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Answer

It is unlikely that Samantha will be convicted of murder, because there is no evidence that she intended to kill or cause GBH to David, Jenny or Ian. Thus, she has no mens rea for murder. However, she might be charged with offences of involuntary manslaughter, namely unlawful act manslaughter and gross negligence manslaughter.

Samantha might be charged with unlawful act manslaughter in relation to David's death. Unlawful act manslaughter was defined in **Larkin** [1944] 29 Cr App R 18 and requires proof of four elements: there must be an intentional act, rather than an omission (**Lowe** [1976] QB 702), which is unlawful, objectively dangerous and which causes death (per Lord Salmon in **DPP v Newbury and Jones** [1977] AC 50).

However, although Samantha does an intentional act here by holding the tourniquet for David while he injects himself with the heroin, on the facts there are problems in establishing guilt here. The offence of unlawful act manslaughter requires that there is an unlawful act which is a criminal offence (**Franklin** [1883] 15 Cox CC 163). It could be argued that the criminal act here is assisting the malicious administration of a poison or noxious thing so as to endanger life or inflict GBH, and in **Rogers** [2003] EWCA Crim 945 the Court of Appeal held that a defendant could be guilty of unlawful act manslaughter where he held a tourniquet around the victim's arm while the victim injected himself with a drug because the defendant had played a part in the mechanics of the injection.¹ However, this was rejected by the House of Lords in **Kennedy (No. 2)** [2007] UKHL 38, in which Lord Bingham stated that 'the crucial question is not whether the defendant facilitated or contributed to administration of the noxious thing but whether he went further and administered it. What matters . . . is whether the injection itself was the result of a voluntary and informed decision by the person injecting himself'.² Lord Bingham concluded that the voluntary act of self-administration precluded a finding of guilt. Thus, Samantha will not be convicted of unlawful act manslaughter in respect of David's death.

Samantha is also unlikely to be convicted of unlawful act manslaughter in respect of Jenny's death because Jenny self-injects. Consequently, it is difficult to ascertain what the unlawful act would be that Samantha does which causes Jenny's death. If the act is

¹ Although this case has been overruled, it is worth mentioning because it is factually very similar to the problem scenario.

² It is worth learning a few key quotes from leading judgments for use in your examination. At the very least, you should be able to paraphrase key principles.

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³As this is the leading authority on this point now, there is no need to trawl through the previous drugs cases.

⁴This sentence is important as it provides the application of the law to the problem scenario.

⁵If it is clear that unlawful act manslaughter does not apply, rule it out and move on to a more appropriate offence.

the possession of drugs or the supply of drugs, proving causation is problematic. In fact, the House of Lords has now held that the free and voluntary self-administration of heroin by a fully informed and responsible adult would break the chain of causation (**Kennedy (No. 2)**).³ Thus, provided that Jenny was acting freely and voluntarily in injecting herself and that she was a fully informed and responsible adult, Samantha will not be guilty of unlawful act manslaughter here.⁴

Furthermore, Samantha cannot be convicted of unlawful act manslaughter for the failure to summon medical assistance as this offence requires a positive act (**Lowe**).⁵

However, Samantha may be convicted of gross negligence manslaughter on the basis that she left Jenny unconscious without summoning medical help. The offence of gross negligence manslaughter may be committed by either an act or an omission, so Samantha might be convicted on the basis that she failed to summon medical assistance or because she acted by walking off and leaving Jenny to die. The prosecution would need to prove that Samantha owed Jenny a duty of care, she breached this duty, the breach caused Jenny's death and that Samantha's omission was grossly negligent (**Adomako** [1995] 1 AC 171). The duty to act giving rise to criminal liability for omission is narrower than the civil duty of care.

Whether or not Samantha owed Jenny a duty of care is a question of law according to **Willoughby** [2004] EWCA Crim 3365 and **Evans** [2009] EWCA Crim 650. The judge will direct the jury as to the law in this regard. According to Lord Mackay in **Adomako**, the ordinary principles of negligence apply to the meaning of 'duty of care'. This scenario is factually similar to the case of **Evans**, in which the Court of Appeal held that the defendant did owe the victim a duty of care despite the fact that their relationship was not one upon which the law already imposed a familial duty. Lord Judge CJ stated that 'when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise'.⁶ Thus, applying this case, it is likely that a duty of care will be imposed upon Samantha to take reasonable steps to save Jenny's life when she realises (as she ought reasonably to) that Jenny is unconscious.

