed as irrelevant in the cases of Marsh and Marsh⁴⁸ and Russell and Russell.⁴⁹ Equally, the previous activities of the parents are deemed to be irrelevant in Strudwick⁵⁰ but are active in Russell and Russell.⁵¹ The fact that evidence potentially exists against one defendant, rather than the other, as was stated in S and C⁵² and which might be inferred from the report in the case of Aston and Mason⁵³ is illogical and erroneous when advanced to support a statement that no evidence exists to prove a charge against one rather than the other. As such none of these cases are devoid of evidence and none can accurately be said to fall within the lacuna. Even with the leading case of Lane and Lane⁵⁴ both defendants were convicted of 'wilfully ill-treating' the child. As such can it logically be determined that the fault, if it can be called such, lies with a failure of evidence? If there is no evidence then there is a defence in silence, which is acknowledged by the Law Commission. Equally, if the Law Commission expects that the imposition of a duty to give account should countenance a response by those with a responsibility, then it must be a breach of that responsibility that constitutes the 'evidence' against the defendants; as such evidence exists as opposed to the lacuna. Therefore, surely the answer lies within a rule of law and its subsequent application and not with a lack of evidence. This 'answer' will be explored within chapter 2.

⁴⁵ Glanville Williams, 'Which of you did it?' (1989) 52 MLR 179 at p.191

⁴⁶ R v Lane and Lane (1986) 82 Cr App R 5

⁴⁷ R v Aston and Mason [1991] Crim LR 701

⁴⁸ Marsh and March v Hodgson [1974] Crim LR 35

⁴⁹ R v Russell and Russell (1987) 85 Cr App R 388

⁵⁰ R v Strudwick [1994] 99 Cr App R 326

⁵¹ R v Russell and Russell (1987) 85 Cr App R 388

⁵² R v S and C

⁵³ R v Aston and Mason [1991] Crim LR 701

⁵⁴ R v Lane and Lane (1986) 82 Cr App R 5

In respect to the Law Commission's proposals the fact that the aggravated offence requires a guilty verdict under section 1 of the 1933 Act and because that requires a realisation of the consequence, by virtue of the decision in *Sheppard*,⁵⁵ then that means that the proposed offence does nothing more than duplicate the law of manslaughter. The imposition of a statutory statement is ineffective, because it fails to give any assurance to a defendant who fears violence and is equally defeated by lies. If the prosecution cannot adduce some evidence of the defendant's guilt or presence, irrespective of any adverse inference, the judge would still have to withdraw the case from the jury because no 'properly directed' jury could convict, as such the removal of the 'half-time' rule becomes futile. The conclusion therefore must be that the Law Commission's proposals would have no effective change upon the outcome of the cases cited, or relied upon.

⁵⁵ R v Sheppard [1981] AC 394, HL

The lacuna identifies that there is no evidence to prove that either defendant committed the offence, and no evidence to prove a joint enterprise. It is however the aim of this chapter to argue that the law is capable of bringing about a conviction other than one under section 1 of the **Children and Young Persons Act 1933**. This is not to say that there will not be a controversial argument tabled. It is appreciated that some of the issues raised may require greater debate than is available within this paper, this is unfortunate but unavoidable the law in relation to fatal offences is not particularly clear, satisfactory nor stable.¹

Initial discussion will focus on the law of gross negligence manslaughter and the legal concept and scope of the 'duty of care', which is both a central component of the offence, as well as being a marshalling post for the recommendations of the Law Commission. To facilitate this discussion, once the elemental scope has been determined, then it will be necessary to examine the remaining requirements of the offence. This cannot be done without taking into consideration the convoluted historical development that forms the backdrop to the current interpretation of the leading case of *Adomako*.² A study will then be presented to assess the viability of sustaining a conviction for this offence, by applying the facts from the remaining cases relied upon by the Law Commission as proving the existence of the lacuna.

The nature and extent of the 'duty of care' inherent within gross negligence manslaughter will also feature as a focal point when discussing unlawful act manslaughter and the nature and scope of joint enterprise. The reason for doing this is to determine any correlation or disparity between the two concepts: 'duty of care' v 'joint enterprise'.

¹ Following the conviction of Andrew Wragg and Damien Hanson the Law Commission is now seeking consultation in order to make proposals to redefine the homicide offences; *The Times*, Punishing Murder, Dec 21, 2005; Law Commission Consultation Report, A New Homicide Act for England and Wales, Law Com.177, Nov 28, 2005

² *R v Adomako* [1995] AC 171

The Scope of 'Duty of Care' and Gross Negligence Manslaughter

Background: A History

The offence of gross negligence manslaughter has existed in a comparable form for at least approximately 280 years.¹ In *Williamson*,² it was stated that:

To substantiate that charge, [indictment of murder, manslaughter per Coroner's inquisition] the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct.³

As the name implies, the offence has as its base the concept of negligence. Culpability arises here when the negligence is gross and death has resulted. As a term of art, gross negligence did not start to appear until the mid 19th Century, as *Crassa Negligentia*.⁴ The offence is however, not without its conceptual problems, because while the extent of the negligence is described as gross, this is hardly precise and judicial attempts to clarify the matter have been equally vague. Lord Hewart CJ laid down the following test:

...the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment⁵

Notwithstanding its vagaries this test was utilised by Judges, however, it was not used alone the word 'reckless' has also be employed to describe the extent of the

¹ *R v Burton* (1721) 1 Stra 481, firing pistols in a street, criminally negligent

² *R v Williamson* (1807) 3 C & P 635

³ *Ibid.* at p.635. Williamson was actually acquitted, having acted to the full extent of his skill, and notwithstanding a misdiagnosis.

⁴ *R v Trainer* (1864) 4 F & F 105 at p.115

⁵ *Bateman* (1925) 19 Cr App R 8 at pp.11-12

negligence or breach, as emphasised by Lord Atkin in the case of *Andrews*.⁶ This was not initially problematic even following the case of *Cunningham*⁷ in 1957, which linked the concept to the defendant's knowledge or understanding of the events surrounding the *actus reus* of the offence. However, in 1982 the two cases *Caldwell*⁸ and *Lawrence*⁹ unfortunately utilised the word, and therefore the concept, of 'reckless' in an objective test. This had a consequential impact on the offence of gross negligence manslaughter; no doubt not helped by the fact that negligence as a civil tort also utilises an objective test. The House of Lords eventually rectified the situation and re-established the offence in *Adomako*.¹⁰ Together with this resurrection came the reiteration of Lord Hewart CJ's test. However, this does not mean that there are no similarities between subjective and objective reckless manslaughter and the resurrected offence of gross negligence manslaughter. These similarities exist because of the relationship between the 'duty of care' and the breach of that duty when laid against a background of surrounding events. At this stage it is worth stating that although this discussion is focused on gross negligence manslaughter, the imposition of a 'duty of care' together with a breach of that duty leading to injury alone and not death may well lead to a prosecution under section 1 of the 1933 Act. The charge however invariably being couched in different terms, i.e. 'wilfully assaults' etc.¹¹

As a generality it is understood that there are certain relationships that automatically generate a 'duty of care' between the parties involved, for example, doctor/patient, and parent/ child being the most obvious, other situations might also be said to create a 'duty of care'. However, it really needs to be understood how and why these relationships create this crucial element, the parent/child relationship for instance might be thought to exist because of the existence of the natural bond, but not all parents bond with their children. Equally it might be said to be based on the moral

⁶ *Andrews v DPP* [1937] AC 576 at p.583

⁷ *R v Cunningham* [1957] 2 QB 396, [1957] All ER 412

⁸ *Metropolitan Chief Commissioner v Caldwell* [1982] AC 341, [1981] All ER 961

⁹ *R v Lawrence* [1982] AC 510

¹⁰ *R v Adomako* [1995] AC 171

¹¹ There is only one offence under this section, *R v Hayles* [1969] 1 QB 364, 53 Cr App Rep 36. Each verb describes a type of cruelty, as such the prosecution should select the most appropriate one in the circumstances: *R v Beard* (1987) 85 Cr App Rep 395

duty¹² to care for our child because of their vulnerability.¹³ But the problem at the core of this paper demonstrates that parents can seriously injure or kill their own children; although there has been a dramatic shift in social conscience in this regard.¹⁴ There would of course be a further problem created if the duty were to arise from vulnerability alone because a wider proportion of the populace would be held accountable for their acts or omissions.¹⁵ Because it cannot be said that the 'duty of care' arises out of either a moral, vulnerable or natural state, it therefore must arise out of a legal one, which is to say a law. Any of these issues may be the base of the law, but it is the law that is operative and not the base reason for it. This being the case, an exposition of how the law creates the imposition of a 'duty of care' has to be undertaken.

Statute automatically places responsibility for a child on married parents, or to the mother alone where they are not married.¹⁶ The responsibility is one that cannot be simply avoided, for example by either, or both, parents merely walking out.¹⁷

Section 2 of the **Children Act 1989** also states that:

Where more than one person has responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility¹⁸

¹² The jurisprudential argument as to whether morals forms any part of the law is of course a long one and well beyond the scope of this paper.

¹³ For Judicial commentary on children as a vulnerable class, see the judgement of Baroness Hale in *R (on the application of Williamson and others) v Secretary of State for Education and Employment* [2005] UKHL 15, paras 71-87

¹⁴ The **Infanticide Acts of 1922 and 1938** were created because of a social lack of enthusiasm to categorise the mother as a murderess and a general belief that it was less heinous: See Smith and Hogan, *Criminal Law*, 11thEd., Ormerod, D., 2006, Oxford Press, Oxford, pp.497-498

¹⁵ There may well be an argument to impose such a duty, however, in relation to this matter the Law Commission rejected a narrower recommendation; Law Com 282 paras 6.12 – 6.14, and Glazebrook, *Insufficient Child Protection* [2003] Crim LR 541 (referred to at Law Com 279 and 282 para 6.4). Proposals to reform the 'bystander' issue has been raised by Dr. Claire Valier, Birkbeck, University of London; BBC Radio 4, *Start the Week* October 17th, 2005; British Academy, *symposium on Philosophical Analysis and the Criminal Law*, October 21st-22nd, 2005

¹⁶ **Children Act 1989** section 2

¹⁷ *Ibid.* §9; see also the cases of abandonment under section 1 of the 1933 Act, *R v Falkingham* (1870) LR 1 CCR 222, 39 LJMC 47; *R v White* (1871) LR 1 CCR 311

¹⁸ *Ibid.* §7

By use of the word ‘may’ a strict interpretation means that the law places a joint responsibility on married parents. This does not apply to those not married, however, section 17 of the 1933 Act extends this statutory provision, by presumption, to those persons who have ‘care’ for a child, which extends this responsibility to a wide variety of familial situations; i.e. the step-father or boyfriend etc. This provision also extends the duty beyond immediate physical proximity in a similar manner to that of the **Children Act 1989**. As such, the recommendation to make it clear that a person should not be immune from prosecution if they place a child in a dangerous situation simply because the care arrangement ends, is nothing more than a reiteration of existing law ignorance of which is immaterial and does not constitute a valid defence, as seen in the case of *Youden*.¹⁹

The common law also imposes a similar responsibility on people who voluntarily undertake a responsibility, this has occurred most noticeably in cases involving the care of an infirm adult, but the principle still applies, *Marriott*²⁰ and *Nicholls*,²¹ and extends to those persons who might be said to be one-step removed, as was the case of Dobinson in *Stone and Dobinson*.²² The voluntary undertaking of a duty, theoretically at least, starts from the point when a person decides to give assistance, especially if the law can establish, or construct, a reliance by the victim onto the actions of the person who lends his assistance, as occurred in *Wacker*,²³ *Ruffell*²⁴ and again *Stone and Dobinson*.²⁵ Although the law does not impose a duty, or liability, on a bystander *per Coney*²⁶ and *Allen*,²⁷ and according to the latter case not even if they have a criminal intent.

