November 26, 2019

A Lesson in First Year Criminal Law Principles: How The Supreme Court of Canada "Modifies" Objective *Mens Rea* Offences in *R v Javanmardi*

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Case Commented On: *R v Javanmardi*, 2019 SCC 54 (CanLII)

As I come to the close of the first half of teaching 1Ls criminal law principles, I review the course syllabus for the second half of the course to revise, delete, and add relevant case readings. Next term, I will discuss those crimes, which require the objective form of liability or objective *mens rea*. Although this area was once rife with disagreement and fractured alliances at the Supreme Court of Canada level, at the time of formulating last year's syllabus, objective *mens rea* offences, such as unlawful act manslaughter and criminal negligence causing death, were well-defined both in terms of *actus reus* (prohibited act) and *mens rea* (fault element). However, the law can and does change; either through clarification or modification of accepted legal rules and principles or through the creation of completely new ones. In *R v Javanmardi*, 2019 SCC 54, the most recent Supreme Court of Canada decision on objective *mens rea* offences, it appears the Court has done more than clarify and modify what was a settled area of law but has, arguably, radically re-defined the legal tests and principles for objective *mens rea* offences in the *Criminal Code*. This article will attempt to deconstruct the majority decision, authored by Justice Rosalie Abella, in an effort to understand the significance of this decision and the future impact it will have to this area of law.

First, for those who do not have their 1L CANS on the subject at hand, I will provide an objective *mens rea* primer. Such a discussion cannot occur without a clear understanding of the basic principles. One of the core learnings in 1L criminal law is the identification and discussion of the required elements of a criminal offence; the *actus reus* (prohibited act) and *mens rea* (fault element). The prohibited act is many and varied in accordance with the many different forms of criminal behaviour described in the numerous crimes detailed in the *Criminal Code*. Due to the cognitive relationship between the prohibited act and the fault element of a crime, it can be argued that there are also as many fault elements as there are crimes. In reality, however, the law recognizes two distinct categories of *mens rea*: subjective and objective.

Subjective *mens rea*, as a form of liability, takes on the persona of the accused person by focusing on the accused's intention, knowledge or awareness at the time of the offence. Instead, in the objective form of liability, the assessment focuses on what the accused should have or ought to have known at the time. This objective perspective requires a shift away from the mental machinations of the accused to the more predictable standard of the reasonable person. In the objective world view, the *mens rea* determination is not based on the individual's knowledge, awareness and specific thought processes but is fixed on what the reasonable person, facing the

same circumstances as the accused, would have known. The reasonable person is the yardstick by which the accused's conduct is measured and assessed in light of the offence requirements.

In criminal law there are two kinds of objective *mens rea* offences; negligence-based crimes and crimes requiring an objective foreseeability of bodily harm. Typically, the negligence-based crimes are licensed or duty-based activities, like dangerous driving (s 320.13 of the *Criminal* Code) or failing to provide the necessaries of life (s 215(2) of the *Criminal Code*). For this kind of objective *mens rea* offence, the court must also consider how much the accused's conduct deviates from the standard of the reasonable person. The second type of objective *mens rea* offences, which has an underlying or predicate offence as an essential element, considers whether flowing from the commission of that underlying act there is an objective foreseeability of bodily harm. As objectively-based offences, the reasonable person perspective informs the objective foreseeability requirement but the assessment is not concerned with the amount of deviation from the norm.

Without covering a term's worth of principles, needless to say, the objective form of liability resides uneasily in criminal law where the core principle of fundamental justice requires a fault element reflective of the moral culpability of the individual. The line of Supreme Court decisions in the area are some of the best-known decisions in criminal law (See *R v Tutton*, [1989] 1 SCR 1392, *R v Hundal*, [1993] 1 SCR 867; *R v Creighton*, [1993] 3 SCR 3). In these decisions the Court not only grapples with the concept of objective fault as a basis for a criminal conviction but also with the meaning of objective fault in the criminal law context. Two major issues arise from these cases; who is the reasonable person and to what extent the accused's conduct must deviate off that standard to be considered criminal.