⁶This quote supports the argument that there is a duty of care here and is a useful application of the *Miller* [1983] 2 AC 161 principle by the Court of Appeal.

⁷This sentence demonstrates application to the problem scenario.

Next, it must be established whether Samantha breached this duty. Breach requires that Samantha's conduct fell below that to be expected of a reasonable person. This is likely to be the case here, as the reasonable person would have summoned medical assistance and not simply walked off and left Jenny.⁷

The usual rules of causation apply. But for Samantha's act of supplying the heroin and then failing to summon medical assistance, leaving Jenny unconscious, Jenny would not have died (**White** [1910] 2 KB 124). Samantha's omission was also a more than minimal cause of death (**Cato** [1976] 1 WLR 110) and there was no intervening event.

Finally, it must be established that Samantha's conduct was grossly negligent. This is a question of fact and the jury should consider '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 their judgment to a criminal act or omission' (Lord Mackay in **Adomako**). A reasonably prudent person must have foreseen a serious risk of death (**Misra** [2004] EWCA Crim 2375). If Samantha's conduct was grossly negligent, she will be convicted of gross negligence manslaughter.

⁸Refer to factually similar authorities to demonstrate how liability will be established.

Samantha might be convicted of unlawful act manslaughter in relation to Ian's death. The intentional act here occurs when Samantha injects Ian with the heroin. This is a criminal offence (**Franklin**) under section 23 of the Offences Against the Person Act 1861, namely the malicious administration of a poison or noxious thing so as to endanger life or inflict GBH (see **Cato**).⁸ The administration of the drug is an objectively dangerous act because it was such as 'all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm . . . albeit not serious harm' (Edmund Davies J in **Church** [1966] 1 QB 59). Finally, in order to establish Samantha's liability for unlawful act manslaughter in respect of Ian, it must be proved that Samantha's act of injecting Ian caused his death. The usual rules of causation apply. Applying the test for factual causation: but for Samantha's act of injecting Ian, he would not have died (**White**). Samantha's act was also a more than minimal cause of Ian's death (**Cato**) and there is no *novus actus interveniens* to break the chain of causation. Thus, Samantha is likely to be guilty of unlawful act manslaughter in respect of Ian's death.



Make your answer stand out

- Refer to specific statements made by judges in leading authorities. If you cannot remember quotes verbatim, you should be able to paraphrase the principles. In fact, the ability to accurately paraphrase a point made in a judgment demonstrates a better understanding of the specific issue.
- Refer to academic opinion where appropriate. You might consider referring to Freer, E. (2018) We need to talk about Charlie: putting the brakes on unlawful act manslaughter. Crim LR 612; or Heaton, R. (2003) Dealing in death. Crim LR 497 (although be aware that this article was obviously written prior to the decision of the House of Lords in *Kennedy (No. 2)*, which was decided in 2007). You might also refer to Leigh, L. (2009) Duty of care and manslaughter. 173 JPN 296.
- You should be able to distinguish between all of the drugs cases, but you should demonstrate particularly good knowledge of the House of Lords' decision in *Kennedy (No. 2)*.
- Consider exploring further the extent to which criminal law relies upon definitions of civil law in defining the offence of gross negligence manslaughter and whether this is satisfactory in light of the severity of the offence.



Don't be tempted to . . .

- Waste time going through all of the previous cases on the supply of drugs. In a problem question, you are expected to apply the current law and now that the law is settled as a result of *Kennedy (No. 2)*, this is the case you should apply. However, if the facts of a previous authority are directly relevant, you may make brief reference to it.
- Forget that some of the previous case law has been overruled by *Kennedy (No. 2)*. Make sure that you are aware which cases are still good law and which have been overruled so as to avoid applying incorrect law.