A manslaughter conviction has also been imposed on a person for failure to carry out a contractual duty, even when the victim was not a party to the contract, the well-

¹⁹ *Johnson v Youden* [1950] KB 544; *Bateman v Evans* [1964] Crim LR 601

²⁰ *Marriott* (1838) 8 C & P 425

²¹ *R v Nicholls* (1874) 13 Cox CC 75

²² *R v Stone and Dobinson* [1977] QB 354

²³ *R v Wacker* [2003] QB 1203, Driver owed a Duty to the illegal immigrants hiding in the back of lorry, the fact that he was a party to the illegal activity was irrelevant. The maxim *ex turpi causa non oritur actio* did not apply; see also *R v Willoughby* [2004] EWCA Crim 3365; [2005] WLR 1880

²⁴ *R v Ruffell* [2003] EWCA Crim 122

²⁵ *R v Stone and Dobinson* [1977] QB 354

²⁶ *R v Coney* (1882) 8 QBD 534, CCR

²⁷ *R v Allan* [1965] 1 QB 130, 47 Cr App Rep 243

known case of *Pittwood*²⁸ being the prime example. This principle may well appear to be out of context given the current discussion. But the proposition has been made that the better interpretation might be:

...more accurately based on the breach of a duty...his employers paid him to discharge.²⁹

Pittwood omitted to close the level-crossing and left his place of employment, in light of this failure a carter was killed. The question raised by this case is: 'Why should a person employed to carry out a duty be placed in a more onerous position than a parent?' If it is, as Blackstone's suggests, to be based on the fact that he was paid, then it needs to be mentioned that the State pays parents to care for their children, by way of State benefit in one form or another.³⁰ *Pittwood*'s absence from the scene at the relevant time needs to be noted and not just because he created an obvious and dangerous situation. This principle also underlies those who undertake a position or occupation where a 'duty of care' is normally expected; such as that imposed upon those in the police force or in the nursing profession.³¹

As mentioned in the foregoing paragraph, the creation of an obvious and dangerous situation equally creates a 'duty of care' under which the creator or defendant will labour if injury is caused, although obviously the injury in this instance must be death. Although the principle has a wider application, it is sufficient to give rise to a 'duty of care' and thus liability, especially if the person with responsibility places the child in a situation he knows to be dangerous. A hypothetical situation of this type was raised in the discussion above when considering clauses 2 & 3 of the proposals.³²

Having considered the situations that give rise to a 'duty of care' there needs to be a breach of that duty. However, in this regard, the fact that the child has died will, or

²⁸ R v *Pittwood* (1902) 19 TLR 37

²⁹ Blackstone's Criminal Practice, 2004, Oxford University Press, Oxford para A1.15

³⁰ R v *Instan* [1893] QB 450; 17 Cox CC 602, The D was the V's niece, and took advantage of the food coming into the house, which was paid for on V's account, however, V died of neglect and starvation.

³¹ See R v *Dytham* [1979] QB 722 and R v *Forman and Ford* [1988] Crim LR 677 and of course *Adomako* [1995] AC 171

³² Clauses 2 & 3 *Failure to protect a child and the effect of intoxication*; see p.9 *supra*

should, immediately give rise to an investigation.³³ Where there is no evidence of independent third party involvement or death by misadventure³⁴ then the focus will turn to those with responsibility to give account. Failure to do so will raise suspicion and with evidence it might be expected a trial and prosecution. But, it must be remembered that suspicion alone is insufficient. This does of course narrow the identified lacuna. In relation to the offence of gross negligence manslaughter the breach of duty must occur when there is a 'risk of death'.³⁵ The breach of duty in these circumstances should result in a conviction for gross negligence manslaughter if it is found as a fact that the breach was an operative cause of death. This determination of fact is of course a matter for the jury. But, the distinction between advertence and inadvertence is a fine one. As such Jefferson³⁶ states that it is possible that two juries may bring two differing verdicts because of this distinction.³⁷ It has already been mentioned that there is an overlap between the two different states of recklessness and gross negligence manslaughter. Equally, and possibly because of the previous authorities used and approved in *Adomako*,³⁸ there have been subsequent variations of the epithet used to describe the surrounding circumstance when the breach occurs. These issues will be examined in depth throughout this chapter.

The last requirement to establish this offence is that the breach of duty and the defendant's actions must be said to be so gross as to warrant criminal liability; *per* the earlier decision in *Bateman*³⁹ and more recently *Adomako*.⁴⁰ However, according to *Akerele*⁴¹ the gross nature of the offence is not cumulative. But this does not mean that a person who repeatedly exposes a child to a dangerous situation is not capable of being charged with this offence; because each occasion would represent a singular and independent act, rather than a cumulative one.

³³ However see Law Com 282, paras 2.32-2.34

³⁴ There may well be other similar situations the two examples given are not intended to be exclusive.

³⁵ R v Adomako [1995] AC 171

³⁶ Jefferson M., Criminal Law, 7th Ed., (2006), Pearson Education Ltd, Harlow

³⁷ *Ibid.* at p.429

³⁸ R v Adomako [1995] AC 171

³⁹ R v Bateman (1925) 19 Cr App R 8

⁴⁰ R v Adomako [1995] AC 171

⁴¹ Akerele v R [1943] AC 255, PC

There is some discussion as to whether each element is a matter of fact for the jury. However, in relation to the issue at the centre of this discussion, the imposition of a duty of care is taken as being one of law; the cases presented by the Law Commission reflect this stance, and as such nothing further will be pursued in this regard.

Adomako and Reckless Manslaughter

The test to ascertain whether the accused is guilty is said to be an objective one. However, the test is that contained in Adomako⁴² and not Caldwell,⁴³ so what is the difference? The Caldwell⁴⁴ test, although now expurgated from the law by the case of G⁴⁵, stated that:

A person... is reckless... if he does an act which creates an obvious risk... and when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it.⁴⁶

This test comprised two parts: the creation of an obvious risk in the first part and the conduct of the defendant in relation to that obvious risk in the second. In relation to the second part Lord Diplock, who gave the judgement, also stated that:

[Recklessness] includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also fails to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it might be obvious that there was.⁴⁷

⁴² R v Adomako [1995] AC 171

⁴³ Metropolitan Chief Commissioner v Caldwell [1982] AC 341, [1981] All ER 961

⁴⁴ *Ibid.*

⁴⁵ R v G [2004] AC 1034

⁴⁶ Metropolitan Chief Commissioner v Caldwell [1982] AC 341, [1981] All ER 961 at 967; see also R v Goodfellow (1986) 83 Cr App R 23 and R v Seymour [1983] 2 AC 493

⁴⁷ *Ibid.* at p.966

This passage establishes that the first part of the test is purely objective, which is to say determined by the application of the 'reasonable man' test, which is of course the anthropomorphic representation of a legal fiction. Lord Goff confirmed the objective nature of the first part in the case of Reid.⁴⁸ The test was not considered to be one of strict liability, because had the defendant thought about the risk and erroneously concluded that it did not exist, he would accordingly escape liability as recognised in the cases of Coles⁴⁹ and Merrick.⁵⁰ But following the earlier case of Shimmen⁵¹ the extent of the gap was already apparent and it might be concluded that it was so small, that a defendant may have had an easier task placing *Pelion upon Ossa*. It is this difficulty that differentiates Adomako⁵² from Caldwell.⁵³ The test in the former, as stated earlier, is that:

[In] regard to the risk of death involved, the conduct of the defendant was so bad as in all the circumstances as to amount in the jury's judgement to a criminal act, or omission.⁵⁴

This test allows the jury to weigh the defendant's conduct against *all* the circumstances, which means that they can take account of the defendant's knowledge and abilities. Thus the stupid, ignorant or personally inadequate are more likely to escape liability; their actions being capable of bearing the description of an unavoidable tragedy or an inadvertence, rather than an avoidable advertence. Caldwell⁵⁵ was not so forgiving as demonstrated by the case of Elliott.⁵⁶

The culpability of those of low intelligence and its relation to the central issue by analogy can be demonstrated by analysing the leading case with that of Stone and Dobinson.⁵⁷ The defendant Stone who lived with his mistress Dobinson was also the brother of the deceased, who rented a room from him but who lived as a recluse

⁴⁸ R v Reid [1992] 3 All ER 673

⁴⁹ R v Coles [1995] Cr App R 157

⁵⁰ R v Merrick [1996] Cr App R 130

⁵¹ Chief Constable of Avon and Somerset v Shimmen (1986) 84 Cr App R 7

⁵² R v Adomako [1995] AC 171

⁵³ Metropolitan Chief Commissioner v Caldwell [1982] AC 341, [1981] All ER 961

⁵⁴ *Ibid.* at p.171, see also p.187; see further, Smith and Hogan, Criminal Law, 11thEd., Ormerod, D., 2006, Oxford Press, Oxford, p.133

⁵⁵ Metropolitan Chief Commissioner v Caldwell [1982] AC 341, [1981] All ER 961

⁵⁶ Elliott v C [1983] 2 All ER 1005, [1983] WLR 939; see also Rogers (1984) 149 JP 89, sub nom R (Stephen Malcolm) 79 Cr App R 334

⁵⁷ R v Stone and Dobinson [1977] QB 354

therein. Nevertheless, the Court of Appeal did not uphold the 'duty of care' on either of these two grounds; i.e. receipt of money or familial relationship. Instead, they found the 'duty' to have occurred from an assumption of responsibility namely after it became apparent that the victim was ill and after Dobinson had attempted to care for her. Equally both Stone and Dobinson had made an attempt to find his sister's doctor but failed. The Court identified a specific date from which this duty ran, that being the date on which Dobinson and a neighbour had washed the victim and had found her to be living in the most squalid of conditions. It was their failure to summon help after this date that constituted support for the conviction and it mattered not that they were incapable of using a telephone. Jefferson in his observations on this case states in relation to this that:

...presumably the law is that one must act as a reasonable person would have acted, not as a person of limited intelligence and so on would have acted.⁵⁸

With respect, this is not the case; to impose such a condition would substantially alter the offence and resurrect the *Caldwell*⁵⁹ principle. The defendants' gross negligence is more accurately determined by reference to their own knowledge and lack of action. The fact that she was ill and in need of medical attention was known, notwithstanding Stone's exculpatory statement that he had not realised the extent of his sister's illness. Dobinson had, on the date from when the failure is measured, recruited the help of a neighbour and both defendants had commented to the landlady of their local pub about getting help, as such both had demonstrated their realisation and ability, limited though it was. There were numerous options within this limited field of ability that might have been pursued, including raising the issue with the visiting social worker. The conclusion is that in this regard, neither Stone nor Dobinson could claim to fall within that class of people described as stupid, ignorant or personally inadequate; the judgement thus being princely forged. The same application of subjective knowledge to gross failure, and therefore gross negligence, can be applied to Adomako. As an anaesthetist, Adomako knew what his duties were and that a failure to monitor adequately the patient's breathing and airway could have

⁵⁸ Jefferson M., *Criminal Law*, 7th Ed., (2006), Pearson Education Ltd, Harlow at p.70

⁵⁹ *Metropolitan Police Commissioner v Caldwell* [1982] AC 341, [1981] All ER 961

fatal consequences; as happened. In fact this subjective analysis of knowledge was stated by the Court of Appeal when discussing *Adomako*.⁶⁰ In this regard the fact that the House of Lords have effectively approved two apparently disparate statements to describe the circumstance under which the breach of duty occurs, 'risk of death' and 'injury to health and welfare' is not beyond reconciliation; in fact, by simply placing these statements against the background events, we can determine that they are merely descriptions used to emphasise the degree or gravity of any consequential breach. This approach can be affirmed by analysing the decision of the House in *Adomako*⁶¹ the first sentence describes the material characteristics of the offence:

A defendant was properly convicted of involuntary manslaughter by breach of duty if the jury were directed, and had found, that the defendant was in breach of a duty of care towards the victim who died, that the breach of duty caused the death of the victim, and that the breach of duty was such as to be characterised as gross negligence and therefore a crime.⁶²

The following, second sentence, describes that offence with reference to the specific case in issue:

Whether the defendant's breach of duty amounted to gross negligence depended on the seriousness of the breach of duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury's judgment to a criminal act or omission.⁶³

In *Litchfield*,⁶⁴ the accused attempted to assert that the principle in *Adomako*⁶⁵ required that the jury should be directed in terms, that his conduct should only be

⁶⁰ R v Prentice and others [1993] 4 All ER 935 at 954

⁶¹ R v Adomako [1995] AC 171

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ R v Litchfield [1998] Crim LR 507

⁶⁵ R v Adomako [1995] AC 171

described as a crime if he had demonstrated a lack of regard for the lives of others. However, given that he had created a dangerous situation by sailing too close to the rocks, which might not of itself have made his actions grossly negligent even when measured against the actions of a reasonably competent sailor or ship's captain; disregarding for the moment the application of maritime law. Once the defendant's knowledge in relation to the contaminated fuel is placed against the background of his reckless course then his conduct and the breach of duty become manifestly more culpable. In all these cases, the defendants need only have done a minimal act well within their capability to avert liability, thus it is their conduct and not the act or background *per se* that results in liability. Neither does this result in the creation of a purely subjective reckless manslaughter offence, that would only come about if for instance, Litchfield had sailed too close to the rocks whilst realising that it might be dangerous to do so. As such, gross negligence is neither subjective nor objective in nature; it has elements of both and occupies the ground between each. This is not to say that there is not an overlap. The fact that the overall assessment of the conduct and therefore guilt of the defendant is determined by the jury does not make the test an objective one. The inclusion of references to the reasonable man when applying the test is to 'navigate a Litchfield course'; it is fraught with danger and liable to founder on Caldwell rock.