After twenty-four years of argument and shifting positions, the Court, unanimously decided in *R v Roy*, 2012 SCC 26, on a workable test for negligence-based offences. This is known as the modified objective test. Despite the moniker, the so-called modifications to this objective test are minimal, boiling down to a requirement for a "marked" deviation from the standard of the reasonable person, or, for criminal negligence under s 219, a "marked and substantial" deviation. This true modification was needed to recognize the difference between the criminal form of negligence and the civil form of negligence found in regulatory offences.

The facts in *Javanmardi* are important to both the majority, written by Justice Abella, and the dissent, written by Chief Justice Wagner. In fact, one could argue that the decision's precedential power may be limited by the specific factual narrative. Justice Abella, in restoring the acquittals, stresses the decision involves activity-based cases of criminal negligence, emphasizing the skill and expertise of the Appellant, a long practicing naturopath (at para 39). Justice Abella begins her judgment reiterating Ms. Javanmardi's education, expertise and experience as a naturopath. She also emphasizes the Appellant's particular expertise in intravenous injections, the activity in question on appeal. Quebec prohibits naturopaths from such activities, but Justice Abella contrasts Quebec with "most provinces" in which the activity is "lawful" (at para 1). The facts, as depicted by the majority, depict the Appellant as a competent, caring practitioner, whose actions, on a normative level are reasonable and appropriate.

The dissent's opening salvo is much different. Chief Justice Wagner outlines the issues to be determined in the appeal and does so in a manner separating the factual narrative from those issues (at para 47). In the next paragraph, he views the Appellant in a much different light than the majority. The Appellant practises in Quebec and administers intravenous injections to her clients without legal authority (at para 48). In fact, the Appellant has been conducting illegal injections for years and therefore violating provincial laws for years. This runs counter to the narrative of the majority, which does not use the word "illegal" anywhere in the decision. Conversely, the dissent references the illegality of the Appellant's "practice of medicine" four times. This differential characterization of the Appellant's conduct acts as a leitmotif throughout the decision.

Such intravenous injections of nutrients are part of the stock and trade of naturopaths. According to Justice Abella, Ms. Javanmardi treated thousands of patients with intravenous injections before the day of the incident without any adverse results (at para 1 and 5). On the day of the incident, the Appellant used a single-use vial of the nutrients for three client injections (at para 3). The third time, with tragic consequences, as the client died from toxic shock brought on by contamination of the vial (at para 7). The other two clients suffered no adverse effects (at para 3). Although not noted by the majority decision, according to the dissent, the use of the single-dose vial, which contained no preservative, was contrary to the "recommended practice" (at para 50). Ms. Javanmardi was subsequently charged with criminal negligence causing death (then s 220 of the *Criminal Code*) and unlawful act manslaughter (s 222(5)(a) of the *Criminal Code*), both objective *mens rea* offences. Notably, the "unlawful act" element of both offences is the Appellant's administration of the intravenous injection contrary to the provincial legislation (at paras 9 and 17).

The trial judge acquitted Ms. Javanmardi of both charges. On the criminal negligence offence, the judge found her conduct neither amounted to a marked departure from the standard of the reasonable person nor would a reasonable person have foreseen the risk (at para 12). As for the unlawful act manslaughter charge, the trial judge found the intravenous injection was not "objectively dangerous" and, in any event, a reasonable person would not have foreseen the risk (at para 13). Both the majority and dissent agree the trial judge erred in law but disagree on the extent and effect of the errors. They agree the trial judge erred in articulating the law on the *mens rea* requirements for criminal negligence pursuant to s 219, requiring the conduct amount to a "marked" departure from the standard as opposed to a "marked and substantial" departure.

Two points must be noted here. First, the standard of liability for a s 219 criminal negligence offence was, years earlier found to be a "marked and substantial" departure from the norm by Justice McIntyre, in *R v Tutton*, [1989] 1 SCR 1392 (at 1430-31). This standard was later refined to distinguish the general form of criminal negligence from the specific form found under s 219. The offence of criminal negligence under s 219 required a higher level of deviation off the norm to recognize the seriousness of the offence. All other forms of negligence-based offences in the *Code* from careless use of a firearm under s 86 (See *R v Finlay*, [1993] 3 SCR 103 at 115) and failure to provide the necessities of life under s 215 (See *R v Naglik*, [1993] 3 SCR 122, at 143 and *R v JF*, 2008 SCC 60 at para 8) to dangerous driving now under the new s 320.13 (See *R v Beatty*, 2008 SCC 5 at para 43) require the lower deviation of "marked". The trial judge

seriously misstated the law on this point – law that certainly since *Beatty* in 2008 had been well defined.