Question 3

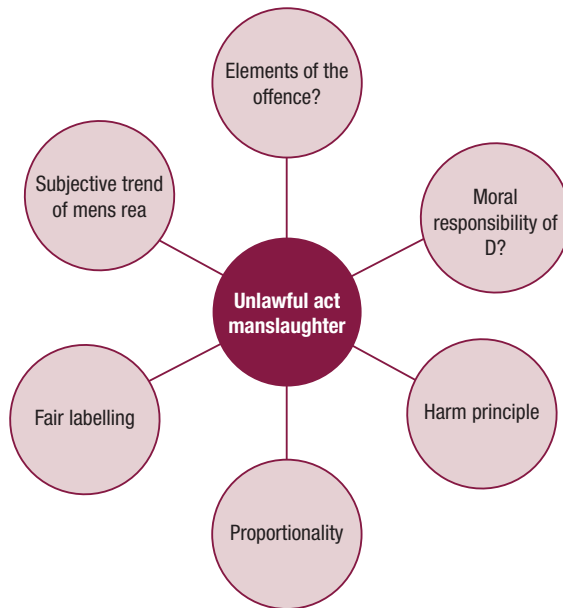
'For the objectivist, the consequences must be taken into account when assessing moral responsibility' (Ashworth (1993) 'Taking the Consequences' in Shute, Gardner and Horder (eds), *Action and Value in Criminal Law*, Oxford: Clarendon Press, p. 110).

With reference to the above quote, critically evaluate the offence of unlawful act manslaughter.

Answer plan

- ➔ Address the question directly at the start of your answer.
- ➔ Consider the elements of unlawful act manslaughter which reflect the moral responsibility of the defendant.
- ➔ Discuss the extent to which the offence is consistent with general principles of criminal law.
- ➔ Consider the example of the 'one-punch killer'.

Diagram plan



A printable version of this diagram plan is available from www.pearsoned.co.uk/lawexpressqa

Answer

Where a person performs an unlawful and dangerous act which causes the death of another human being, the law holds that an offence of manslaughter has been committed. The rationale for criminalising unlawful act manslaughter is based upon the harm principle. However, unlawful act manslaughter does not require proof of an intention to kill or cause GBH, and liability is constructed out of a lesser unlawful act (such as an assault) which causes the death of

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¹ This sentence demonstrates that you have immediately identified the key issue and understand the problems associated with unlawful act manslaughter.

² You should address the question directly in your introduction.

³ This is a key quote which you should learn.

⁴ This sentence and those that follow demonstrate your appreciation of the academic criticism surrounding this offence.

the victim even though that death is neither intended nor foreseen by the defendant. Thus, the defendant may be convicted in respect of unforeseen consequences which do not necessarily reflect his moral responsibility.¹ This offence was described as 'unjustifiable in principle' by the Law Commission (Law Commission (1996) Report, *Legislating the Criminal Code: Involuntary Manslaughter*, No. 237, Para. 5.15). This is a very serious offence which carries a potentially lengthy sentence of imprisonment, so it is important to ensure that there is a justifiable basis for criminalisation. While the objectivist would support liability based upon the consequences caused by the defendant, criminal law generally adopts a more subjectivist approach which requires a corresponding level of mens rea.²

The offence of unlawful act manslaughter requires proof of four elements: (i) an intentional act; (ii) which is unlawful; (iii) the act must be objectively dangerous; and (iv) it must cause death (**Larkin** [1944] 29 Cr App R 18 and **DPP v Newbury and Jones** [1977] AC 50). Although it is necessary to prove a causal link between the actions of the defendant and the death of the victim, there is no need to prove that the defendant intended or foresaw the risk of death or even harm. The dangerousness element is objectively assessed, such that it must be questioned whether the act was 'such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm' (**Church** [1966] 1 QB 59).³

The offence has a very broad scope which has been criticised because it allows conviction for a serious criminal offence in respect of accidental and negligent deaths (as in **Meeking** [2012] EWCA Crim 641).⁴ A defendant might be convicted of unlawful act manslaughter where a reasonable person would foresee the risk of some harm resulting from the defendant's actions, irrespective of whether the actual defendant foresaw any risk of harm. Even on the objective assessment, the reasonable person need not foresee the risk of death or serious harm. Thus, the mens rea element of unlawful act manslaughter is reduced to three requirements: (i) the defendant must intentionally do an act; (ii) the mens rea for the lesser unlawful act must be proved (the subjective elements); and (iii) the reasonable man would foresee the risk of some harm (the objective element).