The state of mind of the defendant was considered in the Attorney-General's Reference (No.2 of 1999)⁶⁶ by the Court of Appeal, which stated that:

Although there may be cases where the defendant's state of mind is relevant to the jury's consideration when assessing the grossness and criminality of his conduct, evidence of his state of mind is not a prerequisite to a conviction for manslaughter by gross negligence.⁶⁷

This passage was approved in DPP ex p Jones.⁶⁸ It does not, however, mutate the test in Adomako⁶⁹ from that which has been asserted into an objective one. Exclusion of the defendant's state of mind, other than in cases where statute specifically dictates

⁶⁶ A-G's Ref. (No.2 of 1999) [2000] 3 All ER 182

⁶⁷ *Ibid.* at p.182

⁶⁸ R v DPP *ex p. Jones* [2000] IRLR 373

⁶⁹ R v Adomako [1995] AC 171

an objective test, such as *Litchfield*,⁷⁰ does not allow a jury to assess the seriousness of the defendant's breach of duty. But this is necessary to determine whether the defendant's conduct should be categorised as criminal and this so even with or without the inclusion of the statement '*in all the circumstances*' as contained in the second sentence of the judgement.⁷¹ Inclusion of the defendant's state of mind may also be relevant to the background events. Ian Dennis⁷² describes three theories of 'fact finding',⁷³ the third being that of '*Narrative and Story-telling*',⁷⁴ which while using a holistic approach also allows the jury to reason individually and collectively. The other advantage or disadvantage of this theory is its retention of 'jury equity'. Which not only lies at the heart of the constitutional issue of trial by jury, but which would also appear to be at the heart of this test. Lord Bingham CJ in *Sawoniuk* stated that:

Criminal charges cannot fairly be judged in a factual vacuum.⁷⁵

The Hypothetical Scenario of Liability

In relation to the situations central to this discussion and the hypothetical scenarios advanced to emphasize parental responsibility and liability, this interpretation of the law on gross negligence manslaughter has concomitant application. The rule in *Lane and Lane*⁷⁶ and its precursor in *Abbott*⁷⁷ that presence alone does not automatically give rise to immediate liability remains intact. For example, is a parent who takes a child to the park to play on the swings and to feed the ducks, liable for a charge of gross negligence manslaughter should the child accidentally drown? Or is the loss punishment enough? Equally, what if that same parent in these circumstances sees

⁷⁰ R v Litchfield [1998] Crim LR 507, under s27(2) of the **Merchant Shipping Act 1970 (Repealed)**

⁷¹ Whether the defendant's state of mind works for or against him does not mean that it should simply be excluded, without some overarching justification; see R v DPP *ex p. Jones* [2000] IRLR 373 and R (Rowley) v DPP [2003] EWHC 693

⁷² Dennis, I., *The Law of Evidence*, 2nd ed., (2003 reprint), Sweet and Maxwell, London

⁷³ *Ibid.* at pp103 - 122

⁷⁴ *Ibid.* at pp116 - 122; The theory presented is acknowledged to be dependant on the works of Pennington and Hastie, '*The story model for juror decision making*' in Hastie, *Inside the Juror*, 1993, Cambridge. The other two are based on Wigmorean Analysis (pp. 105 - 108) and Mathematical Model Theories (pp.108 - 116), the latter includes a discussion based on Bayes' Theorem, from its notorious legal inclusion in the Californian case of *People v Collins* (1968) 438 P 2d 33, to the short shrift it received in the English case of *Adams (Dennis)* [1996] 2 Cr App R 467

⁷⁵ *Sawoniuk* [2000] 2 Cr App R 220, CA at p.234

⁷⁶ R v Lane and Lane (1986) 82 Cr App R 5

⁷⁷ R v Abbott (1955) 39 Cr App R 141

the child fall into the duck pond and makes an inept or futile attempt to rescue the child, or fails to have someone else intervene for having a morbid fear of water, are they to be considered grossly negligent?⁷⁸ Does the stigmatisation as a killer accurately reflect the negligence involved?⁷⁹ What if that same parent sees their child fall into the water, or notes that the child is in the water and does nothing, either recklessly or negligently, to remedy the situation, does this amount to gross negligence? Or is it open for debate? Any of these situations might constitute some form of culpability, but if the child shows signs of distress or is unconscious in the water when the parent detects the predicament and does nothing, surely their culpability rises. Should it also be shown that the child cannot swim, is inherently clumsy and accident prone while having an absolute fascination with ducks, water and all things aquatic, then the lack of response has a greater attachment of culpability and the attachment of criminal stigma potentially becomes less abhorrent when the child is found to have died. Ultimately, of course, the decision is one for the jury, but the question of where on this spectrum of events we place, ‘injury to health or welfare’ or ‘risk of death’, is obscure and difficult to answer. But it does not mean that a finding of gross negligence manslaughter is beyond reason. On the other hand, it does question the Court of Appeal’s ruling that gross negligence manslaughter requires ‘foresight of death’ as was stated in the case of *Misra*.⁸⁰

Croom-Johnson LJ in *Lane and Lane*⁸¹ questioned why the prosecution had not pursued the case under a charge of neglect,⁸² rather than as a charge of unlawful act manslaughter based on a singular incident, especially when there were separate charges of ‘wilfully ill-treats’ under section 1 of the 1933 Act; which were based on three previous and separate incidents. While it is speculative to contemplate the possible outcome of the case had the prosecution sought to base the whole of their argument on neglect, it is not unreasonable to hypothesise that the defendants would still have been found guilty. Following this comes the question of whether a conviction of gross negligence manslaughter would have withstood examination,

⁷⁸ *R v Van Butchell* (1829) 3 C & P 629 (genuine attempt to cure patient; not manslaughter); see also *R v Knock* (1877) 14 Cox CC 1

⁷⁹ The Law Commission’s express similar views in this regard; see Law Com 282 para 6.24

⁸⁰ *R v Misra* [2004] EWCA Crim 2375

⁸¹ *R v Lane and Lane* (1986) 82 Cr App R 5

⁸² *Ibid.* at p.7

given that the charge of unlawful act manslaughter failed. Given the facts (the previous abuse over the summer, being background and not used as cumulative liability) it is not a great step to ask, whether:

...the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment⁸³

Applying the *Bateman*⁸⁴ test, or by asking whether the defendants had placed their child in an obviously dangerous situation, according to the standards of a reasonable man, by either not giving the situation any thought, or by having thought about it and nevertheless gone on to run that risk. It is not unreasonable to assume that the defendant's failed to do that which they should or ought to have done. This is a modified *Caldwell*⁸⁵ test, to take account of physical injury, rather than damage to property.

The *Bateman*⁸⁶ test, like the *Adomako*⁸⁷ test, is satisfied by application of the foregoing argument. The *Caldwell*⁸⁸ test, however, creates another dilemma; would the reasonable man have realised that the situation in which the child was placed was dangerous? On the surface it would not appear so. However, following the first instance of abuse, would the reasonable man have stayed with the abuser? The answer to this may be 'yes'; but it would no doubt be modified by the caveat, '*do that again and I leave*'. The reasonable man, it is asserted, does not allow a child to be abused. Further more the child in *Lane and Lane*⁸⁹ was 22 months old, and Martin B. in *Griffin*⁹⁰, states that:

⁸³ *Bateman* (1925) 19 Cr App R 8 at pp.11-12

⁸⁴ *Ibid.*

⁸⁵ Metropolitan Chief Commissioner v Caldwell [1982] AC 341, [1981] All ER 961; which has been included because it was the favoured approach at the time of the *Lane* case

⁸⁶ *Bateman* (1925) 19 Cr App R 8

⁸⁷ R v Adomako [1995] AC 171

⁸⁸ Metropolitan Chief Commissioner v Caldwell [1982] AC 341, [1981] All ER 961

⁸⁹ R v Lane and Lane (1986) 82 Cr App R 5

⁹⁰ R v Griffin (1869) XI Cox CC 402

The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable...⁹¹

We might also add that, the reasonable man is assumed to be law abiding. While there is authority to state that a defendant having a 'duty of care' is not guilty of manslaughter by virtue of his absence,⁹² there is other authority to state that if both defendants are at fault then both are culpable.⁹³ As such the fact that one is absent should not alter the verdict.

In relation to the case of *Strudwick*⁹⁴ the second count was related to the period between the infliction of the fatal injuries and the child's death. Given that it was based on wilful neglect, it would appear to follow the judgement in *Stone and Dobinson*.⁹⁵ There should be little difficulty therefore, in sustaining a charge of gross negligence manslaughter provided the hurdle in *Lowe*⁹⁶ can be surmounted.

Lowe: A bar to stop at

*Lowe*⁹⁷ is authority to the effect that a conviction for manslaughter does not automatically follow because the defendant has been convicted of 'wilful neglect' under section 1 of the 1933 Act simply because that neglect caused the victim's death. Blackstone's Criminal Practice⁹⁸ identifies the fact that:

...it may sometimes do so if, for example, if there is proof of an intent to harm the child through such neglect.⁹⁹

⁹¹ *Ibid.* at p.403

⁹² *R v Allen* (1835) 7 C & P 153 at 156; *R v Green* (1835) 7 C & P 156

⁹³ *R v Haines* (1847) 2 Car & Kir 368; *R v Benge* (1865) 4 F & F 504 at 509 per Pigott B; *R v Salmon* (1880) 6 QBD 79; See also *R v Gibbins and Proctor* (1918) 13 Cr App Rep 134

⁹⁴ *R v Strudwick* (1994) 99 Cr App R 326

⁹⁵ *R v Stone and Dobinson* [1977] QB 354

⁹⁶ *R v Lowe* [1973] QB 702, [1973] All ER 805

⁹⁷ *Ibid.*

⁹⁸ Blackstone's Criminal Practice, 2004, Oxford University Press, Oxford

⁹⁹ *Ibid.* para A1.13, where it is also identified that deliberate starvation may be murder; *Gibbins and Proctor* (1918) 13 Cr App R134

Ormerod, as editor of Smith and Hogan,¹⁰⁰ states that Lowe¹⁰¹ has been overruled by Sheppard¹⁰² as regards the 1933 Act. However, he also draws attention to the anomaly that Senior¹⁰³ was disapproved by the court in Lowe¹⁰⁴ but has been rehabilitated in part by Sheppard.¹⁰⁵ Lowe¹⁰⁶ however, remains the law on this point despite being overruled and having similar facts to Senior.¹⁰⁷

This knot of confusion is not conducive to the pursuit of a manslaughter charge, especially as Sheppard¹⁰⁸ held that:

...although failure to provide adequate medical care was deemed by s 1(2)(a) [of the 1933 Act] to amount to 'neglect' it was not deemed to amount to 'wilful' neglect, and therefore the prosecution was required to prove not only that the child did in fact need adequate medical care at the relevant time but also that the parents had deliberately or recklessly failed to provide that care.¹⁰⁹

Both Lowe¹¹⁰ and Senior¹¹¹ concern the death of a child through the non-provision of medical care; adequate or otherwise. So, can the knot be undone, the bar passed and the principles reconciled *sans torture*?

