

Agreement and Disagreement in Murder and Manslaughter Verdicts

David Ormerod

UCL, Faculty of Laws

Richard Taylor*

Emeritus Professor, University of Central Lancashire

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Juries are routinely asked whether they have reached a verdict upon which they are all agreed. What does or should this mean in trials where a verdict of manslaughter is available and there is more than one type of manslaughter in issue? Does it matter if members of the jury do not agree as to the type of manslaughter committed but all think it is manslaughter, albeit for different reasons, in order to return a verdict of guilty of manslaughter? Can the jury properly return a verdict of not guilty of murder, which is normally a pre-requisite for an alternative verdict of manslaughter, if they are not agreed on the form of manslaughter which constitutes the partial defence to murder? Are the answers to these questions important in order to inform sentencing, or for the legitimacy of the verdicts or for the construction of routes to verdicts? This article investigates these questions and suggests some answers, concluding that whilst sentencing issues are not the driver, legitimacy and justice require that in some cases at least, agreement on at least one particular route to manslaughter should be required.

Prologue

D causes the death of his lover, V, by pressure to her neck. D is charged with murder. D admits that, following V's revelation that she had told D's wife of the affair, D had argued with V and struggled physically with her. D claims, however, that in assaulting V he did not intend to kill or cause her GBH. He pleads guilty to manslaughter on the grounds of lack of intent.¹ At the conclusion of the trial for murder, the judge's directions to the jury explain the bases on which they could convict of manslaughter if not sure of D's guilt on the murder charge. They are that the prosecution has not proved intent to kill or cause GBH, or the prosecution has not disproved the partial defence of loss of control (based on the facts including V telling his wife of the affair).

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¹ *Brehmer* [2021] EWCA Crim 390; [2021] 4 W.L.R. 45 is the most recent example of this common type of problem.

In such a case, to what extent is it necessary for the judge tell the jury that they have to be all “agreed”² on at least one of these alternative reasons for reaching a verdict of manslaughter rather than murder? If they are not directed that they have to be agreed in this sense (as seems most commonly to be the case), is it thus sufficient that, for example, six jurors think the prosecution have not proved that D intended death or GBH whilst six think the prosecution have not disproved it was a case of loss of control (LoC)? How is the judge to sentence on the basis of a verdict as non-specific as “manslaughter” in this case?

This conundrum is one that appears to arise in homicide trials on a frequent basis. It generates interesting issues of principle and practice which we seek to address in this article. Does our desire for such agreement to ensure that acquittals for murder/convictions for manslaughter are properly based go so far as to require that the necessary number of jurors agrees not only the verdict *but also the route to it*? Where the jury is hung on a step in the route to a verdict can that render the verdict finally reached invalid? What is it that the law demands the jury to be agreed about? Is it the verdict, as s.17 of the Juries Act 1974 suggests, or something more? If a jury is sufficiently agreed about the verdict (but the judge is unclear about what else they have agreed and to what extent), could a court refuse to accept a verdict? Should a judge, faced with a note from the jury saying that six jurors held that intent had not been proved, and six held that LoC had not been disproved so all 12 agreed on “not guilty of murder” but “guilty of manslaughter”, refuse to accept the verdict and discharge the jury and direct a re-trial?

There are several potential practical problems with an approach in which there is no requirement for the jury to be agreed as to even the type of manslaughter of which they are convicting.³ First, there is, a perceived unfairness in convicting someone of an offence as serious as manslaughter (carrying a potential life sentence) without the jury being agreed as to the basic elements of the offence.⁴

Secondly, but something that is often overlooked, there is the situation where the jury may have effectively acquitted of murder without there being agreement as to why the defendant’s conduct did not amount to murder.⁵ We examine the extent to which that is a problem and draw upon cases from Northern Ireland to demonstrate that.

Thirdly, there is the issue of the inscrutability of the jury verdict that inhibits any subsequent examination of how the verdicts were reached. In this context, if multiple options for verdicts are available to a jury without a requirement for agreement, there is a risk that that cloak of inscrutability hides so much more.⁶ It

² By which throughout this article we mean either “unanimous” or, if and only if they have been directed that a majority verdict is permissible, that the relevant proportion of them are agreed: 11:1; 10:2 etc.

³ We recognise that there are deeper theoretical questions that arise as to what is being protected against—is it accuracy of verdict or legitimacy of process—and how the presumption of innocence might be engaged (see for example L. Youngjae, “Reasonable doubt and disagreement” (2017) 23 *Legal Theory* 203. Our focus is on the practical impacts in criminal trials for homicide and the judge’s directions in England and Wales.

⁴ We note also the constitutional dimension to this debate in capital cases in the US. R.G. Cantero and R.M. Kline, “Death is different: the need for jury unanimity in death penalty cases” [2009] *St Thomas L.R.*.

⁵ This is particularly troublesome on facts such as *Brehmer* [2021] EWCA Crim 390; [2021] 4 W.L.R. 45 where D is willing to plead to manslaughter and the main issue for the jury is whether the offence amounts to murder—this aspect of the problem is discussed further at pp.198-202 below.

⁶ In murder trials a written direction is, in practice, always expected. See comments in *Atta Dankwa* [2018] EWCA Crim 320; [2018] Crim. L.R. 685. In *ABCD* [2010] EWCA Crim 1622; [2011] Crim. L.R. 61, a multi-handed murder: Hughes LJ applauded the judge giving “both (commendably brief) written directions and, even more helpfully, a ‘route to verdicts’” at [2]. See most recently *Grant* [2021] EWCA Crim 1243 in which no written directions were

is, therefore, especially important that the directions the jury receive are precise. Moreover, if, as we argue below, there are at least some cases in which agreement as to the type of manslaughter is required—the need for the judge to identify those and direct accordingly is critical.

Fourthly, there is the potential difficulty in sentencing, despite the Court of Appeal repeatedly expressing confidence that judges can be left to determine the appropriate basis on which to sentence when a “non-specific” verdict of manslaughter is returned.⁷

There are also more fundamental problems of principle. A verdict should be formulated and communicated in such a way that a defendant can understand exactly of what it is that he has been found guilty. That is a requirement of art.6 of the European Convention on Human Rights. It is clear from the Strasbourg jurisprudence that the Convention does not require jurors to give reasons for their decision to the accused.⁸ However, as the European Court noted in *Taxquet v Belgium*:

“for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention.”⁹

There is, we suggest, a real risk that if there are multiple potential routes to verdict this may not be possible. At its most extreme there could be a situation where a defendant hears the jury return a verdict of manslaughter and then hears the foreman expressly admit that the jury was not agreed on the basis for their verdict.¹⁰

It is worth noting that the more commonplace adoption of the system of providing the jury with a route to verdict¹¹ (RTV) in writing may have had an impact on the issue and brought it to the fore. Recent years have seen the use of written guidance for juries and the use of routes to verdict, strongly promoted in the *Leveson Review of Efficiency in Criminal Proceedings* (2015),¹² become the norm, particularly in serious cases such as those involving murder and manslaughter.¹³ The RTV has the benefit of ensuring that the jury can be clear about the precise questions they must address. The use of RTVs may, however, have introduced a new problem: with a route to verdict the jury is being directed to approach a series of very specific

given and it was questioned at [50] whether the current essentially permissive approach in the CrimPR should become more directive.

⁷ See below p.192.

⁸ *Saric v Denmark*, no.31913/96, 2 February 1999.

⁹ *Taxquet v Belgium* (2012) 54 E.H.R.R. 26 at [90]; [2011] Crim. L.R. 236. See also *Lhermitte v Belgium* (34238/09). On the impact of *Texquet* see also A. Ashworth, “A Decade of Human Rights in Criminal Justice” [2014] Crim. L.R. 325.

¹⁰ That could happen if the judge adopted the process suggested in some cases of asking the jury whether they were unanimous on their finding of manslaughter. This is discussed below at pp.192–195.

¹¹ Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (London: Judiciary of England and Wales, 2015), paras 307 and 308: “The Judge should devise and put to the jury a series of written factual questions, the answers to which logically lead to an appropriate verdict in the case. Each question should be tailored to the law ... and to the issues and evidence in the case. These questions—the ‘route to verdict’—should be clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached.” See also the D. Maddison et al. *Crown Court Compendium 2021* (London: Court and Tribunals Judiciary, 2021).