The second point is an appellate one. Despite this clear error, Justice Abella for the majority and Chief Justice Richard Wagner for the dissent differ on its significance. Justice Abella finds the error "irrelevant to the outcome" considering the trial judge applied a lower standard than was required, yet still acquitted (at para 43). While Chief Justice Wagner finds the error is not as "palpable" as the other more egregious error in law found earlier in the reasons, that more serious error "magnified the impact" of other errors, including the error in the "marked" *mens rea* standard (at paras 52 and 80). In Justice Wagner's view, the errors in the trial judge's decision should not be viewed separately but as a culmination of an unfair trial.

Disappointedly, the decision does not tell us what the marked standard consists of and how it should be quantified (at para 23). Nor does it tell us how 'marked' differs from 'marked and substantial' other than to say it just does. Justice Abella references Justice Patrick Healy, from the Quebec Court of Appeal, in *R v Fontaine*, 2017 QCCA 1730, who explains how the two standards are "differences of degree" and "cannot be measured by a ruler, a thermometer or any other instrument of calibrated scale" (at para 27). Instead, suggested Justice Healy, the standards gain meaning statutorily, from the *actus reus* elements of the offence and through their factual context. Accordingly, Justice Healy found that "as with the assessment of conduct in cases of criminal negligence, the assessment of fault by the trier of fact is entirely contextual" (at para 27). This contextualizing of objective criminal offences is not new but, as will be discussed later in this article, the majority's concept of what contextual means, may not be the usual or even correct use of the term.

In any event, as far back as 2008, in the majority decision of *JF* written by Justice Morris Fish, the Court successfully side-stepped this crucial issue (*JF* at paras 10-11). This lack of articulation of the meaning of these standards does provide for judicial flexibility consistent with a case-by-case approach, but it also leads to appellate review, such as this decision, where factual context can be depicted and adjudged differently by different levels of court and within the Supreme Court itself. It is often difficult to reconcile the decision in one negligence-based criminal offence *vis-a-vis* the decision in another similarly situated offence. Instead of creating flexibility, too much contextualization creates uncertainty for both the law and the people affected by the possible outcomes. It is time the Court weighs in on the issue and provides clarity where the law truly needs it.

Instead, *Javanmardi* weighs in on many of the issues surrounding objective *mens rea* offences, which, as mentioned, appeared to be previously thoroughly discussed. The majority in *Javanmardi* clarifies, modifies, and muddies the objective waters; waters that remained calm since the unanimous decision of *Roy* in 2012. Admittedly, some of the issues decided in previous Supreme Court of Canada case law is puzzling. For instance, in *R v DeSousa*, [1992] 2 SCR 944, Justice John Sopinka clarified the requirements for a crime based upon an underlying or predicate offence. There, the offence was unlawfully causing bodily harm under s 269, an odd offence which seemed to mirror assault causing bodily harm but left open the unlawful act as something other than assault. Although not clear, the unlawful act in *DeSousa* could have been assault or mischief resulting from the accused throwing a beer bottle against a wall, which broke

into shards of glass, injuring the nearby complainant. Justice Sopinka did a masterful job in that decision, breaking down the required *actus reus* and *mens rea* of a crime relying on a predicate offence.