Senior was a member of a religious sect known as the Peculiar People. They believed fervently in the power of prayer and a strict interpretation of the scriptures. Life and death being God's prerogative and any resort to medical treatment was construed as an interference with divine will. The Jury found Senior guilty of manslaughter. On the other hand, Lowe realised that the child needed medical attention, and stated on two separate occasions to the child's mother that she should take the child to the

¹⁰⁰ Smith and Hogan, Criminal Law, 11thEd.; Ormerod, D., 2006, Oxford Press, Oxford, p.478

¹⁰¹ R v Lowe [1973] QB 702, [1973] All ER 805

¹⁰² R v Sheppard [1981] AC 394, HL

¹⁰³ R v Senior [1899] QB 283

¹⁰⁴ R v Lowe [1973] QB 702, [1973] All ER 805

¹⁰⁵ R v Sheppard [1981] AC 394, HL

¹⁰⁶ R v Lowe [1973] QB 702, [1973] All ER 805

¹⁰⁷ R v Senior [1899] QB 283

¹⁰⁸ R v Sheppard [1981] AC 394, HL

¹⁰⁹ *Ibid.*

¹¹⁰ R v Lowe [1973] QB 702, [1973] All ER 805

¹¹¹ R v Senior [1899] QB 283

doctors. Instead she lied to him and it was this deceit and the subsequent lack of medical attention that prevented the child receiving the attention she needed. This point was acknowledged by the court in the 1973 judgement. Originally the jury were asked to determine whether Lowe was guilty of unlawfully causing death; i.e. manslaughter. Their verdict was that he was not guilty. The jury were then asked whether he was guilty of 'wilful neglect' in respect to section 1 of the 1933 Act to which the jury returned a guilty verdict. This was a decision well within their jurisdiction; notwithstanding that the House of Lords have now overruled the conviction. There was then a direction by the trial judge that the jury, by law, had to find the defendant guilty of unlawful act manslaughter, i.e. by construction, but in this regard, there was no act. In relation to Lowe's¹¹² overall effect, the decision to overturn the judge's ruling on construction is correct for two reasons. The first is that the direction usurped the function and jurisdiction of the jury. The second is the inference that because a child dies as a result of wilful neglect there is an automatic assumption that an offence of manslaughter has been committed. It is of course the latter to which the judgement was aimed and which is a valid principle that still stands in both respects. The House of Lords in Sheppard¹¹³ overturned Lowe's conviction because there was equally no direction by the trial judge that Lowe was wilful as to the consequence of the neglect under section 1, had there been then the jury's decision would be final. Lowe's will was overshadowed by the Mother's deceit which constituted a *novus actus interveniens*. There is, therefore, no distortion of the law by application of the principle in Lowe.¹¹⁴ In fact it is harmonious with the findings in both Senior¹¹⁵ and Adomako.¹¹⁶ The facts of Senior¹¹⁷ having been stated, demonstrates that where a parent, for whatever reason, wilfully neglects a child they can be found guilty of a section 1 offence under the 1933 Act and if, as in Senior,¹¹⁸ that neglect is considered gross, then the jury is then at liberty to determine that the parent, or responsible person, has committed a crime warranting the stigma and label

¹¹² R v Lowe [1973] QB 702, [1973] All ER 805

¹¹³ R v Sheppard [1981] AC 394, HL

¹¹⁴ R v Lowe [1973] QB 702, [1973] All ER 805

¹¹⁵ R v Senior [1899] QB 283

¹¹⁶ R v Adomako [1995] AC 171

¹¹⁷ R v Senior [1899] QB 283

¹¹⁸ R v Senior [1899] QB 283

attached to a conviction for manslaughter. The conclusion therefore is that *Lowe*¹¹⁹ is not a bar to placing before the jury a charge of gross negligence manslaughter.

Having demonstrated that the law of gross negligence manslaughter is determined purely by examination of the background scenario with reference to the defendant's knowledge and state of mind and the obvious risks to the victim, the defendant's culpability can be weighed and measured accordingly. The fact that there may be other persons whose acts are equally negligent and operative at the time does not constitute a *nous actus interveniens*, because that would defeat the laws application, as stated in *Benge*.¹²⁰ Equally, the law can find more than one person guilty of gross negligence manslaughter whether they are present throughout or not, *per Stone and Dobinson*.¹²¹ The question must therefore be asked, 'is there a correlation between the 'duty of care' at the centre of gross negligence manslaughter and the concept joint enterprise, in order to establish the offence of unlawful act manslaughter?'

¹¹⁹ R v Lowe [1973] QB 702, [1973] All ER 805

¹²⁰ R v Benge (1865) 4 F & F 504; however contrast R v Trainer (1864) 4 F & F 105

¹²¹ R v Stone and Dobinson [1977] QB 354

Unlawful Act Manslaughter and the Joint Enterprise

Unlawful Act Manslaughter

Unlawful act manslaughter, like gross negligence manslaughter, is open to criticism because of the construction of the offence from a base unlawful act. The defendant needs only the *mens rea* for that basic act, rather than a specific *mens rea*. If however, it can be shown that the defendant realised a 'risk of serious harm'¹ though not wishing to injure, harm or hurt anyone, and continues to run that risk then it might more accurately be described as subjective reckless manslaughter, but invariably he has either committed some base crime or created a dangerous situation from which a 'duty of care' can be constructed; by either route and without such 'construction' people would remain unaccountable for a death caused by their action or *omission*.

According to Lord Hope², unlawful act manslaughter comprises three elements:

- i) An unlawful act, intentionally performed;
- ii) In circumstances rendering it dangerous and 'likely to cause harm';
- iii) Causing death.³

The unlawful act at the centre of the cases in issue are usually either assault or neglect or both. The first issue therefore, would appear to be satisfied, but the problem arises from the fact that neglect is not an act for the purposes of this offence. This means that because there is no direct evidence to prove that both or all the

¹ The 'risk of serious harm' has been used to differentiate between the requirements needed when lending oneself to an unlawful enterprise where such injury is potentially foreseeable, Powell and English [1999] AC 1, *R v Slack* [1989] QB 775, Cr App Rep 252, and *Chan Wing-Siu v R* [1985] AC 168, and 'risk of death' per *R v Adomako* [1995] AC 171; However, in *R v Chuch* [1966] 1 QB 59 followed *R v Le Brun* [1992] QB 61, the act needs only be one involving 'some harm'.

² A-G's Reference (No.3 of 1994) [1998] AC 245; there actually four, but the fourth is merely a cumulative of the preceding three

³ *Ibid.* at p.960; see also Smith and Hogan, Criminal Law, 11thEd., Ormerod, D., 2006, Oxford Press, Oxford, p.472

defendants assaulted the victim, the lacuna is formed and unless there is proof of a joint enterprise the lacuna widens.

The circumstance of the child's death usually indicates harm inflicted by human agency and once this is demonstrated and death results from this harm (be it physical injury⁴ or poison⁵) then the offence is made out; notwithstanding issues surrounding causation and the 'but for' rule⁶ which are beyond this paper's remit. The task therefore is either prove joint enterprise, which according to the lacuna and the cases used in support of its existence cannot be done. Or, reconcile the two exceptions to it, i.e. the cases of *Russell and Russell*⁷ and *Marsh and Marsh*,⁸ and the use of 'joint custody and control' with the principle of joint enterprise.

Elements and Scope of Joint Enterprise

The term joint enterprise is used to describe a common venture which has been pre-planned and where the parties know the role and extent of their individual tasks within that endeavour. However, the Judicial Studies Board states that:

The words 'plan' and 'agreement' do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look. An agreement can be inferred from the behaviour of the parties.⁹

There is therefore, some overlap with the notion of complicity. However, given that the defendant in each case must be proved to have the requisite *mens rea* and must in

⁴ R v Strudwick (1994) 99 Cr App R 326

⁵ Drug overdose, R v Russell and Russell (1987) 85 Cr App R 388; Administration of excessive amounts of salt, R v Gay and Gay, Worcester Crown Court Ref T20037208 (At the time of writing, an appeal was being launched on the grounds of fresh medical evidence to the effect that the child had a medical condition which was not disclosed during the original trial).

⁶ Causation is a complex area of law which may be divided into two distinct parts, actual cause, Dalloway (1847) 3 Cox CC 273, and legal causation, Cheshire [1991] 3 All ER 670 both elements must be proved.

⁷ R v Russell and Russell (1987) 85 Cr App R 388

⁸ Marsh and Marsh v Hodgson [1974] Crim LR 35

⁹ Judicial Studies Board website, online reference, criminal law, specimen directions, general, 7 joint responsibility; http://www.jsboard.co.uk/criminal_law/cbb/mf_02a.htm#08

some way lend assistance by aid or encouragement the term joint enterprise has been employed to represent the defendant's participation.

The **Accessories and Abettors Act 1861**, section 8 as amended, states that:

Whosoever shall aid, abet, counsel, or procure the commission of [any indictable offence], whether the same be [an offence] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

In relation to the issues in this paper, we need only focus on the first two elements under this section, namely aid and abet, because they are the elements that have formed the focus of the cases utilised by the Law Commission when presenting their proposals. The statute does not give any assistance in relation to what constitutes aiding and abetting, nor what type of *mens rea* is required of the accessory when they lend themselves to the enterprise,¹⁰ for this we need to look to the common law.

The first question that needs to be asked is, 'does the accessory have to do a physical act to aid and abet'? The cases in point would appear to state that they do. Croom-Johnson LJ in Lane and Lane¹¹ talks of 'active consent'¹². In Aston and Mason,¹³ Lord Lane CJ stated that, 'there was no evidence to prove the opportunity to intervene in the assault against the baby'. Impliedly this means that presence and active encouragement are elements in accessorial liability. The bystander is not liable and the case of Coney¹⁴ is authority for this proposition, but differentiations can be made according to the background or circumstance. In Du Cros,¹⁵ the defendant was the proud owner of a Mercedes which had been driven recklessly, but the court was faced with the dilemma of who was driving, Du Cros or the Lady of the case, Miss Victoria Godwin.

¹⁰ The Accessory and Abettors Act 1861, does not create an offence *per se*

¹¹ R v Lane and Lane (1986) 82 Cr App R 5

¹² *Ibid.* at p.12

¹³ R v Aston and Mason [1992] 94 Cr App R 180

¹⁴ R v Coney (1882) 8 QBD 534, CCR

¹⁵ Du Cros v Lambourne (1907) KB 40

The Court held that Du Cros:

...had become an accomplice by failing to exercise the control over the driver that he, as owner, could have exercised.¹⁶

In fact the headnote in *Du Cros*¹⁷ uses language, which is to the same effect, as the recommendations of the Law Commission and that enacted in the Domestic Violence Crime and Victims Act 2004. Du Cros, being in control of the car, could and ought to, have prevented it, is comparable with s5(1)(d)(i):

...at that time there was a significant risk of serious physical harm being caused to V... D was, or ought to have been, aware of the risk mentioned... [and] failed to take such steps as he could reasonably have been expected to take to protect V from the risk...