¹² <https://www.judiciary.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/> [Accessed 21 December 2021], p.288.

¹³ See also the D. Maddison et al. *Crown Court Compendium* (London: Court and Tribunals Judiciary, 2016), preface by the Lord Chief Justice.

questions, sequentially (in a carefully crafted schema produced after the judge and advocates' best endeavours), and being told very explicitly that they must be sure about each step before proceeding to the next. Depending on the formulation of the route to verdict and the offence in question, the route to verdict has introduced (or made more explicit) that there has to be agreement not just as to outcome but as to each logical step in reaching that verdict. Once we have adopted a scheme (which is almost mandatory in a murder trial¹⁴) in which jurors are directed that they must follow the steps in the route to verdict in order, and where that route to verdict includes for each question a requirement that the jury is sure of their answer to that question, *unity of route* to verdict and not just the concluded verdict matters. The introduction of routes to verdict has also arguably cemented a shift in practice. Whereas historically in cases where causation was admitted it was not uncommon to find cases in which a jury would be directed simply that if they found D intended to kill or do GBH they should convict of murder, and if not of manslaughter, it is now the norm to set out more fully all of the elements of the form of involuntary manslaughter which the jury must consider if they reject murder.¹⁵

Routes to verdict are not, we suggest, merely devices of convenience. They cause counsel, judges and, crucially, juries to address more logically and systematically the legal bases for reaching their verdict. There seems to be something unprincipled about requiring a jury merely to be unanimous as to a verdict and inviting them to adopt an entirely free process as to how that was reached when as a matter of law there is a series of reasoned steps that are necessary for that verdict to have been properly reached. They also, of course, enable the Court of Appeal (Criminal Division) to determine if something has gone wrong on appeal.

There may also be further, more subtle but no less significant problems if we do not have clarity as to the agreement reached by jurors. For example, empirical research suggests that as a collective body juries are not racially biased towards defendants.¹⁶ In part, the confidence in that conclusion rests on the fact that whilst individual jurors might hold racially biased views, those will be corrected or diluted by the requirement for agreement.¹⁷ If that requirement for agreement is lost, is there a greater risk of illegitimate biases influencing outcomes?

On the other hand, the greater the requirement for jury agreement on a specific form of manslaughter verdict, the greater the risk of hung juries and/or of creating jury disharmony. In addition, if agreement as to the precise form of manslaughter was required in every case, there is a risk that defendants, being aware of that fact, will advance a greater number of types of denial or partial defences, aware of the

¹⁴ See *Grant* [2021] EWCA Crim 1243.

¹⁵ Whereas previously the manslaughter verdicts in such cases would more accurately be described as reckless manslaughter, the jury are now routinely directed, in terms, on unlawful act manslaughter. On reckless manslaughter see D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Criminal Law*, 16th edn (Oxford: Oxford University Press, 2021), Ch.14.3; F. Stark, "Reckless Manslaughter" [2017] Crim. L.R. 763 and R. Taylor, "The Contours of Involuntary Manslaughter—A Place for Unlawful Act by Omission" [2019] Crim. L.R. 205.

¹⁶ C. Thomas, *Are Juries Fair?* (London: Ministry of Justice, 2010); C. Thomas, "Ethnicity and Fairness of Jury Trials in England and Wales 2006-2014" [2017] Crim. L.R. 860; D. Lammy, *An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (London: TSO, 2017), p.30.

¹⁷ A requirement for absolute unanimity may in fact enable those with racially biased views to hold the whole jury to ransom. The ability to accept a majority verdict prevents individual racist jurors from affecting the verdict. We are grateful to Cheryl Thomas for this point.

greater chance that the jury may be unable to agree on a verdict or be confused by the process.¹⁸ Again, there may be other less direct impacts such as that on the likely engagement of the prosecution in plea negotiation (if they know they can be confident of a manslaughter verdict of some undefined form). There may also be an impact on sentences imposed in such cases if judges lack the same degree of confidence as to the factual basis for sentence they would have in a case where the jury was considering a single charge requiring agreement.

The scenario outlined at the start of this article is merely one example of the categories of cases in which a verdict of manslaughter might be returned where there is no clarity as to the jury's basis/bases for that verdict. The issue has, as we noted, become more transparent with the increased use of routes to verdict.¹⁹ It is quite plausible to see directions and routes to verdict in murder trials which provide the jury with alternatives of (i) acquittal on self-defence, (ii) acquittal on lack of causation, (iii) guilty of murder, (iv) guilty of manslaughter by lack of intent, (v) manslaughter by loss of control, (vi) manslaughter by diminished responsibility and (vii) unlawful act manslaughter.²⁰ Similar problems can arise where the prosecution allege, in the alternative, that the accused could be guilty of unlawful act manslaughter or manslaughter on the basis of gross negligence²¹ (e.g. *Cawthorne* and *McClenaghan* discussed below.)

In this article we seek to explore these problems and pose some potential solutions. We anticipate that the instincts of the Court of Appeal (Criminal Division) when asked to provide explicit clarification on the issues will be to adopt a flexible and pragmatic path. We acknowledge, for reasons to be discussed, that in very many cases there is no pressing need for explicit agreement as to the type of manslaughter, and that judges are also able find the just and appropriate sentence in most such cases. However, we also identify a subset of cases where agreement as to the type of manslaughter certainly ought to be required, primarily where the choice is between unlawful act and gross negligence manslaughter. We also raise the question, reflected in some of the case law, as to whether agreement on the reasons for reduction to manslaughter ought to be required when the issue is not so much the legitimacy of the manslaughter conviction but rather the appropriateness of the “not guilty of murder” aspect of such a verdict.

General background to the problem

It is trite law that juries have to be agreed that the elements of the offence that they are considering have been proved beyond reasonable doubt—or “so that you are sure”—as that test is explained to juries. This remains true even in the circumstances where a majority verdict can be given, in the sense that at least all the relevant

¹⁸ Although conversely there is the risk that the more defences to murder put forward, the greater the risk that the jury may acquit of murder without being satisfied that any single one of them was made out.

¹⁹ On which see D. Ormerod and C. Thomas, “Routes to Verdict—What We Know and What We Need to Know” [2021] Crim. L.R. 615.

²⁰ With the issues to be addressed in this order we would strongly suggest. See, e.g. *Sargeant* [2019] EWCA Crim 1088. On the order of verdicts in a route to verdict in homicide see Maddison et al, *Crown Court Compendium* (2021), Ch.19.

²¹ See *Rebello (No.1)* [2019] EWCA Crim 633 (which we have labelled “*No 1*” to distinguish it from the separate appeal following the retrial reported as *Rebello* [2021] EWCA Crim 306, which could usefully be labelled as *Rebello (No.2)*).

proportion²² of the requisite majority have to be agreed that the elements of the offence have been proved.²³ In some cases, jurors may appear to be agreed about the verdict of guilty but are fundamentally not in agreement about the factual basis on which they have reached that conclusion. It is impossible to state how often this happens in trials. In circumstances where that is an acute risk because the Crown is advancing its case on alternative factual bases, what has come to be known as a *Brown* direction can be given in order to ensure that the relevant facts have been proved to the criminal standard.²⁴ The need for such a direction can arise in relation to a wide range of crimes, although typically it arises in frauds and conspiracies. There is, however, sometimes barely concealed scepticism from the senior judiciary about the need for such an approach.²⁵

The issue of jury agreement has led to particular difficulties in homicide trials because of the complex relationship between murder and manslaughter, the sub-varieties of manslaughter²⁶ and ways in which the offences can be committed. The available alternative verdicts open to a jury are those identified in s.6(2) of the Criminal Law Act 1967 and these include, by virtue of s.6(2)(a), manslaughter. However, the alternative verdicts prescribed in s.6(2) only apply where the defendant is found “not guilty of murder”. If the jury cannot agree on whether the defendant is guilty or not guilty of murder, the normal consequence would be a retrial for murder unless the trial judge decides under the common law²⁷ that the jury should be discharged from returning a verdict on murder and be able to convict of manslaughter. In such circumstances it is not permissible for the prosecution to seek a retrial on the charge of murder: *JB*.²⁸ The issue of jury agreement is also bound up with considerations relating to the different sentences or disposals which may be appropriate depending on the type or types of manslaughter which the jury are agreed upon.