The *actus reus* consists of an unlawful act and the causing of bodily harm. The unlawful act itself could be a criminal or regulatory offence but not an absolute liability offence. The unclear part of *DeSousa* is whether the unlawful act needs to be objectively dangerous apart from being contrary to law. Justice Sopinka appears to require the predicate offence be objectively dangerous but does not clearly indicate if that requirement is a separate element of the *actus reus* of the overall offence. Justice Abella picks up on this obfuscation within the decision and clarifies. In her view, dangerousness as a separate *actus reus* element is clumsy and unnecessary because of the *mens rea* requirement. According to Justice Sopinka, the *mens rea* of the overall offence requires objective foreseeability of bodily harm, meaning the bodily harm caused by the accused's actions in committing the underlying offence must be objectively foreseeable. In Justice Abella's view, this *mens rea* requirement takes care of the dangerousness requirement (paras 26-30). Therefore, the acquittal of Ms. Javanmardi was not in error as the trial judge found her actions were not objectively dangerous. As an aside, here too the trial judge erred as she applied the wrong *mens rea* for unlawful act manslaughter, that of objective foreseeability of death. That form of *mens rea* had also been rejected decades ago in *Creighton.*

Chief Justice Wagner vehemently disagrees with Justice Abella's re-alignment of the objective dangerous requirement (at paras 58-59). In his view, Justice Sopinka was clear and the underlying offence itself requires an element of dangerousness. Interestingly, by leaving dangerousness as an added requirement of the *actus reus*, the focus remains on the predicate offence. Following that line of reasoning, in *Javanmardi*, therefore, the focus should be on the "illegal practice of medicine," as suggested by Justice Wagner, through the improper intravenous injection by an unlicensed naturopath. If Justice Abella's view is accepted, that dangerousness is subsumed in the *mens rea* analysis, the focus would remain on the specific circumstances of the accused's conduct. That conduct, according to the majority in *Javanmardi,* would not be objectively dangerous as the Appellant was an experienced and practiced injector and used the vial previously with no ill results. Context, when it comes to dangerousness and where it resides, is indeed everything.

Other parts of the *DeSousa* decision are very clear, particularly in the matter of the requirements of the underlying or predicate offence. If the predicate offence is regulatory in nature, it needs to be constitutionally viable. Therefore, the underlying offence could not be an absolute liability offence, which requires no fault element, as the principal criminal offence could result in a loss of liberty upon conviction. Such a possibility would be contrary to s 7 of the *Charter*, which requires a fault element for crime to ensure the "innocent not be punished" (See *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at para 69). Although only the underlying offence, permitting the absolute liability offences to become an element of a crime, would impermissibly "boot strap" absolute liability offences into the criminal law (at 957). The underlying predicate offence, however, could be a strict liability offence as found in regulatory law, as some form of objective *mens rea* is required, albeit a lower standard of negligence than required under those negligence-based offences in the *Code*. In those circumstances, strict liability, as a constitutionally valid

form liability (See *R v Wholesale Travel Inc.*, [1991] 3 SCR 154), could constitute an appropriate underlying act.

Yet this rather straight forward proposition in *DeSousa* is also subject to the majority's efforts to clarify this area of the law. But by clarifying, Justice Abella changes, not just modifies, the *Desousa* structure. She finds that if the underlying offence is a regulatory offence requiring strict liability, because it resides within a criminal offence there must be a marked departure from the standard (at para 31). In other words, she transforms strict liability from a public welfare offence to a criminal one by requiring the application of criminal negligence concepts. Although this position may be consistent with maintaining the "bright-line" between criminal and civil law, it raises further issues. For instance, strict liability offences reverse the onus onto the defendant to prove due diligence on a balance of probabilities. Will this bring into question that burden and standard of proof when a predicate offence is regulatory? The repercussions of this decision may be deeper than first realized. This change is not just for unlawfully causing bodily harm but for all those offences, such as unlawful act manslaughter, which lean on *DeSousa* for the delineation of the *actus reus* and *mens rea*. The list includes criminal negligence causing death and possibly criminal negligence itself where it is founded on a failure in a regulatory duty. It is this seemingly small clarification, which may change the nature of a crime based on a predicate offence that is regulatory in nature.

Then, we come to another controversial part of this decision, the composition of the reasonable person in the modified objective test. As mentioned earlier in this article, the reasonable person is to be viewed, not through the accused person's eyes, but as similarly situated as the accused was at the time of the commission of the offence. This begs the question: what does "similarly situated" mean? Is the meaning purely dependent on the context of the events or is it dependent on the personal characteristics of the accused?