Although Lord Alverston CJ states:

I will not attempt to lay down any general rule or principle, but having regard to these findings of fact, it is, in my opinion, impossible to say that there was in this case no evidence of aiding and abetting on the part of the appellant.¹⁸

We can see the principle in *Du Cros*,¹⁹ despite Lord Alverston's words, being applied in other cases such as *Russell and Russell*²⁰ and *Marsh and Marsh*.²¹ However, Glanville Williams asks:

... which of these verbs (aids, abets, counsels and procures) fits the owner who has simply failed to check dangerous driving? My answer would be, none of them. The decision extends the notion of complicity to a case where there is no proof of encouragement, or a direct

¹⁶ *Ibid.* see also *Marsh and Marsh v Hodgson* [1974] Crim LR 35

¹⁷ *Ibid.*

¹⁸ *Du Cros v Lambourne* (1907) KB 40 at 46

¹⁹ *Ibid.*

²⁰ *R v Russell and Russell* (1987) 85 Cr App R 388

²¹ *Marsh and Marsh v Hodgson* [1974] Crim LR 35

intention to encourage, or of help. Not of encouragement, because the ordinary driver would not expect to be checked and criticised by a passenger, even the owner who is sitting in the car. Many people are reluctant to criticise others to their faces; they would rather be silent and try to see that the situation is not repeated. It is therefore unjustifiable to assume that the owner's silence about the driver's manner of driving was taken by the driver as an encouragement to continue.²²

He also raises the question:

...would it be absurd to say that a father who stands by while his son, aged 13, rapes a girl of similar age is guilty of *rape*.²³

By analogy, this author would say that it is neither absurd nor perverse to convict the father. This is because the father continues to have a duty of control over his son, even if there is no duty of care in relation to the girl. If the father understands that the girl does not consent²⁴ to the act he is witnessing then his presence becomes an 'active' encouragement despite his *omission* to act. Nobody today would question the conviction of a father for allowing his 13 year-old-daughter to be raped, especially if he stood-by to watch. In the case of *Clarkson*,²⁵ a rape case involving seven Gunners of the Royal Artillery, it was held that on a charge of aiding and abetting an offence on the basis of continuing and non-accidental presence during its commission, the prosecution had to establish that the defendants not only intended to encourage, but also *actually* encouraged the offence.

However, Lord Megaw J states that:

On no view can the conduct of any of them be regarded as other than deplorable... To say that those who attacked her behaved like animals

²² Williams G., Which of You Did It?, (1989) 52 MLR 179 at p.181

²³ *Ibid.* at p.182, italicized in the original

²⁴ A discussion on the issues of consent and the offences under the Sexual Offences Acts is beyond the scope of this paper; suffice to say that no consent, actual or legal, is sufficient

²⁵ R v Clarkson and others [1971] 3 All ER 344

would be unjust to animals. ...The only thing to be said in their favour is that they may have been in a drunken condition when their moral sense and sense of the requirements of human decency had left them²⁶

His Lordship also cites the well-known passage of Hawkins J from the case of Coney²⁷, *re* the bystander, but we need to take note of these words from that passage:

But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted²⁸

Thus it may constitute aiding and abetting to be reckless or indifferent to the consequence of one's assistance or encouragement in relation to the victim, as *per* the case of Gamble.²⁹ Notwithstanding that mere presence alone does not constitute aiding and abetting,³⁰ given the caustic remarks of Megaw LJ, above, and the principle of Du Cros,³¹ it may also be reasoned that had one of the soldiers a greater duty of control over the others he may have also been found guilty for his failure to intervene even if he had been 'heavy with drink'. In Morgan³² the husband was held liable as an accessory to his wife's rape even though at the time he could not have been convicted of rape, also in the case of Russell,³³ a husband who watched his wife drown their children was found guilty as a secondary party. The decision to allow the appeal in Clarkson³⁴ as in many cases, was because the Court was of the opinion that the direction, read as a whole, might have lead the Court Martial to:

²⁶ R v Clarkson and others [1971] 3 All ER 344 at 346

²⁷ R v Coney (1882) 8 QBD 534 at 557

²⁸ *Ibid.* at p.558

²⁹ National Coal Board v Gamble [1959] QB 11

³⁰ R v Coney (1882) 8 QBD 534

³¹ Du Cros v Lambourne (1907) KB 40

³² DPP v Morgan [1976] AC 182

³³ Russell [1933] VLR 59

³⁴ R v Clarkson and others [1971] 3 All ER 344

...have misunderstood the relevant principle that ought to be applied.³⁵

The soldier's failure remained disgraceful and potentially unlawful, because the Appeal Court had:

...no doubt that the inferences could properly have been drawn in respect of each defendant... so that verdicts of guilty could properly have been returned.³⁶

Thus far all the defendants in these cases have been present; but the cases demonstrate that the law can and has found that presence alone might constitute encouragement by inference from the circumstances and no doubt the gravity of the crimes committed. Therefore in respect of what Glanville Williams has stated, the likelihood of a conviction and the vilification of the father, as an accessory is highly probable. Failure to exercise control can give rise to liability; Marshall should have protected his wife, notwithstanding that he was a superior officer. This establishes a proposition that the law differentiates between defendants and places them in superior or inferior categories. A mere bystander is not exposed to liability because he has no duty to the victim, has not created a dangerous situation, or allowed a situation of his own making to continue; as *per Miller*.³⁷ This proposition is also supported by the fact that *Stone and Dobinson*³⁸ and *Benge*³⁹ were held liable, but *Trainer*⁴⁰ was acquitted and the railway company blamed and by the fact that persons considered stupid, ignorant and personally inadequate (see *Sheppard*⁴¹ and by extension *Adomako*,⁴²) are exempt from liability.⁴³ Thus the parents have a greater duty to the child than anyone else; but this is not to say that the others who fail in

³⁵ *Ibid.* at p.349

³⁶ *Ibid.* at p.349

³⁷ R v Miller [1983] 2 AC 161, [1983] All ER 978

³⁸ R v Stone and Dobinson [1977] QB 354

³⁹ R v Benge (1865) 4 F & F 504

⁴⁰ R v Trainer (1864) 4 F & F 105

⁴¹ R v Sheppard [1981] AC 394, HL

⁴² R v Adomako [1995] AC 171

⁴³ Equally so are those considered to be legally insane by virtue of McNaghten's case (1843) 10 Cl & F 200, 8 ER 718, 1 Car & Kir 130

their responsibility are not beyond reproach, as witnessed by the cases of *Dytham*⁴⁴ and *Russell*.⁴⁵

Failure to exercise control when present can give rise to liability in the absence of exculpatory explanation. Equally in these circumstances if the aiding and abetting is implied then the 'active consent' is implied also. But distinctions can still be drawn, as per *Morgan*,⁴⁶ which might be described as a case of active participation compared to the case *Du Cros*⁴⁷ who omitted to exercise control. But in *Clarkson*⁴⁸ there was neither a duty of care, nor control, nor direct evidence of active participation by some of the defendants. However, the Judicial Studies Board also makes this point:

Mere presence at the scene of a crime is not enough to prove guilt, but if you find that a particular defendant was on the scene and intended and did by his presence alone encourage the other(s) [in the offence] he is guilty.⁴⁹

Thus the fact that a person has failed to exercise control does not of course mean that he aids and abets a crime, because not only must there be some knowledge (i.e. they must realise that the crime is or might be committed) the law actually requires that the mind of the defendant goes with *that* crime. If the acts perpetrated against the child are substantially different then the defendant would not be a party to that crime; as per the ruling *Powell and English*.⁵⁰ There are however, finite distinctions between whether the participant's activities fall within the scope of the joint enterprise. The House of Lords' decision in the case of *Powell and English*⁵¹ quite clearly states that the requisite *mens rea* for accessory liability is subjective foresight of the possible resultant consequence of the principal's action and it matters not whether the act, or omission, by the accessory is substantial or trivial: *Giannetto*.⁵² Equally, the element of subjective foreseeability does not correspond with the *mens rea* of the principal

⁴⁴ R v Dytham [1979] QB 722

⁴⁵ Russell [1933] VLR 59

⁴⁶ DPP v Morgan [1976] AC 182

⁴⁷ Du Cros v Lambourne (1907) KB 40

⁴⁸ R v Clarkson and others [1971] 3 All ER 344

⁴⁹ Judicial Studies Board website, online reference, criminal law, specimen directions, general, 7 joint responsibility; http://www.jsboard.co.uk/criminal_law/cbb/mf_02a.htm#08

⁵⁰ R v Powell and English [1999] AC 1, [1997] 4 All ER 545

⁵¹ *Ibid.*

⁵² *Giannetto* [1997] 1 Cr App R 1, CA

offence; the rationale for this being founded on the grounds of public policy and socio-legal need.⁵³ The defendant need only realise that their activity aids and abets. The case of *Powell and English*⁵⁴ also dealt with the principle of disjointment; i.e. the second question of appeal, when a participant to a joint enterprise claims that the principal act was outside of the agreed enterprise and therefore an act giving rise to individual rather than collective liability. It is difficult however, to rationalise some of the decisions that find successful appeal in relation to the application of disjointment, because some decisions, both before and subsequent to the decision in *Powell and English*,⁵⁵ appear to be in direct conflict with other principles of law. Examples include the Northern Ireland case of *Gamble*⁵⁶ (knee-capping) and the principle of transferred malice had the plan gone awry, or the principle inherent to the 'egg shell skull' rule,⁵⁷ or even *Mair*,⁵⁸ a pub fight in which Mair had a broken bottle and the principle a knife.⁵⁹

Proving *mens rea* is of course no easy matter, in fact there might never be any direct evidence to prove what is in the mind of the defendant. Even a statement by the defendant that "I am going to fly to Manchester" is only circumstantial, no matter how many people hear him say it and testify to the fact. The reason being that it is open to a plurality of reasonable interpretations:

- i) Man is incapable of that independent attribute, therefore he cannot literally mean what he says; or
- ii) Does he intend to take a plane, piloting it himself, or does he mean that he will take a commercial flight; or
- iii) Is it merely the expression of a fanciful desire?

⁵³ R v Powell and English [1999] AC 1, [1997] 4 All ER 545, see p.551 judgement of LJJ Steyn; see also *Chan Wing-Siu v R* [1985] AC 168; *McAuliffe v R* (1995) 130 ALR 26; *R v Hyde* [1990] 3 All ER 892 as cited and approved in Powell and English

⁵⁴ R v Powell and English [1999] AC 1, [1997] 4 All ER 545

⁵⁵ *Ibid.*

⁵⁶ R v Gamble [1989] NI 268

⁵⁷ R v Blaue [1975] 3 All ER 446

⁵⁸ R v Mair [2002] EWCA 2858, WL 31676355

⁵⁹ The dilemmas that are created warrant further discussion beyond the scope of this paper.

Consequently the statement alone proves little, it is only by adding this to other evidence (be that circumstantial or direct evidence) that a determination can be made as to what the defendant may have thought or realised; consider the comments in *McGreevy*.⁶⁰ In any event it remains speculative because even if the defendant gives his own account there is still the possibility that he is lying. As such even when all his actions are witnessed, the *full* extent of his thoughts and intentions remain unknown; because once the law determines that there is sufficient intention the enquiry stops. The desires, motives or wishes of the accused are irrelevant to his guilt (see *Sharp*⁶¹, *Hill v Ellis*⁶², and *Wai-Yu-tsang*⁶³) although they may be thought to mitigate sentence:

Moral judgements do not effect the criminality of the act though they may affect sentence. ‘*Rea*’ means criminally, not morally, wrong.⁶⁴

Returning to the problem, if there is evidence that the victim has suffered previous physical violence (meaning any unlawful violence⁶⁵) which is virtually any violence to a child under two and a half years-old, as *per* the case of *Griffin*,⁶⁶ then provided the violence is of a ‘like’ nature and a contributory cause of death.⁶⁷ Once it is demonstrated that each parent had such knowledge their failure to exercise that duty then becomes an act of facilitation and thereby encouragement. This is no different from that found in *Russell and Russell*.⁶⁸ The bar in *Lowe*⁶⁹ is removed for the reasons already given.

This approach does challenge the proposition made by Professor Ashworth that *Lowe*⁷⁰ establishes a third limitation; i.e. renders an omission incapable of

⁶⁰ *McGreevy v DPP* [1973] All ER 503 particularly p.511; “The mental element in a crime can rarely be proved by direct evidence.”