Some of the complications have been discussed previously in articles in the *Review*.²⁹ They were also considered briefly by the Law Commission in its project on *Murder and Manslaughter*,³⁰ and have been addressed in practice in a variety of ways. Numerous developments on the law of homicide in recent years have, we suggest, compounded rather than reduced the complications. The details of voluntary manslaughter have been revised as a result of the Coroners and Justice Act 2009 introducing a new loss of control defence and overhauling the elements

²² i.e. 11:1; 10:2, etc.

²³ See *Criminal Practice Direction 26Q*; D. Ormerod and D. Perry, *Blackstone's Criminal Practice* (Oxford: Oxford University Press, 2022), para.D19.35. See also Maddison et al. *Crown Court Compendium*, para.21-11.

²⁴ *Brown (Kevin)* (1983) 79 Cr. App. R. 115, CA. On which see inter alia, J.C. Smith, “Satisfying the Jury” [1988] Crim. L.R. 335.

²⁵ See recently *Chilvers* [2021] EWCA Crim 1311; [2022] 1 Cr. App. R. 2. Another recent example is in *Solanki* [2020] EWCA Crim 47; [2020] Lloyd's Rep. F.C. 143 where the CACD quite rightly rejected the need for a *Brown* direction when the Crown could not identify the precise origins of allegedly criminal property. A further illustration of the desire to avoid *Brown* directions lurks beneath the Supreme Court's decision on bad character in *Mitchell* [2016] UKSC 55; [2017] Crim. L.R. 310.

²⁶ Unlawful (constructive/dangerous act), gross negligence, by diminished responsibility, by loss of control and by suicide pact, not to mention for some at least the possibility of reckless manslaughter.

²⁷ *Saunders* [1988] A.C. 148; [1987] Crim. L.R. 781.

²⁸ *JB* [2013] EWCA Crim 256.

²⁹ See R.D. Taylor, “Jury Unanimity in Homicide” [2001] Crim. L.R. 283; HH Judge Clarke QC, “Jury unanimity—a practitioner's problem” [2001] Crim. L.R. 301.

³⁰ See Appendix H in Law Commission, *For England And Wales* (London: TSO, 2005), Consultation Paper No.177, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-1/ljsxou24uy7q/uploads/2015/03/cp177_Murder_Manslaughter_and_Infanticide_consultation_.pdf [Accessed 22 December 2021] concluding that “The problem is not serious enough to require a statutory solution” at para.H.31.

of diminished responsibility (DR). The limited research available suggests, in relation to diminished responsibility at least, that the partial defence is left to the jury in a greater proportion of murder trials than was previously the case.³¹ There is therefore a greater likelihood that jurors will be left with a range of verdicts in such cases—possibly murder, manslaughter by diminished responsibility and/or loss of control and manslaughter by unlawful act. The contours of involuntary manslaughter have also been restated and further refined in recent years, particularly in relation to gross negligence manslaughter.³² There is no question that this form of manslaughter is completely distinct from unlawful act manslaughter (or any form of reckless manslaughter that may exist). In addition, the disparities between the likely sentences imposed for each of the varieties of manslaughter have become more pronounced with the promulgation of the Sentencing Council definitive guideline.³³ That enhances the claim that the various forms of manslaughter increasingly resemble distinct offences.

There is, as noted above, the introduction and endorsement of the written route to verdict in homicide trials, with the requirement for agreement as to the steps in the process of reaching a verdict which that compels.

These recent developments all support the need for a rigorous review of the issue of agreement in homicide verdicts. There is limited and inconsistent authority about the way juries should be directed on agreement when manslaughter (in one or more forms) may be a possible verdict. There is a lack of clarity as to what form of route(s) to verdict might be appropriate in such a case. There is also uncertainty as to when, if ever, a judge should interrogate the verdict once delivered and how a judge might legitimately seek clarification as to the basis on which a verdict was reached.

In the following section we examine the coherence of the responses that have been advanced by the courts and academic commentators and suggest possible ways forward.

Problems and solutions

We turn to an examination of the current authorities in an attempt to address several distinct issues:

1. Whether the jury needs to be agreed as to the form of manslaughter verdict they have reached when the alternatives left to them on a murder charge are (i) loss of control; and/or (ii) diminished responsibility; and/or (iii) unlawful act manslaughter *in order that a judge can deliver a fair sentence*.
2. Whether agreement³⁴ is required in any event in 1 above simply for the integrity of the manslaughter verdict.

³¹ R.D. Mackay and B. Mitchell, “The New Diminished Responsibility Plea in Operation—Some Initial Findings” [2017] Crim. L.R. 18.

³² See in particular: *Sellu* [2016] EWCA Crim 1716; [2017] Crim. L.R. 799; *Bawa Garba* [2016] EWCA Crim 1841; [2016] Inquest L.R. 320; *Rose* [2017] EWCA Crim 1168; [2018] Crim. L.R. 76; *Kuddus* [2019] EWCA Crim 837; [2019] Crim. L.R. 1055; *Broughton* [2020] EWCA Crim 1093; [2021] Crim. L.R. 869.

³³ Sentencing Council, *Manslaughter: Definitive guideline* (London: TSO, 2018), <https://www.sentencingcouncil.org.uk/publications/item/manslaughter-definitive-guideline/> [Accessed 22 December 2021], in force from 1 November 2018.

³⁴ i.e. unanimity or agreement in the relevant proportion if a majority direction has been given as explained above.

3. Whether the integrity of the verdict requires the jury to be agreed as to the form of manslaughter verdict they have reached when the alternatives left to them are (i) unlawful act manslaughter and (ii) gross negligence manslaughter.

We argue that a Court of Appeal decision unequivocally clarifying the position on each of these points is long overdue.

We then raise a fourth more subtle question whether (even if the jury does not usually have to be agreed in order to convict of at least manslaughter in categories 1 and 2 above) the jury needs to be agreed, when the initial charge is murder, on the basis for a “not guilty of murder” verdict in order to return that verdict and pre-empt a retrial for murder? In other words, this causes us to consider a fourth question.

4. Is there a difference between:
 - (a) A jury agreeing on a *guilty of manslaughter verdict* even though split as between LoC or DR or unlawful act (but all still agreed that there was an intent to commit at least an unlawful act, and thus all agreed on the alternative charge of manslaughter which is therefore a legitimate verdict); and
 - (b) A jury disagreeing on the basis for a *not guilty of murder verdict*, because they are split between LoC or DR or no mens rea for murder (and thus arguably not able to return a *not guilty of murder* verdict and thus unable to agree a verdict either way on *that* charge), notwithstanding that they are agreed that it is at least unlawful act manslaughter as in (a)?

Agreement required to legitimise the sentence imposed?

How can a judge be confident that the sentence imposed for manslaughter is a fair and accurate one, reflecting the principles of sentencing in the Sentencing Code and the guidance in the Sentencing Council guidelines³⁵ when it is not even clear on which basis the jury convicted of manslaughter?

One of the earliest cases thought to acknowledge and address the issues was *Matheson* in 1958.³⁶ It is not entirely surprising that the matter arose then, given that the forms of voluntary manslaughter had just been expanded from one to three by the Homicide Act of the previous year. Available verdicts now included “diminished responsibility” along with the common law partial defence of provocation, as well as murder and forms of involuntary manslaughter. In *Matheson*, Lord Goddard CJ substituted a verdict of manslaughter (on the basis of uncontested medical evidence as to diminished responsibility) in place of the jury’s verdict of murder. His lordship gave guidance, obiter, on the potentially new situation of both diminished responsibility and provocation being in issue in the same case.³⁷

³⁵ Sentencing Council, *Manslaughter: Definitive Guideline* (2018), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-definitive-guideline-Web.pdf> [Accessed 22 December 2021].

³⁶ *Matheson* [1958] 1 W.L.R. 474; (1958) 42 Cr. App. R. 145.

³⁷ *Matheson* [1958] 1 W.L.R. 474; (1958) 42 Cr. App. R. 145 at 153.

“It may happen that on an indictment for murder the defence may ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation. If the jury return a verdict of manslaughter, the judge may, and generally should, then ask them whether their verdict is based on diminished responsibility or on the other ground or on both.”³⁸

It should be noted that this says nothing about how juries should be directed. It merely suggests, and encourages, a question to be asked of the jury following a verdict of not guilty of murder but guilty of manslaughter. The question has nothing to do with jury agreement but was concerned with establishing the correct basis for sentencing (although inevitably, it may also provide useful information for a convicted defendant considering an appeal).