This distinction was already considered and debated in the long line of cases on objective *mens rea*. For instance, Justice Antonio Lamer, as he then was in the *Tutton* decision, advocated for the "generous allowance" of factors personal to the accused, such as "youth, mental development, education" (at 1434) in considering the reasonable person. This depiction of the reasonable person was soundly rejected by Justice Beverley McLachlin, as she then was, in *Creighton*. In her view, "considerations of principle and policy dictate the maintenance of a single, uniform legal standard of care for such offences, subject to one exception: incapacity to appreciate the nature of the risk which the activity in question entails" (at 61). To import personal characteristics into the reasonable person standard would effectively turn the assessment into a subjective one, transforming the reasonable person into the accused person. As succinctly put by Justice McLachlin "we are all, rich and poor, wise and naive, held to the minimum standards of conduct prescribed by the criminal law" (at 63). The reasonable person is not personalized, merely contextualized by being placed within the circumstances of each unique case. Otherwise the reasonable person standard remains the same, whomever is charged with the offence.

Yet, twenty-six years later, the majority in *Javanmardi* returns to this issue but in the context of an individual who possesses expertise and skill in a particular activity. This conundrum of the reasonable person in licensed or "activity-sensitive" (at para 38) offences lies at the heart of the

Javanmardi decision. There is commentary by Justice McLachlin in *Creighton* on this issue. Contextualization means the case is not to be assessed in a "factual vacuum" (*Creighton* at 71). Context is provided not only by the circumstances of the incident but also the nature of the activity undertaken. Although the legal standard remains the same for each case, it is in the application of that standard, and whether the accused failed to come up to that standard, which may vary case to case depending on the circumstances and the activity undertaken. In activities that have an elevated standard of care, such as in surgery, an example referenced by Justice McLachlin, a person may fail to come up to the standard either because they are not qualified to perform surgery or, if qualified, performed the act in a grossly negligent manner. Either way, the standard remains the same, but the failure is arrived at from differing factual perspectives.

Justice Abella approves of Justice McLachlin's activity-sensitive approach. At paragraph 38, Justice Abella agrees that "while the standard is not determined by the accused's personal characteristics, it is informed by the activity." Therefore, the Appellant's conduct must be viewed in light of the administration of the intravenous injection by a reasonably prudent naturopath. Justice Abella finds the trial judge did not err in applying this activity-based standard as she was "obliged" to consider the Appellant's skill and expertise as a naturopath (at para 39). This, at first blush, seems logically sound. If the person is charged as an expert who negligently failed in the performance of their expertise, the reasonable person must be similarly situated as the prudent expert.

But there is a missing piece of activity-sensitive information that must also inform the context. In the circumstances of this case, the Appellant, although skilled, was prohibited from practicing medicine and therefore prohibited from performing the activity in question. The Appellant, no matter how qualified, is still unlicensed. The reasonably prudent naturopath situated in Quebec does not practice medicine. It is this very lack of medical skill that is important to the dissent. Yet, in the majority's view, the Appellant's skill in an unlicensed activity is relied upon as an exonerating factor. This may be taking contextualization too far by hyper-contextualizing the reasonable person with the personal skill set of the accused as opposed to the skill set of the reasonably prudent naturopath who follows the regulatory regime required by law.

The *Javanmardi* decision can be read as a decision, which clarifies the law for easier application at the trial level. But, as argued in this article, there is another side to *Javanmardi*, which suggests the challenge is not over when it comes to objective criminal offences. The dissent in *Javanmardi*, although small in size, has much precedential power behind it, namely the series of decisions rendered by the Court over a span of more than two decades. The majority in *Javanmardi*, by attempting to clarify the law, also muddies the clear vision and court unity so painstakingly created over time in these past decisions. Instead of providing closure on these complex issues, this decision may only be the beginning of a new series of case law as the trial courts attempt to apply *Javanmardi* principles. In any event, however this decision is interpreted, one thing is very clear, *Javanmardi* will be added to my criminal law syllabus for next term.

This post may be cited as: Lisa Silver, "A Lesson in First Year Criminal Law Principles: How the Supreme Court of Canada "Modifies" Objective Mens Rea Offences in R v Javanmardi" (November 26, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/11/Blog_LS_Javanmardi.pdf

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