⁶¹ *Sharp* (1857) 26 LJMC 47

⁶² *Hill v Ellis* [1983] QB 680

⁶³ *Wai-Yu-tsang* [1992] 1 AC 269, [1991] 4 All ER 664 at 672

⁶⁴ Jefferson, *Criminal Law*, 7th Ed., (2006), Pearson Education, Harlow at p.280

⁶⁵ A-G’s Ref (No.3 of 1994) [1998] AC 245

⁶⁶ *R v Griffin* (1869) XI Cox CC 402

⁶⁷ This link has to be made in order to maintain the scope of the joint enterprise, see *R v Calhaem* [1985] QB 808, [1985] 2 All ER 266; however, evidence of provocation may break the causal link, *R v McKechnie* [1992] Crim LR 194

⁶⁸ *R v Russell and Russell* (1987) 85 Cr App R 388

⁶⁹ *R v Lowe* [1973] QB 702, [1973] All ER 805

⁷⁰ *Ibid.*

constituting an ‘act’ for the purposes of unlawful act manslaughter.⁷¹ This does not mean however, that an omission should constitute an ‘act’ for the purposes of unlawful act manslaughter, just as an act that terminates life does not necessarily constitute an ‘act’ of murder, because as the case of *Bland*⁷² proves, some positive acts are actually omissions. Equally, some non-acts have to be constructed as positive ‘acts’; for instance where the harm is psychological as in the case of *Ireland*,⁷³ the nature of the ‘contact’ was a construction, there being no actual physical contact. The circumstances of the ‘act’ have to be weighed in the same manner as the background circumstances with ‘acts’ amounting to gross negligence.

The statement by the Lord Chief Justice, in *Aston and Mason*⁷⁴ that ‘there was no evidence to prove the opportunity to intervene in the assault against the baby’, is therefore negated by this interpretation of facilitation.

Gibson: come in from the cold

The case of *Gibson and Gibson*⁷⁵ was considered in *Lane and Lane*,⁷⁶ the latter case being followed, no doubt, for the reasons stated by the Law Commission.⁷⁷ But with respect, this author intends to reconcile the cases and demonstrate the validity of the foregoing proposition.

The facts of *Gibson and Gibson*⁷⁸ are that a 5 week-old baby was taken to hospital and subsequently found to have extensive multiple fractures and brain damage. The case against the defendants charged each with an offence under section 20 **Offences Against the Person Act 1861**, as well as and one under section 1 of the **Children and Young Persons Act 1933**.⁷⁹ When rejecting a submission of ‘no case to

⁷¹ See commentary Lowe [1973] Crim LR 238 at p.240

⁷² *Airedale NHS Trust v Bland* [1983] AC 789

⁷³ *R v Ireland* [1998] AC 147; See also Smith and Hogan, *Criminal Law*, 11thEd., Ormerod, D., 2006, Oxford Press, Oxford, p.80 where it is argued that *Gibbons and Proctor* (1918) 13 Cr App R 134 might be basis for a s18 Offences Against the Person Act 1861 offence by omission.

⁷⁴ *R v Aston and Mason* [1992] 94 Cr App R 180

⁷⁵ *R v Gibson and Gibson* (1985) 80 Cr App R 24

⁷⁶ *R v Lane and Lane* (1986) 82 Cr App R 5

⁷⁷ Law Com 279 para 1.19-1.25, notably 1.19-1.21

⁷⁸ *R v Gibson and Gibson* (1985) 80 Cr App R 24

⁷⁹ The charges under section 18 of the Offences Against the Person Act 1861 having been withdrawn.

answer'(1) and when summing-up the case (2), the trial judge, Mr Justice Drake, stated that:

(1)...it would be sufficient to sustain a case against either of the parents if it were proved that they were parties to a joint enterprise to injure the child and that there was sufficient evidence to leave the lesser offence under section 20 of the 1861 Act to the jury.

(2)...the jury were directed that before they could be satisfied so as to be sure that a defendant who is not guilty of a physical act against the child should be guilty as a partner, they should be satisfied so as to be sure that the other defendant actively approved and by doing so encouraged the other in inflicting the injuries.⁸⁰

This approach was rejected by the Court of Appeal, however, Lord O'Connor J when giving the judgement of the court did state that:

In law the defendants had joint custody and control of their baby. They were under a duty to care for and protect their baby and ... The evidence established that while in their joint custody and control the baby had sustained grievous bodily harm which had been inflicted by one, other or both parents. There being no explanation from either parent, and no evidence pointing to one rather than the other, the inference can properly be drawn that they were jointly responsible and so both guilty as charged.⁸¹

This latter approach is concomitant with the decision in *Marsh and Marsh*,⁸² but, if a conflict of logic is to be avoided, how are these statements reconciled? The prosecution's line of assault was three-fold:⁸³

⁸⁰ R v Gibson and Gibson (1985) 80 Cr App R 24 at p.25

⁸¹ *Ibid.* at p.30

⁸² *Marsh and Marsh v Hodgson* [1974] Crim LR 35

⁸³ R v Gibson and Gibson (1985) 80 Cr App R 24 at p.28

- (1) one, other or both the defendants had inflicted the injuries on the baby; and
- (2) on the doctor's evidence the injuries had been inflicted on more than one occasion;
- (3) that because they were together most of the time the defendant not responsible for an assault must have known about it, and by not reporting the matter must have encouraged further assault and thus they were both guilty.

The first is merely a statement and without more proves nothing. The second is that there is a series of injuries. The Third falls within Lord O'Connor J's proposition that an inference can be made, if there is nothing more. This assumption of knowledge is within the jury's remit to infer, however, the subsequent direction over-rode the assumption, as was pointed out by his Lordship in the judgement. Also, the only evidence presented by the prosecution actually negated their attack, as stated in the following passage:

Take the brain damage. [If] One parent was the assailant. The theory posits that this act of violence was committed in the presence of the other parent who encouraged and assented to the assault because he or she knew of and had condoned at least one previous serious assault by the same parent. There was no evidence from which this inference could be drawn--indeed the quilt incident negated the inference.⁸⁴

There also appears to be a failure to 'prove' knowledge on the part of the other defendant, which forms the next sentence in his judgement; i.e. to demonstrate that each party knew that the child had suffered previous injury and done nothing, the prosecution *must* demonstrate this for the jury to make the inference. As such, provided there is this 'proof' of knowledge, which is purely circumstantial, the

⁸⁴ *Ibid.* at p.29

‘implied guilt’ principle is the proposition stated *re* unlawful act manslaughter. That is provided the case of Lane and Lane⁸⁵ can be reconciled.

LANE: Re-Walked

Croom-Johnson LJ refers to the passages mentioned above *re* Gibson and Gibson,⁸⁶ in his judgement in the instant case, at pages 12-14, and most notably the two nugatory statements, as well as the ‘implied guilt’ principle. There is then a reminder about the facts, including statements about where the prosecution had erred:

At all times the prosecution were unable to show when it was inflicted, by whom it was inflicted, or how many people were present.⁸⁷

At this point, it should also be noted that the prosecution was seeking to prove a singular incident, which makes it quite similar to Gibson and Gibson.⁸⁸ The prosecution however, were able to demonstrate in this case previous injury to the child. Equally the jury were at liberty, given the movements of the parents, to dismiss the chances of it being a third-party killing; there being no evidence to substantiate this anyway. The problem is the summation, which in its language placed the defendants together at the time of the incident. But there was no ‘direct’ proof of this. As such the Judge altered the potentially implied transmuting it to an absolute and it is this jurisdictional trespass that forms the *ratio* of the judgement.

There is also Croom-Johnson LJ’s comments on Ashworth J’s fourth judgement, from Marsh and Marsh,⁸⁹ to the effect that:

It may be that a defendant either does not know the true explanation or has no means of knowing the facts which require explaining.⁹⁰

⁸⁵ R v Lane and Lane (1986) 82 Cr App R 5

⁸⁶ R v Gibson and Gibson (1985) 80 Cr App R 24

⁸⁷ R v Lane and Lane (1986) 82 Cr App R 5 at p.14

⁸⁸ R v Gibson and Gibson (1985) 80 Cr App R 24

⁸⁹ Marsh and Marsh v Hodgson [1974] Crim LR 35

⁹⁰ R v Lane and Lane (1986) 82 Cr App R 5 at p.12

These remarks are accurate and of sound principle generally and possibly form the basis for the well-known passage of Croom-Johnson LJ that:

[For a] lack of explanation, to have any cogency, [it] must happen in circumstances which point to guilt; it must point to a necessary knowledge and realisation of that person's own fault. To begin with, one can only expect an explanation from someone who is proved to have been present. Otherwise it is no more consistent with that person either not knowing what happened or not knowing the facts from which what happened can be inferred, or with a wish to cover up for someone else suspected of being the criminal. There may be other reasons.⁹¹

But with the greatest respect, when considering the second judgement in *Gibson and Gibson*,⁹² which states that inferences can be drawn from the fact that a parent has a duty to the child and therefore a duty to give an account. Then when the defendants are not forthcoming in circumstances that call for an answer, the jury can draw what inference they consider best suits the circumstance or narrative. The last opportunity to give such an account is the courtroom, it should be noted that defence of 'marriage privilege' has been removed.⁹³ Equally, it fails to account for the fact that a joint enterprise does not require presence at the scene of the crime; as such the comments in this context become a distraction. A case in point is that of *Wragg*.⁹⁴ In this case, there appears to have been a discussion about a future course of action that involved terminating their son's life. On the evening in question, Mrs Wragg left the house with their other son, thereby facilitating the actions of Mr Wragg, *re* their remaining son. The Judge, comments specifically on Mrs Wragg's complicity in the crime.⁹⁵ As such it can be deduced that she knew of Mr Wragg's intention, she omitted to protect the child and was not present at the scene of the crime, as such her act of facilitation involves her in the principal offence. This, therefore, falls within the ambit of

⁹¹ R v Lane and Lane (1986) 82 Cr App R 5 at p.14

⁹² R v Gibson and Gibson (1985) 80 Cr App R 24

⁹³ Police and Criminal Evidence Act 1984, section 80(9)

⁹⁴ R v Wragg, Lewis Crown Court, Judgement on the 12th Dec 2005 case number T20047199

⁹⁵ Woolcock and Hoyle, Former SAS soldier is cleared of murdering severely disabled son, The Times, December 13, 2005; (sic)

Russell.⁹⁶ To restrict any answers or comment only to those present, potentially distracts the court from gaining the information it needs and defeats the purpose of Lord O'Connor J's second judgement.

Summary

It can be concluded that Lowe⁹⁷ forms no bar to the prosecution presenting either a charge of gross negligence manslaughter or one of unlawful act manslaughter, when that 'act' is by omission. The case, and its principle, is nothing more than a general one of law and does not create any special restriction. In fact the words of Lord Justice Hobhouse in Coles⁹⁸ are apt:

The inferences to be drawn from the intentional commission of the act will normally provide the primary proof of the relevant mental state... In any given case, other evidence may confirm or detract from the inference... It is open to the defendant in any case to destroy or rebut the inference which the Crown seeks to rely upon.⁹⁹

This is also true of the evidence in Gibson and Gibson,¹⁰⁰ where the 'quilt-incident' negated the assumption. The fact that the charge does not automatically follow is no different to saying that the prosecution must prove its case. This assertion is also true of the proposition that 'parents are in no different a position to that of the ordinary defendant', especially when considering a singular incident; consider Lane and Lane.¹⁰¹ However, when there is a catalogue of incidents, as in Russell and Russell,¹⁰² Marsh and Marsh¹⁰³ and even Strudwick,¹⁰⁴ the law can look to the defendants with responsibility to give account; in this regard the law already has the teeth that the Law Commission's proposal lacked. Therefore, the principle in

⁹⁶ Russell [1933] VLR 59

⁹⁷ R v Lowe [1973] QB 702, [1973] All ER 805

⁹⁸ R v Coles [1995] Cr App R 157

⁹⁹ *Ibid.* at p.165

¹⁰⁰ R v Gibson and Gibson (1985) 80 Cr App R 24

¹⁰¹ R v Lane and Lane (1986) 82 Cr App R 5 at p.11

¹⁰² R v Russell and Russell (1987) 85 Cr App R 388

¹⁰³ Marsh and Marsh v Hodgson [1974] Crim LR 35

¹⁰⁴ R v Strudwick (1994) 99 Cr App R 326

Abbott¹⁰⁵ remains true. When the case involves a singular incident the prosecution must prove either the actual offender, or that there was a joint enterprise, lack of evidence or silence will generally defeat the prosecution's assertions: Lane and Lane.¹⁰⁶ However, when there has been more than one incident against the victim, (provided death results from that kind of injury or harm) if the prosecution 'prove' knowledge and a lack of disjointment both parents are culpable and potentially liable. An inconceivable or untenable excuse will not exonerate the defendant: Marsh and Marsh.¹⁰⁷ Equally there is no reverse burden of proof, because the prosecution must construct a case against the defendants from the circumstantial evidence available,¹⁰⁸ but for all intents and purposes, the defendant's knowledge is the key. Neither is there any conflict with European jurisprudence: Sheldrake¹⁰⁹ and Salabiaku.¹¹⁰ It is accepted that there may be other reasons why a prosecution might not be pursued, but it is asserted that it not for the reasons existent in the now rather ethereal lacuna which is formed on the assertion that there is no evidence.