The approach in *Matheson* seeking clarity for the judge about the category or categories of manslaughter agreed on by the jury was followed in *Cawthorne*,³⁹ although with some reservations. Like *Matheson*, that was a case in which a manslaughter verdict was returned in the alternative on a murder charge and the central issue on appeal was the appropriate basis of sentence. In the appeal against sentence, Swinton Thomas LJ emphasised that seeking clarification about the jury’s finding on the type of manslaughter was a matter for the discretion of the trial judge and said:

“It very frequently occurs in cases where a defendant is charged with murder and there is an alternative verdict of manslaughter open to the jury that there will be different bases upon which they can reach that verdict. Having considered the various cases to which we have been referred,⁴⁰ we are quite clear that whether or not the judge asks the jury to indicate to him the basis of their verdict is entirely a matter for the judge’s discretion. In many cases the judge will not wish to do so, and doing so will throw an unnecessary additional burden upon the jury. In a case such as the present, and many other cases of this nature, there are grave dangers in asking juries how they have reached a particular verdict. For example, they may not all have reached it by precisely the same route. In many cases where lack of intent and provocation and gross negligence form the basis of the possible verdict, it would be quite inappropriate for the judge to ask the jury to indicate the basis of their verdict. In other cases, for example, where provocation is raised and a defence of diminished responsibility is also put forward, the judge may well regard it as absolutely essential for sentencing purposes to know the basis of the jury’s verdict. It is entirely a matter for the judge’s discretion and save in the most exceptional case this Court would not question the exercise of that discretion.”⁴¹

The interesting thing about this passage is the explicit recognition and acceptance that the jury “may not all have reached [the verdict] by precisely the same route”.

³⁸ Cf *Larkin* [1943] K.B. 174; [1943] 1 All E.R. 217 in which the court had stated that no questions should be asked.

³⁹ *Cawthorne* [1996] 2 Cr. App. R. (S) 445; [1996] Crim. L.R. 526.

⁴⁰ These cases included *Matheson* [1958] 1 W.L.R. 474; (1958) 42 Cr. App. R. 145; *Frankum* (1983) 5 Cr. App. R. (S) 259; [1984] Crim. L.R. 434; *Solomon and Triumph* (1984) 6 Cr. App. R. (S) 120; [1984] Crim. L.R. 433.

⁴¹ *Cawthorne* [1996] 2 Cr. App. R. (S) 445 at 450–451; [1996] Crim. L.R. 526.

The court does not appear to have regarded this as problematic. On the facts, the real alternatives in the case were unlawful act and gross negligence manslaughter, each of which has (and had at that time) very different elements on which the jury must be sure before they can convict.⁴² Cawthorne's conduct was never realistically likely to be held to constitute murder,⁴³ so provocation was not really an issue (it was a baby shaking case). Whilst unlawful act manslaughter on the basis of an assault to the baby was the most likely route to a manslaughter verdict, it is possible that some of the jurors might have rejected that route and based the conviction on gross negligence.⁴⁴

Despite the explicit statements above, and in the light of *Rebello (No.1)*, *Cawthorne* must be approached with some caution. The possible lack of agreement as between the forms of manslaughter was not the issue on which the appeal was argued. Rather it was on the basis that, in the absence of information on the actual basis of conviction, the appellant should have been sentenced on the most favourable possible basis to him—which was taken to be gross negligence. This argument was emphatically rejected in favour of the judge sentencing on the basis of the facts heard in evidence as they appeared to the judge.⁴⁵

The general approach to the factual basis for sentencing has more recently been set out in *King*⁴⁶ where Sweeney J, giving the judgment of the court, said:

“In our view the correct approach by the judge, after a trial, to the determination of the factual basis upon which to pass sentence, is clear. If there is only one possible interpretation of a jury's verdict(s) then the judge must sentence on that basis. When there is more than one possible interpretation, then the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and he is not sure of any of them, then (in accordance with basic fairness) he is obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant.”

King deals directly with the factual basis for sentence within an agreed single offence (of unlawful act manslaughter). More pertinently, in *Brehmer* the court adopted the same approach to a case where it was not explicit from the verdict which form of manslaughter the jury had found. The trial judge however was satisfied that the defendant had the necessary intent for murder but that he had lost control for the purposes of the partial defence (rather than it being a less serious case of unlawful act manslaughter as contended by the defence). The judge took the view that this was a case that “only just met the criteria for a qualifying trigger [under the LoC defence]” thus putting the case into the highest category of culpability for this type of manslaughter. The Court of Appeal held that the judge was correct not to go beyond the relevant starting point in the guideline for

⁴² See the discussion below at pp.196–198 below in which we suggest that this approach is wrong following *Rebello (No.1)* [2019] EWCA Crim 633. *Cawthorne* was not cited in *Rebello*.

⁴³ See the observations about the address to the jury at *Cawthorne* [1996] 2 Cr. App. R. (S) 445 at 448; [1996] Crim. L.R. 526.

⁴⁴ At that time governed by *Bateman* (1925) Cr. App. R. 9. The quite separate nature of the offences is clear from cases like *Andrews v DPP* [1937] A.C. 576; [1937] A.C. 576.

⁴⁵ See generally D. Thomas commenting on the case at [1996] Crim. L.R. 526.

⁴⁶ *King* [2017] 4 W.L.R. 95 at [31]; [2017] Crim. L.R. 497.

manslaughter by loss of control and correct not to invoke the higher Sch.21⁴⁷ starting points relevant only to murder. Even though this was a case close to murder, the distinction between murder and manslaughter was significant and the different guidelines for the different offences had to be adhered to.

As will be discussed later, the difficult issue arising from *Brehmer* is that whilst the judge may feel sure on the evidence about the basis of the verdict, the jurors may in fact have been split as to the bases for rejecting murder. Suppose that eight jurors thought (like the judge) that the defendant had acted with intent to kill or cause GBH but also that the Crown had failed to disprove loss of control, whereas the other four jurors were not satisfied that the defendant had acted with an intention to kill or do GBH (but were also sure he did not qualify for the loss of control defence).⁴⁸ Does that voting pattern justify a verdict of “not guilty of murder” (where the case is on any view very close to murder)? In this scenario there is no agreement about lack of intent to kill and no agreement about loss of control. Should there not be at least consideration of a retrial for murder if the jury are not agreed on at least one of the bases for finding D not guilty of murder?

Returning to the Court of Appeal’s approach to the basis for sentencing, whilst it creates a challenging task for the judge, in the light of *King* and *Brehmer*, it seems now to be settled that there is no need for agreement for this purpose. Given that that matter is now resolved, it would be beneficial, in our view, for the Court also to explicitly reject the possibility (canvassed in *Matheson* and *Cawthorne*) of the judge interrogating the jury about the basis of the verdict of manslaughter once returned. This possibility was also suggested in *Jones (Douglas Leary)* in 1999. In that case Rose LJ held that once the jury had returned a manslaughter verdict it would be permissible for the judge to ask about the basis for it, provided the judge had warned them, in advance of returning the verdict, that he planned to do so. The court also held, however, that if such a question were posed, the jury were not obliged to answer.⁴⁹ This is an approach still favoured by some judges.

Such an approach is unsatisfactory for a variety of reasons. It seems inappropriate for a judge to be able to warn the jury of an intention to ask for clarification to assist in sentencing if the jurors are then free to refuse to answer.⁵⁰ As a matter of principle, either the judge is required/entitled to know, for the purposes of sentencing, the actual basis of the verdict or not. For the reasons given above, it should be clarified that such an enquiry ought not be pursued for the purposes of sentencing.

The integrity of the manslaughter verdict

The first case to address the jury agreement issue directly from the point of view of the integrity of the manslaughter verdict, as opposed to the basis for sentencing, was *Jones (Douglas Leary)* in 1999, discussed in detail in a *Review* article in 2001.⁵¹

⁴⁷ Schedule 21 to the Criminal Justice Act 2003 has now been codified in the Sentencing Act 2020 Sch.21.

⁴⁸ This may depend on how the jury goes about its deliberations and whether, or at what stage, they follow the RTV individually or collectively.

⁴⁹ See also *Bowen* [2001] 1 Cr. App. R. (S) 82 citing *Jones* and holding that in the absence of clarification of the basis for the verdict the judge could sentence on the obvious basis of manslaughter by reason of provocation (where D had intended at least GBH) rather than unlawful act. And see now *Brehmer* [2021] EWCA Crim 390; [2021] 4 W.L.R. 45.

⁵⁰ That refusal may appear deeply unsatisfactory, at least to the defendant and his supporters.

⁵¹ R.D. Taylor, “Jury Unanimity in Homicide” [2001] Crim. L.R. 283.

The appellant had killed the victim with a knife in a fight at a bus stop. Although charged with murder he was convicted of manslaughter, but it was unclear whether the manslaughter verdict (following a majority direction) was based on provocation or lack of intent to kill/cause GBH. Lord Justice Rose held that the basis for the verdict did not matter “provided that the jury are agreed, in the sense that there was an unlawful act etc”. In other words, if the alternatives for the jury are (i) unlawful act manslaughter and (ii) loss of control (at that time provocation) [or we would add (iii) diminished responsibility], there is no problem if the jury has not been given a direction on agreement (whether unanimity or majority) because every juror, irrespective of how they arrived at their verdict of manslaughter, has necessarily concluded that the defendant did an act with intent to cause, at the least, GBH. That would involve an unlawful and dangerous act, and so at the very minimum satisfy the elements of unlawful act manslaughter and the conviction for manslaughter is safe.

The court therefore concluded that there was no obligation on the judge to give a direction to the jury requiring agreement about at least one of the canvassed routes to manslaughter. (There had in fact been discussions about this possibility between judge and counsel but any decision on the matter had been pre-empted by the jury returning with a majority verdict.) On the question of the integrity or safety of the actual verdict, *Jones* appears to be correct on its facts since the choice was between forms of manslaughter which could all be distilled to unlawful act manslaughter as a minimum.

The label “manslaughter” is therefore fair and accurate in all such cases. We would support this approach and urge the Court of Appeal to give an explicit confirmation of its legitimacy. The safeguards we would encourage in all such cases are that the judge provides written directions making clear the alternatives available to the jury which, as we discuss below, may be important in determining whether the “not guilty of murder verdict” is appropriate (as opposed to the legitimacy of the verdict of manslaughter).

Where unlawful act and gross negligence manslaughter are the alternatives

The position endorsed in the preceding section—i.e. that a manslaughter verdict (essentially an unlawful act) may be legitimate even though reached by different routes—cannot be adopted without qualification in any case in which the alternatives types of manslaughter are gross negligence manslaughter (GNM) and unlawful act manslaughter (UAM). We argue that that is the case whether those are the only two alternatives being left, or they are two of the many alternatives available.

It is clear that UAM and GNM have developed quite distinct elements. The elements of GNM have, in particular, been refined in recent years and now number six elements:

- “i) The defendant owed an existing duty of care to the victim. ii) The defendant negligently breached that duty of care. iii) At the time of the breach there was a serious and obvious risk of death. Serious, in this context, qualifies the nature of the risk of death as something much more than minimal or remote.

Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation. iv) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death. v) The breach of the duty caused or made a significant (i.e. more than minimal) contribution to the death of the victim. vi) In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.”⁵²

These are in contrast to the elements of unlawful act manslaughter which have remained relatively static for over the 50 years since *Church*⁵³—an intentional, unlawful act which all reasonable and sober people would realise is bound to subject some person to some physical harm (albeit not necessarily serious harm) and which causes death.⁵⁴

These two offences thus have very distinct elements even though they result in the same generic verdict of manslaughter. As such, there is a true “*Brown*” problem⁵⁵ if the jury is not told that they must be agreed as to the form of manslaughter on which they are sure. This issue has been the subject of further discussion in the Court of Appeal (Criminal Division) in *Rebello (No.1)*.⁵⁶

Rebello was a case that attracted widespread publicity. The case arose from the distribution by the defendant, via online sales, of the dangerous chemical DNP. It was advertised by him as an aid to slimming. V, a young woman who had become addicted to the substance, was taking it in dangerous quantities and that consumption led to her death. At the first trial the defendant was convicted of manslaughter both on the basis of the unlawful act of supply and on the basis of gross negligence. The conviction on the former basis was quashed on appeal to the Court of Appeal as the act of supply was not in itself dangerous in the requisite sense.⁵⁷ The conviction on gross negligence was also quashed owing to inadequacies in the jury direction on the issue of whether V had made a free deliberate and informed decision to take the DNP and whether that may have broken the chain of causation.⁵⁸ A retrial was ordered on the gross negligence manslaughter charge.

At the retrial for manslaughter a year later in April 2020, the defendant was convicted of gross negligence manslaughter and jailed for seven years. The judgment of the Court of Appeal in the first appeal was, in accordance with normal practice, not reported in the intervening period (nor for a further 12 months after that) but was eventually published⁵⁹—a welcome development given the interesting and useful observations which it contains about the correct procedure where the alleged facts may amount to either or both of unlawful act manslaughter and gross

⁵² *Broughton* [2020] EWCA Crim 1093 at [5] per Lord Burnett Chief Justice; [2021] Crim. L.R. 869.

⁵³ *Church* [1966] 1 Q.B. 59 at 70; [1965] 2 W.L.R. 1220.

⁵⁴ Ormerod and Laird, Smith, *Hogan and Ormerod’s Criminal Law*, 16th edn (2021), p.590 and Ormerod and Perry, *Blackstone’s Criminal Practice* (2022), B.1.

⁵⁵ *Brown (Kevin)* (1983) 79 Cr. App. R. 115, CA.

⁵⁶ *Rebello (No.1)* [2019] EWCA Crim 633.

⁵⁷ The House of Lords decision in *Kennedy No.2* [2007] UKHL 38; [2008] Crim. L.R. 222 precludes liability for unlawful act manslaughter in such cases, but the CACD has accepted that gross negligence manslaughter is possible subject to the elements of that offence being proved: *Evans* [2009] EWCA Crim 650; [2009] Crim. L.R. 661.

⁵⁸ Unlike *Jones*, there was no murder charge to complicate matters.

⁵⁹ *Rebello (No.1)* [2019] EWCA Crim 633.

negligence manslaughter. Since the decision is not widely reported, we provide the relevant passage in full.⁶⁰ The judge at the first trial had ruled that the two bases should be alleged in separate counts and the defendant was, as noted, initially convicted on both of those counts. Presiding over the first appeal Sir Brian Leveson P commented on this as follows:

“Given that the offence could be committed in different ways, in our judgment, it was sensible (and entirely appropriate) to allow the jury to focus on each separately. Provided that the routes to verdict are presented clearly and permit of no confusion, whether it was presented as one allegation of manslaughter which could be committed in two slightly different ways (so that the jury could focus on both and return a verdict of guilty of manslaughter with a rider as to which or both of the routes they were sure) or whether it was right to leave two counts is of technical interest and matters only in relation to the recording of the result of the trial.

In our judgment, the better course would have been to indict for one offence of manslaughter and allege both unlawful act and gross negligence not as true alternatives but to demonstrate the different ways in which the offence could be committed. It would then have been appropriate to ask the jury to return a verdict in relation to each mechanism not only to avoid the problem in *Brown* but also so that if issues of law later arose in relation to either, the conclusion of the jury on the other would be available. That avoids the concern that two convictions for the manslaughter of one person could be returned. Whatever mechanism is chosen could not, in itself, affect the safety of any conviction for manslaughter. In the context of this case, we shall return to the recording of the result if it arises having considered the other grounds of appeal.”⁶¹

Although the second paragraph indicates a preference for a single count with two separate verdicts (and routes to verdict) rather than two separate counts, either way of proceeding is regarded as legitimate. The important point is the recognition that the two forms of manslaughter have very different ingredients and the jury need to be agreed on at least one or other of them (hence the reference to *Brown*). The case is thus supportive of the argument already advanced: where the choice is between unlawful act manslaughter and gross negligence, it is necessary for the legitimacy of the manslaughter conviction that the jury are agreed on the essential ingredients of at least one and it is not enough that, for example, six jurors would have convicted of unlawful act but not gross negligence and six of gross negligence but not unlawful act.⁶²

⁶⁰ Unfortunately, *Rebello No.1* is not available on Bailii or Westlaw, or Lexis. We are grateful to William Davis LJ (a member of the CACD in *Rebello No.1*) for a copy of the judgment.