In pursuance of this rationale, it might also be stated that the increase of sentence under section 1 of the 1933 Act has distracted the courts from its original intent. Responsibility is onerous and as such failure brings liability. In Falkingham¹¹¹ the mother sent her baby to its father by the railway's parcel service, as such she exposed the child to potential harm and was guilty of an offence under section 1. This is comparable to Litchfield¹¹² who, as ship's captain, was responsible for the passengers and who equally exposed them to danger by sailing the potentially hazardous course. Therefore the offences under the **Children and Young Persons Act 1933**, section 1, and the **Merchant Shipping Act 1970 (Repealed)**, section 27, are comparable.¹¹³ As shown, there is no bar to the prosecution seeking to press for a manslaughter charge where greater subjective liability can be demonstrated.

¹⁰⁵ R v Abbott (1955) 39 Cr App R 141

¹⁰⁶ R v Lane and Lane (1986) 82 Cr App R 5 at p.11

¹⁰⁷ Marsh and Marsh v Hodgson [1974] Crim LR 35

¹⁰⁸ There being in the majority of these case no direct evidence

¹⁰⁹ Sheldrake v DPP [2004] UKHL 43, [2005] All ER 273

¹¹⁰ Salabiaku v France (1988) 13 EHRR 379

¹¹¹ R v Falkingham (1870) LR 1 CCR 222

¹¹² R v Litchfield [1998] Crim LR 507

¹¹³ See now the Pilotage Act 1987

Conclusion

The problem identified at the root of the proposals was a lacuna that states:

A child is cared for by two people (both parents, or a parent and another person). The child dies and medical evidence suggests that the death occurred as a result of ill-treatment. It is not clear which of the two carers is directly responsible for the ill-treatment which caused death. It is clear that at least one of the carers is guilty of a very serious criminal offence but it is possible that the ill-treatment occurred while one carer was asleep, or out of the room.¹

Because of this and the lobbying by such groups as the NSPCC about a lack of prosecution,² the Law Commission were asked to make recommendations to close the apparent lacuna. These Reports, *Children: Non Accidental Death or Serious Injury*³ and the proposals contained within them formed the background and enquiry of this dissertation. The first phase was to assess the validity of the proposals against the Law commission's own standard:

A new offence must be justifiable on its own terms⁴

Close examination reveals that the proposals fail to achieve this goal. The main proposal is an offence based on section 1 of the 1933 Act. But it has been shown to be flawed, because the inclusion of what appeared to be an objective test, i.e. 'ought to have known', is subject to the requirements of *Sheppard*⁵ that interpret the principle requirements of the offence under section 1 of the 1933 Act. As a result, this has the effect of duplicating the test in *Adomako*.⁶ The remaining operative clauses, such as the removal of the 'half-time' rule (clause 7), and the drawing of

¹ Law Com 279 & 282 para 1.1

² Judge Isobel Plumstead, Papers for the NSPCC "Which of you did it?" Conference in Cambridge, 2 November 2002

³ CHILDREN: NON-ACCIDENTAL DEATH OR SERIOUS INJURY (CRIMINAL TRIALS), Consultation Report, Law Com 279, and the Law Commission's Final Report, CHILDREN: NON-ACCIDENTAL DEATH OR SERIOUS INJURY (CRIMINAL TRIALS), Law Com 282

⁴ LC 282 para 1.18

⁵ R v Sheppard [1981] AC 394, HL

⁶ R v Adomako [1995] AC 171, HL

adverse inferences (clause 8), were also found to be flawed. The former fails because the prosecution have to adduce evidence which according to the lacuna does not exist and the latter fails because on examination it only repeats provisions which already operate generally within the law. Having examined the clauses individually, the proposals as a whole were tested against those cases used by the Law Commission to demonstrate the existence of the lacuna. However, it became apparent that the failings in these cases were not because of a deficiency in the evidence, which the lacuna is meant to demonstrate, but rather because of an error in procedural approach to the cases when heard at first instance. It has to be noted that there was always going to be a difficulty in proving the negative aspect of the lacuna when utilising cases that to some degree had a positive evidential element.

The second chapter re-examined these cases to disprove the existence of the lacuna, first in respect of the offence of gross negligence manslaughter, and then again in respects of unlawful act manslaughter. Examination of the leading case on gross negligence manslaughter, *Adomako*⁷ which is said to be objective, was actually shown to be in a separate category falling into the middle ground between a strict objective test, as in *Caldwell*,⁸ and the completely subjective test of *Cunningham*.⁹ This was achieved by demonstrating that the risk element should form the background of circumstance upon which the actions of the defendant are 'played-out'. This approach reconciles the apparent disparity between the 'risk of death' and 'injury to health and welfare' requirements approved by the House of Lords. Further to this, the apparent bar and anomaly that was perceived as existing in the case of *Lowe*¹⁰ was also explained and reconciled against the cases of *Senior*¹¹ and *Adomako*¹² and thereby removed.

In relation to unlawful act manslaughter the 'duty of care' requirement necessary to prove cases of negligence was incorporated to construct a hypothesis of joint enterprise and the remaining cases were then explained against this hypothesis; most

⁷ *Ibid.*

⁸ Metropolitan Chief Commissioner v Caldwell [1982] AC 341, [1981] All ER 961

⁹ R v Cunningham [1957] 2 QB 396, [1957] All ER 412

¹⁰ R v Lowe [1973] QB 702, [1973] All ER 805

¹¹ R v Senior [1899] QB 283

¹² R v Adomako [1995] AC 171

notably the cases of *Gibson and Gibson*¹³ and *Lane and Lane*,¹⁴ the former of these two cases appears to have been overshadowed by the latter. Reconciliation of these cases however, has proved the validity of the hypothesis; which was first alluded to in the case of *Gibson and Gibson*.¹⁵ *Lowe*¹⁶ has also been considered an obstacle in respect to unlawful act manslaughter, by virtue of it barring omissions from consideration within this offence. However, it has been demonstrated and proved by example (albeit a non-prosecuted example), that once knowledge is proved an omission to exercise a duty becomes an act of facilitation, thereby falling into the Judicial Studies board's specimen directions that:

An agreement can be inferred from the behaviour of the parties.¹⁷

Therefore, the law is already capable of bring a prosecution against those responsible for these crimes and their infringements against society. This approach may be considered fragile, but given the fact that in a recent manslaughter and cruelty to a child case, *Wright*,¹⁸ the defendant was sentenced to consecutive terms of 12 years imprisonment for manslaughter and 5 years for child cruelty, such sentences would hardly seem to suggest that '*someone got away with murder*'.

¹³ R v Gibson and Gibson (1985) 80 Cr App R 24

¹⁴ R v Lane and Lane (1986) 82 Cr App R 5

¹⁵ R v Gibson and Gibson (1985) 80 Cr App R 24

¹⁶ R v Lowe [1973] QB 702, [1973] All ER 805

¹⁷ Judicial Studies Board website, online reference, criminal law, specimen directions, general, 7 joint responsibility; http://www.jsboard.co.uk/criminal_law/cbb/mf_02a.htm#08

¹⁸ R v Wright [2002] All ER (D) 80; see also R v R [2005] EWCA Crim 1657, mother sentenced to 5 years imprisonment for child cruelty

APPENDIX ONE

Offences Against Children Bill 2004 (Proposed)

1 Cruelty contributing to death

In the Children and Young Persons Act 1933 (c.12), after section 1 (cruelty to persons under sixteen), insert –

“1A Cruelty contributing to death

- (1) A person is guilty of an offence if—
 - (a) he commits an offence under section 1 against a child or young person (“C”);
 - (b) suffering or injury to health of a kind which was likely to be caused to C by the commission of that offence occurs; and
 - (c) its occurrence results in, or contributes significantly to, C’s death.
- (2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.”

2 Failure to protect a child

- (1) A person (“R”) is guilty of an offence if –
 - (a) at a time when subsection (3) applies, R is aware or ought to be aware that there is a real risk that an offence specified in Schedule 1 might be committed against a child (“C”);
 - (b) R fails to take such steps as it would be reasonable to expect R to take to prevent the commission of the offence;
 - (c) an offence specified in Schedule 1 is committed against C; and
 - (d) the offence is committed in circumstances of the kind that R anticipated or ought to have anticipated.
- (2) A person guilty of an offence under this section is liable –
 - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.
- (3) This subsection applies if R –
 - (a) is at least 16 years old;

- (b) has responsibility for C; and
 - (c) is connected with C.
- (4) R is connected with C if –
- (a) they live in the same household;
 - (b) they are related; or
 - (c) R looks after C under a child care arrangement.
- (5) R and C are related if they are relatives within the meaning of Part 4 of the Family Law Act 1996 (c.27).
- (6) R looks after C under a child care arrangement if R –
- (a) looks after C (whether alone or with other children) under arrangements made with a person who lives in the same household as, or is related to, C; and
 - (b) does so wholly or mainly in C's home.
- (7) It does not matter whether R looks after C for reward or on a regular or occasional basis.

3 Effect of intoxication

- (1) A person's voluntary intoxication is to be disregarded in determining –
- (a) for the purposes of section 2(1)(a), whether he ought to be aware of a risk; and
 - (b) for the purposes of section 2(1)(b), what steps it would be reasonable to expect him to take.
- (2) A person's intoxication is voluntary if he takes an intoxicant, or allows an intoxicant to be administered to him –
- (a) knowing that it is or may be an intoxicant; and
 - (b) otherwise than in accordance with medical advice.
- (3) "Intoxicant" means alcohol, drugs or anything else which may impair awareness.
- (4) A person's intoxication is to be taken to be voluntary unless sufficient evidence is adduced to raise an issue with respect to whether it was voluntary.
- (5) Where sufficient evidence is so adduced, the court is to assume that his intoxication was not voluntary unless the prosecution prove beyond reasonable doubt that it was.

4 The statutory responsibility

- (1) This section applies if a serious offence has been committed against a child or there are reasonable grounds for suspecting that such an offence has been committed.
- (2) Any person who had responsibility for the child at the relevant time also has the responsibility imposed by this section (“the statutory responsibility”).
- (3) “The relevant time” means –
 - (a) the time when the offence was committed (if known); or
 - (b) any time during the period within which the offence could have been committed.
- (4) The statutory responsibility is responsibility for assisting –
 - (a) the police in any investigation of the offence, and
 - (b) the court in any proceedings in respect of the offence, by providing as much information as the person is able to give about whether and, if so, by whom and in what circumstances the offence was committed.

5 Investigations by the police

- (1) This section applies if a constable –
 - (a) is investigating a serious offence against a child; and
 - (b) reasonably suspects that a person whom he is questioning in connection with the offence (“A”) is subject to the statutory responsibility in relation to the offence.
- (2) If A is being questioned under caution, the constable must inform A of his suspicion –
 - (a) when he cautions A; or
 - (b) as soon as he forms that suspicion (if later).
- (3) When giving that information, the constable must explain –
 - (a) the nature of the statutory responsibility; and
 - (b) the effect of subsections (5) and (6).
- (4) If A is not being questioned under caution, the constable may nevertheless give A –

- (a) the information mentioned in subsection (2); and
 - (b) an explanation of the nature of the statutory responsibility and the effect of subsection (5).
- (5) A is not obliged to answer a question put to him by a constable investigating an offence merely because he is, or may be, subject to the statutory responsibility in relation to the offence.
- (6) But if section 34(2) of the Criminal Justice and Public Order Act 1994 (c.33) (circumstances in which inferences may be drawn from failure to mention facts) applies in relation to a failure by A to mention any fact, a court, judge or jury may, in deciding whether it is proper to draw an inference under that provision, take into account any evidence that A was given the information and explanations mentioned in subsections (2) and (3).