⁶¹ *Rebello (No.1)* [2019] EWCA Crim 633 at [28]–[29].

⁶² See also Taylor, “Jury Unanimity in Homicide” [2001] Crim. L.R. 283, 288–289.

Where the question is not the legitimacy of the manslaughter conviction but the correctness of the not guilty of murder verdict

Two cases from Northern Ireland—*McCandless*⁶³ and *McClenaghan*⁶⁴—provide us with valuable examples which take us into this separate question of the legitimacy of the verdict of “not guilty of murder”. (This was not an issue in *Rebelo* since the charge was never higher than manslaughter.)

McCandless

McCandless differs from the cases considered so far in that the defendant was not only initially charged with murder but also convicted of murder rather than manslaughter. He had stabbed his wife, from whom he was separated, some 33 or more times. The possible grounds for reducing the offence to manslaughter advanced at the trial were lack of intent, provocation and diminished responsibility.⁶⁵ The conviction for murder was quashed because the jury had been misdirected about the relevance to provocation of the defendant’s personal characteristics. In the course of the judgment Lord Carswell CJ took the opportunity to discuss the question of whether, in order to return a verdict of manslaughter, the jury had to be agreed on a particular route or routes, a matter which had also been canvassed at the trial. He referred to *Jones*, which suggested it was not necessary but declined to follow it saying:

“I do not consider that a jury is agreed upon its verdict if some of their number do not regard provocation as negated while others find that a case of diminished responsibility is made out. I am not persuaded that the case is different in kind from that dealt with in *Brown*.”

This was of course only obiter but appears at first sight to be directly contrary to *Jones*. However, core to understanding the case is, we submit, to realise the fundamental difference between the cases. In *Jones*, the appellant was seeking to challenge a verdict of manslaughter and was arguing (unsuccessfully) that the jury had to be agreed on a particular form of manslaughter for a conviction of that offence to be safe.⁶⁶ In contrast, in *McCandless* the appellant was appealing against a verdict of murder and the first issue to be resolved was what is needed for a legitimate verdict of not guilty of murder rather than whether there is a legitimate verdict of manslaughter.

Consistent with this interpretation, throughout his judgment Carswell LCJ repeatedly refers to *defences* to murder and *reducing* the offence from murder to manslaughter. It is quite understandable that in relation to this rather different question, of whether or not guilty of murder, the court should come to a different conclusion to that in *Jones*. As we have seen, the rationale of *Jones* is that a conviction for manslaughter is safe even if it is not clear whether it was based on lack of (murderous) intent or provocation since in both scenarios the essential

⁶³ *McCandless* [2001] NI 86.

⁶⁴ *McClenaghan* [2016] NI 51.

⁶⁵ The defences of loss of control and diminished responsibility in Northern Ireland are identical to those in England and Wales.

⁶⁶ See the observations about the address to the jury at *Cawthorne* [1996] 2 Cr. App. R. (S) 445 at 448; [1996] Crim. L.R. 526.

requirements of unlawful act manslaughter will be satisfied. However, a finding by the jury that they are agreed that the defendant is *at least* guilty of unlawful act manslaughter tells us nothing about whether he should be found *not guilty* of the more serious form of homicide, i.e. murder.

Following *McCandless*, if for example six jurors think that the prosecution has not disproved provocation/loss of control and the other six think that the defendant has proved diminished responsibility, they are actually not in agreement that either partial defence is made out and in principle they should not acquit of murder on either ground. Of course, neither can they convict of murder since they are not agreed that murder is committed without a partial defence. The consequence would normally be a retrial for murder.⁶⁷ That may well be an outcome preferred by the Crown and it is important that the judge should be made aware of the jury's position so that the views of the parties can be sought (in the absence of the jury) as to whether to proceed to manslaughter directions or to order a retrial.

McClenaghan

McClenaghan is also a case where the appellant was convicted of murder rather than manslaughter and where, unsurprisingly perhaps, the explicit observations of the Lord Chief Justice in *McCandless* were approved. The appeal was advanced on the basis that the only ground for reduction from murder to manslaughter left to the jury was diminished responsibility (which the jury by their verdict rejected). It was argued that alternative verdicts of manslaughter based on both unlawful act and gross negligence should have been left to the jury. In the Court of Appeal, Gillen LJ agreed that on the facts these alternatives should have been put and the conviction for murder was unsafe but ordered that there should be a retrial. As to whether the jury had to be agreed on any particular route to manslaughter, the court referred to the decision in *McCandless*. That case was treated as authority for the proposition that

“...the jury had to agree on the basis upon which they brought in their verdict of manslaughter. A jury was not agreed upon its verdict if only some of their number did not regard provocation as negated while some others found that a case of diminished responsibility was made out. It was not sufficient to say that because the consequences of the finding of each group of jurors was that the charge of murder was reduced to manslaughter they were agreed on the essential constituents of the offence of which the defendant was guilty.”

In the next paragraph in his judgment in *McClenaghan* Gillen LJ went on to say:

“49. This approach is echoed in *Blackstone's Criminal Practice* 2017 at B1.35 where the authors, in the context of the separate grounds of manslaughter bearing on an unlawful act and gross negligence, state:

‘It should not be sufficient that six jurors thought that the accused's act causing death was unlawful but not grossly

⁶⁷ Unless there were reasons why the jury should be discharged from returning a verdict on the murder charge and a manslaughter conviction returned as an alternative verdict at common law, as in *Saunders* [1988] A.C. 148; [1987] Crim. L.R. 781. See also *JB* [2013] EWCA Crim 256.

negligent and the other six thought it was grossly negligent but not unlawful. Here the prosecution have not proved either of the two forms of manslaughter beyond reasonable doubt; it is quite different from a case where what would otherwise be murder has been proved and the jurors merely differ as to the reason for reducing the offence to manslaughter.’

We consider that this is the approach that ought to be adopted during the course of a retrial.”

The approval of that passage in *Blackstone* is welcome in one sense, but we submit confused in others. First, the example quoted is used in *Blackstone’s* in the context of cases where the choice is between unlawful act manslaughter and gross negligence manslaughter.⁶⁸ That is a quite different scenario from one where murder is the charge, and the alternatives are different types of voluntary manslaughter and/or unlawful act manslaughter. Secondly, the paragraph quoted is concerned with the question of whether a *conviction for manslaughter* is safe, not with whether the *not-guilty-of-murder* part of a verdict is justified. Thirdly, whether the appellant is guilty of either of the two types of involuntary manslaughter is not directly relevant to whether there is, in addition, proof of the more serious offence of murder. Gillen LJ in approving the passage in *Blackstone* may, with respect, have overlooked the fact that it concludes by stating that the matter is different where a killing with murderous intent is proved and the jurors merely differ as to the reason for reducing to manslaughter. In other words, where they differ as to whether they are satisfied of provocation (loss of control) or diminished responsibility. The verdict of manslaughter is safe in those circumstance but again that says nothing about the quite different question which Gillen LJ is addressing⁶⁹ as to whether the jury are agreed on a specific basis for the not guilty of murder verdict. Despite these quibbles with some of the reasoning in *McClenaghan*, the conclusion that agreement is required as to the basis for being not guilty of murder is sound and supports the conclusion in *McCandless*.

On the basis of these authorities, we conclude that the position can be summarised as follows. Both *Jones*, on the one hand, and *McCandless/McClenaghan*, on the other, are correct even though they appear to say different things. Any apparent discrepancy arises because they are dealing with different questions. In *Jones*, it was the safety of the manslaughter verdict (when the options are voluntary manslaughter or unlawful act manslaughter); in *McCandless* and *McClenaghan*, the question was the validity of the “not guilty of murder” aspect of the verdict.⁷⁰

The implication of the latter point is that in relation to cases such as *Brehmer* the jury ought to have been given a direction requiring them to be agreed as to whether they found the defendant (a) not guilty of murder on the basis of lack of intent or (b) on the basis of loss of control. If they were not agreed in accepting or rejecting either basis for being guilty or not guilty of murder, then they were “not agreed” and there should at least have been consideration of a retrial on the

⁶⁸ i.e. the sort of issue that arose at the first trial in *Rebello (No.1)* [2019] EWCA Crim 633.

⁶⁹ But which the passage in *Blackstone’s* is not.

⁷⁰ For the avoidance of doubt, *Rebello* has no part to play in this analysis as it is relevant only to the distinction between UAM and GNM and not with that between murder and manslaughter.

murder charge (the appellant had already pleaded guilty to manslaughter). On the case as it stands, we do not know if they were agreed on any particular basis for reducing murder to manslaughter and even if they were, we do not know which basis. As a result, the trial judge is left to make his or her own decision for sentencing which may result in a more severe or more lenient one than the jury's view of the facts would warrant. More importantly perhaps, the question about whether a retrial is the more appropriate response will not be addressed.

Practical implications of the above analysis and identifying routes to verdict

In this section, we examine the practical implications of the conclusions reached above and offer possible forms of route to verdict to reflect these principles.

Differentiating between relevant issues in different types of homicide prosecutions

Setting out a single comprehensive route to verdict that resolves all the problems identified above is extremely difficult because of the wide variety of possible scenarios with different approaches and questions being relevant to each. It is thus important to recognise that different questions arise in different types of homicide prosecutions of which the following are three common examples.

First, if, as in *Brehmer*, the initial charge is murder and D is pleading guilty to manslaughter, the focus is clearly on whether any "not guilty of murder" verdict is legitimate. Jury agreement as to at least one basis for a verdict of "not guilty of murder" ought to be required if a retrial for murder is to be ruled out (unless it is decided that the jury should be discharged from having to give a verdict on the murder charge).

Secondly, if the initial charge is murder and D pleads not guilty to both murder and manslaughter, there should again be a requirement for agreement on the reason for a "not guilty of murder" verdict. That follows from the decisions in *McCandless/McClenaghan*. However, if the jury are unable to agree on the murder verdict, and it is not considered appropriate to order a retrial for murder, the jury can be discharged from returning a verdict on the murder charge. In those circumstances, a conviction for manslaughter will often be possible and legitimate (see *Jones*) provided the jury is agreed it is at least UAM (or alternatively agreed it is GNM) even if the jury is not agreed as to why D is not guilty of murder. In such cases the judge should not ask the jury about the basis of the manslaughter conviction for the purposes of sentencing (or for any other reason). This is subject to the proviso that gross negligence manslaughter is not one of the alternatives to unlawful act manslaughter. If gross negligence is an alternative, the jury ought to be required to be agreed on at least one of unlawful act or gross negligence and it would not be enough to be split between them.

Thirdly, where the initial charge is manslaughter only, if there is only one form of manslaughter suggested by the prosecution case, the issue of jury agreement does not arise. However, if a reasonable jury could, on the evidence, convict of either unlawful act or gross negligence manslaughter, they should be required to be agreed on at least one of these. The two forms of manslaughter could be put in

separate counts. Alternatively, as favoured by the Court of Appeal in *Rebello (No.1)*, there could be a single count spelling out separately the requirements of each form of manslaughter in which case the jury would have to give special verdicts indicating which of the alternatives they find proven. That alternative avoids the possibility of two convictions of manslaughter for one death. That would appear to be the optimal approach.

It might be argued that this could be achieved by asking the jury whether they were agreed on a verdict on UAM, if they returned such a verdict it would not be necessary to take a second verdict. But that approach might beg the question of which verdict should be taken first. A further advantage of taking both special verdicts might be that if on appeal (as in *Rebello No.1*) it is found that the UAM guilty verdict was misconceived or unsafe, the finding of the jury on gross negligence (whether guilty or not guilty) has been taken and the need for a retrial can be avoided.⁷¹

Routes to verdict

At the heart of the problem is the typical practice of providing the jury with three potential verdicts to return when there are legally at least six different outcomes in relation to the main homicide offences. (The directions also provide relatively little guidance about what it means to be agreed and on what the jury needs to be agreed about.)⁷² The three potential verdicts are (i) guilty of murder, (ii) not guilty of murder but guilty of manslaughter and (iii) not guilty at all. The six⁷³ different potential outcomes in relation to homicide are (i) guilty of murder, (ii) guilty of manslaughter by reason of diminished responsibility, (iii) guilty of manslaughter due to loss of control, (iv) guilty of unlawful act manslaughter, (v) guilty of gross negligence manslaughter, (vi) not guilty at all (e.g. on the basis of accident or self-defence or a failure in some other way to prove any form of murder or manslaughter).

A radical approach?

In offering possible solutions, we first consider a logical but radical approach to the problem in which the jury could, in every murder trial, be invited to commence their deliberations by considering liability for manslaughter as a foundation for murder. We present this option largely to stimulate thought about the issues, acknowledging that this approach is probably too radical to be accepted in practice.

Working “up” from unlawful act manslaughter

As discussed above, the court’s approach in *Jones* seeks to resolve any apparent unfairness and illogicality in the lack of agreement by looking to the lowest common denominator. It is regarded as unnecessary for the jury to be agreed as

⁷¹ Although this benefit was not evident in *Rebello* because there was also a misdirection on gross negligence.

⁷² Asking an individual juror whether or not he or she is sure about an issue of guilt is a simple binary question/decision (in England and Wales) and the result must always be either (a) sure of guilt (guilty) or (b) not sure of guilt (not guilty).

⁷³ There are of course other possibilities in appropriate cases including suicide pact, infanticide and insanity, not to mention reckless manslaughter.

to which form of manslaughter (in cases where voluntary and unlawful act are available to the jury) because even if the jury is split, they are all necessarily agreed that the defendant satisfies the UAM elements. Given the necessarily sequential approach in a route to verdict, which require a jury to answer each step before turning to the next, any juror who concludes that the defendant satisfied the LOC defence has necessarily accepted that he killed with intent to cause GBH or kill and that would be sufficient to convict him of unlawful act manslaughter. Similarly, any juror who concludes that the defendant satisfied the diminished responsibility defence has necessarily accepted that he killed with intent to cause GBH or kill and that would be sufficient to convict the defendant of unlawful act manslaughter.

Adopting that logic, a more radical approach, which would meet the concerns about hung juries and about any transparency as to the basis for the manslaughter verdict, would be to require an unlawful act manslaughter count to be routine on a murder indictment.⁷⁴ The jury could be directed to consider first the offence of involuntary manslaughter. If all 12 are convinced of the essential elements of that offence they should proceed to consider the issue of murder which requires the proof of intention to kill or cause grievous bodily harm. A draft route to verdict for a case involving an unlawful *act* might look something like this⁷⁵:

1. Has the prosecution made you sure D caused V's death?
*If No, your verdict is "not guilty of murder or manslaughter".
 Go no further.
 If Yes go to QN 2.*

2. Has the prosecution made you sure that D caused V's death by intentionally performing the unlawful act [*specify*]?
*If No your verdict is one of "not guilty of murder or manslaughter". Go no further.
 If Yes go to QN 3.*

3. Has the prosecution made you sure that unlawful act was such that a reasonable and sober person would be bound to realise that it would cause someone some harm (not necessarily serious harm)?
*If No your verdict is one of "not guilty of murder or manslaughter". Go no further.⁷⁶
 If Yes go on to consider QN 4.*

4. Has the prosecution made you sure that when D performed the act that caused V's death he did so intending to kill or cause really serious harm?

⁷⁴ There will be very rare situations in which a GNM count would be more appropriate than a UAM one or may be needed in addition as an alternative. In such a case it may be much more difficult to work up from manslaughter to murder.

⁷⁵ This is the fullest form such a RTV could need to take as it may be that only one form of voluntary manslaughter is pleaded; this example shows how in only six questions both could be included.

⁷⁶ In rare cases it may be that D has an intention to kill because he has specialist knowledge but which a reasonable person would lack so D might intend to kill when RP would not even see risk. (Consider a poisoning case by Novichok, what is the reasonable person deemed to know about the poison, how to administer it and its effect?) In such cases where specialist knowledge is key and cannot be attributed in the circumstances to the reasonable person, a modified route to verdict would be needed.

If Yes, consider QN 5.