6 Responsibility of witness in criminal proceedings

- (1) This section applies if a person ("W") –
- (a) is a witness in criminal proceedings for a serious offence against a child; but
 - (b) is not a person charged with an offence in those proceedings.
- (2) If the court is of the opinion that W is subject to the statutory responsibility in relation to the offence, it may –
- (a) inform W of its opinion; and
 - (b) explain to W the nature of that responsibility and the effect of this section.
- (3) If the court acts under subsection (2), it may take into account that W was given that information and explanation in determining –
- (a) whether W's behaviour as a witness has amounted to contempt of court; and
 - (b) if it has, what punishment to impose.
- (4) This section does not –
- (a) oblige W to answer any question which W is entitled to refuse to answer as a result of any enactment or on the ground of privilege; or
 - (b) affect the court's power, in the exercise of its general discretion, to excuse a witness from answering a question.

7 **Special procedure during trial**

- (1) This section applies if —
 - (a) a person is, or two or more persons are, charged with a serious offence against a child; and
 - (b) at the conclusion of the evidence for the prosecution, it has been proved to the court that three conditions are met.
- (2) The first condition is that the offence charged or any alternative offence has been committed (but it is not necessary for it to have been proved which of those offences was committed).
- (3) The second is that—
 - (a) the number of persons who could have committed the offence charged or any alternative offence is known; and
 - (b) those persons can be described, whether by reference to their names, their personal characteristics or their relationship to one another or to other persons.
- (4) The third is that—
 - (a) if there is only one accused, he is subject to the statutory responsibility in relation to the offence charged; or
 - (b) if there are two or more accused, at least one of them is subject to that responsibility in relation to the offence charged.
- (5) If the court is satisfied, in respect of the accused, or an accused, that he could not have committed the offence charged or any alternative offence—
 - (a) the court must acquit him of the offence charged or direct his acquittal; and
 - (b) he may not be convicted of any alternative offence.
- (6) Subsection (7) applies if, after the court has acted under subsection (5)—
 - (a) one or more persons remain accused of the offence charged; and
 - (b) the third condition continues to be met.
- (7) A submission that the accused, or an accused, does not have a case to answer in relation to the offence charged or an alternative offence may not be made at any time before the conclusion of the evidence for the accused or all of the accused.
- (8) If the court considers at the conclusion of the evidence for the accused, or all of the accused, that no court or no jury properly directed could properly convict the accused, or an accused, of the offence charged—
 - (a) the court must acquit him of that offence or direct his acquittal; and

(b) if the court is of the same opinion in relation to an alternative offence, he may not be convicted of that offence.

(9) This section does not affect—

(a) any power a court may have to acquit or direct the acquittal of an accused otherwise than on a submission made on his behalf; or

(b) any power a court may have to discharge a jury or otherwise prevent a trial continuing.

(10) "Alternative offence", in relation to an offence charged, means any other offence of which the accused could lawfully be convicted on that charge.

8 Inferences from accused's silence

(1) The Criminal Justice and Public Order Act 1994 (c. 33) is amended as follows.

(2) In section 35 (effect of accused's silence at trial), after subsection (7), insert—

"(8) This section does not apply if section 35A applies."

(3) After section 35, insert—

"35A Effect of accused's silence at trial in special cases

(1) This section applies if a person is on trial for a serious offence against a child and, at the conclusion of the evidence for the prosecution—

(a) it has been proved to the court that the conditions in section 7(2) to (4) of the Act of 2004 (conditions for application of special procedure) apply in relation to the offence;

(b) section 7(7) of that Act (restriction on submissions of no case) applies in relation to the offence; and

(c) the court is of the opinion that the accused is subject to the statutory responsibility in relation to the offence.

(2) But this section does not apply if—

(a) the accused's guilt is not in issue, or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence.

(3) The court shall, at the conclusion of the evidence for the prosecution, satisfy itself that the accused is aware—

- (a) that the court is of the opinion that he is subject to the statutory responsibility in relation to the offence;
 - (b) of the nature of that responsibility;
 - (c) that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence;
 - (d) that, if he chooses not to give evidence or, having been sworn, refuses, without good cause, to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from that failure or refusal; and
 - (e) that, in deciding whether it is proper to draw an inference, the court or jury may, if it is of the opinion that he is subject to the statutory responsibility in relation to the offence, take that into account.
- (4) If the accused—
- (a) fails to give evidence, or
 - (b) refuses, without good cause, to answer any question, the court or jury may, in determining whether the accused is guilty of the offence charged or any other offence of which he could lawfully be convicted on that charge, draw such inferences as appear proper from the failure or refusal.
- (5) If the court or jury is of the opinion that the accused is subject to the statutory responsibility in relation to the offence charged—
- (a) it must consider any explanation which has been given in evidence for the failure or refusal; but
 - (b) it is not necessary for it to be satisfied, before drawing an inference (whether in relation to that offence or any other offence of which he could lawfully be convicted on that charge), that he could be properly convicted, on the basis of the other evidence against him, if no such inference were drawn.
- (6) Subsections (4) and (5) of section 35 apply for the purposes of this section as they apply for the purposes of section 35.
- (7) In this section—
- (a) "the Act of 2004" means the Offences Against Children Act 2004; and
 - (b) "serious offence against a child" and "statutory responsibility" (in relation to such an offence) have the same meaning as in Part 2 of that Act."

9 Savings and interpretation

- (1) Nothing in this Part affects any provision which has the result that an answer or evidence given by a person in specified circumstances is not admissible in evidence against him, or some other person, in any proceedings or class of proceedings.
- (2) Nothing in this Part restricts any power of a court to exclude evidence (whether by preventing questions being put or otherwise).
- (3) In subsection (1), the reference to giving evidence is a reference to giving evidence in any manner, whether by providing information, making discovery, producing documents or otherwise.
- (4) In this Part, "serious offence" means an offence specified in Schedule 2.

10 Interpretation: general

- (1) "Child" means a person under the age of 16.
- (2) "The 1933 Act" means the Children and Young Persons Act 1933 (c. 12).
- (3) Section 17 of the 1933 Act (persons presumed to have responsibility for a child) applies for the purposes of this Act as it applies for the purposes of Part 1 of that Act.

11 Minor and consequential amendments

Schedule 3 contains minor and consequential amendments.

12 Commencement and transitional provisions

- (1) This Act, except this section and section 13, comes into force on such day as the Secretary of State may by order appoint.
- (2) An order under subsection (1) may—
 - (a) make different provision for different purposes;
 - (b) include supplementary, incidental, saving or transitional provisions.
- (3) Any provision of sections 6 to 8 and Part 2 of Schedule 3 has effect only in relation to criminal proceedings begun on or after the commencement of that provision.

13 Short title and extent

- (1) This Act may be cited as the Offences Against Children Act 2004.

APPENDIX TWO

Children and Young Persons Act 1933

1 Cruelty to persons under sixteen

- (1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, and shall be liable -
- (a) on conviction on indictment, to a fine, or alternatively, or in addition thereto, to imprisonment for any term not exceeding ten years;
- (b) on summary conviction, to a fine not exceeding the statutory maximum, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.

17 Interpretation of Part I

- (2) For the purposes of this Part of this Act, the following shall be presumed to have responsibility for a child or young person -
- (a) any person who -
- (i) has parental responsibility for him (within the meaning of the Children Act 1989); or
- (ii) is otherwise legally liable to maintain him; and
- (b) any person who has care of him.
- (3) A person who is presumed to be responsible for a child or young person by virtue of subsection (1)(a) shall not be taken to have ceased to be responsible for him by reason only that he does not have care of him.

APPENDIX THREE

Merchant Shipping Act 1970 *(Repealed)*

27 Offences by Seamen

- (1) If the master or any member of the crew of a ship registered in the United Kingdom ~
- (a) does any act which causes or is likely to cause the loss or destruction of or serious damage to the ship or the death of or serious injury to a person on board the ship; or
 - (b) omits to do anything required to preserve the ship from loss, destruction or serious damage or to preserve any person on board the ship from death or serious injury;

And the act or omission is deliberate, or amounts to a breach or neglect of duty, or he is under the influence of drink or a drug at the time of the act or omission, he shall be liable, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, and on summary conviction, to a fine not exceeding £200.

- (2) In this section "breach or neglect of duty", except in relation to a master, includes any disobedience to a lawful command.

APPENDIX FOUR

Children Act 1989

2 Parental responsibility for children

- (1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.
- (2) Where a child's father and mother were not married to each other at the time of his birth—
 - (a) the mother shall have parental responsibility for the child;
 - (b) the father [shall have parental responsibility for the child if he has acquired it (and has not ceased to have it)] in accordance with the provisions of this Act.
- (3) References in this Act to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with section 1 of the Family Law Reform Act 1987 (which extends their meaning).
- (4) The rule of law that a father is the natural guardian of his legitimate child is abolished.
- (5) More than one person may have parental responsibility for the same child at the same time.
- (6) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.
- (7) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.
- (8) The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act.
- (9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.
- (10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.
- (11) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned.

APPENDIX FIVE

Criminal Justice and Public Order Act 1994

34 Effect of accused's failure to mention facts when questioned or charged

- (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
- (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
 - (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,
- being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
- (2) Where this subsection applies—
- [(a) *a magistrates' court inquiring into the offence as examining justices;*]
 - (b) a judge, in deciding whether to grant an application made by the accused under—
 - (i) *section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or*
 - (ii) *paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act)*
- [paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998];
- (c) the court, in determining whether there is a case to answer; and
 - (d) the court or jury, in determining whether the accused is guilty of the offence charged,
- may draw such inferences from the failure as appear proper.
- [(2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.]
- (3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

- (4) his section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.
- (5) This section does not—
 - (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
 - (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.
- (6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.
- (7) ...

35 Effect of accused's silence at trial

- (1) At the trial of any person . . . for an offence, subsections (2) and (3) below apply unless—
 - (a) the accused's guilt is not in issue; or
 - (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;
 but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.
- (2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment [with a jury], in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.
- (3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.
- (4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

- (5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—
 - (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
 - (b) the court in the exercise of its general discretion excuses him from answering it.
- (6) . . .
- (7) This section applies—
 - (a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;
 - (b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

APPENDIX SIX

Domestic Violence Crime and Victims Act 2004

5 The offence

Causing or allowing the death of a child or vulnerable adult

- (1) A person ("D") is guilty of an offence if—
 - (a) a child or vulnerable adult ("V") dies as a result of the unlawful act of a person who—
 - (i) was a member of the same household as V, and
 - (ii) had frequent contact with him,
 - (b) D was such a person at the time of that act,
 - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
 - (d) either D was the person whose act caused V's death or—
 - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
 - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.
- (2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.
- (3) If D was not the mother or father of V—
 - (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V's death;
 - (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.
- (4) For the purposes of this section—
 - (a) a person is to be regarded as a "member" of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;
 - (b) where V lived in different households at different times, "the same household as V" refers to the household in which V was living at the time of the act that caused V's death.

- (5) For the purposes of this section an “unlawful” act is one that—
- (a) constitutes an offence, or
 - (b) would constitute an offence but for being the act of—
 - (i) a person under the age of ten, or
 - (ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.

- (6) In this section—

“act” includes a course of conduct and also includes omission; “child” means a person under the age of 16; “serious” harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c 100); “vulnerable adult” means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

- (7) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

6 Evidence and procedure: England and Wales

- (1) Subsections (2) to (4) apply where a person (“the defendant”) is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death (“the section 5 offence”).
- (2) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c 33) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—
- (a) of murder or manslaughter, or
 - (b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter, even if there would otherwise be no case for him to answer in relation to that offence.
- (3) The charge of murder or manslaughter is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c 37) (unless the section 5 offence is dismissed).
- (4) At the defendant's trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).

- (5) An offence under section 5 is an offence of homicide for the purposes of the following enactments—

sections 24 and 25 of the Magistrates' Courts Act 1980 (c 43) (mode of trial of child or young person for indictable offence);

section 51A of the Crime and Disorder Act 1998 (sending cases to the Crown Court: children and young persons);

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