If No your verdict is one of “Not guilty of murder, but guilty of Involuntary Manslaughter”. Go no further

5. Has the prosecution made you sure that when D killed with intent to kill or cause really serious harm:
- (a) D had *not* lost his self-control? or
 - (b) Any loss of self-control was *not* triggered by D’s fear of serious violence from V (acting alone or together with) and/or something/s done or said (or both) which constituted circumstances of an extremely grave character, *and* caused the defendant to have a justifiable sense of being seriously wronged? Or
 - (c) A person of D’s sex and age with a normal degree of tolerance and self-restraint and in his circumstances would *not* have reacted in the same or a similar way to the defendant?

If the answer is “Yes”—to any one (or more of these) go on to consider Diminished Responsibility (QN 6).

If the answer is No to all of (a)-(c) your verdict is “Not Guilty of Murder but Guilty of Manslaughter by reason of loss of control”.

6. **Diminished responsibility**

Has D satisfied you that it is more likely than not that at the time that he killed V

- (a) D was suffering from an abnormality of mental functioning?
- (b) The abnormality of mental functioning arose from a recognised medical condition?
- (c) The abnormality of mental functioning substantially impaired D’s ability to understand the nature of his conduct and/or to form a rational judgment and/or to exercise self-control?
- (d) The abnormality of mental functioning caused, or was a significant contributory factor in causing, D to stab V?

If the answer is NO to any one or more of questions (a)-(d), your verdict is “Guilty of Murder”.

If the answer is YES to all questions (a)-(d), your verdict is one of “Not guilty of murder, but guilty of manslaughter by diminished responsibility”.

The advantage of such an approach is that in any case in which the *Jones* formula leads to a manslaughter verdict, so should this approach.⁷⁷ If in any case it does

⁷⁷ Of course, none of the above binary yes/no questions tell the jury what to do if they are not agreed about any of the options but that is no doubt true of most RTVs and may also be considered an advantage. There is no danger of encouraging failure to agree (although there may be a corresponding danger of failure to agree not being reported and a not guilty verdict being returned where at least some of the jury were in favour of guilty).

not do so, that demonstrates that the label manslaughter is not appropriate to that defendant and the verdict ought to be not guilty of any homicide offence because there is no agreement as to even the lowest form of manslaughter.

Although logical, and guaranteed to produce more transparent verdicts which are more comprehensible to the defendant and general public, we acknowledge that this would involve such a radical shift in approach that it might not be palatable to the CACD, nor we believe trial judges or prosecutors. The case would be opened and argued on the basis of it being a murder. For the jury to have engaged throughout a trial focused on murder, to be invited to start their deliberations on a completely different offence may appear perverse. There are several other problems: the Crown might not want a manslaughter alternative left (fearing a compromise verdict)⁷⁸; the defendant may have pleaded to manslaughter in which case the first few questions may well commonly be irrelevant; the formula would not work where both unlawful act and gross negligence were left; the directions would necessarily become more complex in multi-handed cases (although that is true of any such directions including those under *Jones*).

More orthodox routes to verdict

The germ of the more orthodox solution may perhaps be found in the Court of Appeal's approach in *Rebello (No.1)*. Sir Brian Leveson in that case accepted that

different routes to verdict for different types of homicide can lead to separate verdicts being taken even if there is not a separate count expressly left to the jury.⁷⁹ Having a separate verdict for each form of homicide will assist the jury to be clear about whether they are agreed about each verdict where it is appropriate that they should be. We offer an example to demonstrate the practicability of this approach. D shoots V at close range with a shotgun causing V's death and adduces evidence that (a) D lacked intent to kill/cause GBH, (b) that there was a loss of control due to a qualifying trigger under the Coroners and Justice Act 2009 s.55, (c) that D comes within the partial defence of diminished responsibility in s.2 of the Homicide Act 1957 (as amended), (d) that D lacked intent to commit any unlawful act, and that (e) D was not grossly negligent in handling the gun.

If, on the evidence, a reasonable juror might accept any one of these pleas such that the judge ought to leave each of them to the jury, the trial judge should provide a route to verdict for each one of them as set out below. If causation and/or self-defence is also in issue, there will also need to be preliminary questions about those issues. The route to verdict may seem long and complex, but we are postulating an extreme case to demonstrate that even when all these issues are live at trial a comprehensive and comprehensible route to verdict can be provided. Its length alone should not, we suggest, be a problem since it will not always be necessary for the jury to work through every question. In terms of complexity, we take comfort from the fact that it would also need to be accompanied with extensive written directions that would flesh out in more detail the definitions of the offences and defences arising in each of the questions. The route to verdict would obviously

⁷⁸ *Coutts* [2006] UKHL 39; [2006] Crim. L.R. 1065; *Barre* [2016] EWCA Crim 216 at [22]; [2016] Crim. L.R. 768; Maddison et al, *Crown Court Compendium* (2021), Ch.19.38.

⁷⁹ Separate counts may be helpful in some situations as discussed in Clarke QC, "Jury unanimity—a practitioner's problem" [2001] Crim. L.R. 301.

be less complex if fewer issues arose at trial. If the jury reports that they are unable to reach agreement on a relevant question at any stage, a majority direction would normally be appropriate in terms of “at least 10 of you” instead of “all” (as in accordance with standard practice for majority verdicts⁸⁰).

1. **Has the prosecution made you all sure that D intended to kill or cause really serious harm?**
 - (a) If your answer is Yes (so you are all agreed that the prosecution has proved this), go to question 2;
 - (b) If your answer is No (so you are all agreed that the prosecution has not proved this), your verdict is “Not guilty of murder” but go on to consider question 3 below;
 - (c) If you are not all agreed on either (a) or (b), report to the judge that you are *not able to agree* on whether D is guilty or not guilty of *murder* [the judge may then authorise you to answer further questions if appropriate].⁸¹

2. **If your answer to question 1 is “Yes”, consider the following questions in order.**
 - (i) **Has the prosecution made you sure that one or more of the elements of loss of control (as explained in the other written directions) is not present?**
 - (a) If *all* agreed that the prosecution has proved this, go to question (ii);
 - (b) If *all* agreed that the prosecution has not proved this, your verdict is one of not guilty of murder but guilty of manslaughter. Do not consider any further questions.
 - (c) If not all agreed on (a) or (b), go to question (ii).
 - (ii) **Has D satisfied you all, that it is more probable than not, that he killed in a state of diminished responsibility?**
 - (a) If *all* agreed that D has not proved this, your verdict is one of “Guilty of Murder”. Do not consider any further questions.
 - (b) If *all* agreed that D has proved this, your verdict is not guilty of murder but guilty of manslaughter. Do not consider any further questions.
 - (c) If not all agreed on (a) or (b), report to judge that you are *not able to agree* on whether D guilty or not guilty of *murder*.⁸²

⁸⁰ See Maddison et al, *Crown Court Compendium* (2021), Ch.19.

⁸¹ We consider that the most appropriate likely course would be for the judge to consider a majority direction and if that failed, to discharge the jury (thereby likely leading to a retrial). The alternative of discharging the jury from returning a verdict on the murder charge and allowing them to consider convicting only of manslaughter would normally be premature if there are members of the jury who still consider D may have intended to kill or cause GBH.

⁸² The judge would then have to consider (if a majority direction did not produce a decision) whether to discharge the jury from returning a verdict on murder so as to enable them to consider (involuntary) manslaughter or alternatively to discharge the jury altogether with a view to a retrial for murder.

3. **Has the prosecution made you sure that D intentionally committed an unlawful and dangerous act which caused death?**
 - (a) If *all* agreed that the prosecution has proved that, your verdict is one of “Guilty of Unlawful Act Manslaughter”. Do not consider any further questions.
 - (b) If *all* agreed that the prosecution has not proved that, go to question 4.
 - (c) If you cannot *all* agree on either (a) or (b), report to the judge that unable to agree on unlawful act manslaughter but also go to question 5.

4. **Has the prosecution made you sure that D caused V’s death by gross negligence?**
 - (a) If *all* agreed that the prosecution has proved that, your verdict is one of “Guilty of Gross Negligence Manslaughter”. Do not consider any further questions.
 - (b) If *all* agreed that the prosecution has not proved that, your verdict is one of “not guilty or murder or manslaughter”. Do not consider any further questions.
 - (c) If you cannot *all* agree on either (a) or (b), report to the judge that you are *unable to return a verdict on gross negligence manslaughter* [but also that you have found D not guilty of unlawful act manslaughter under 3b above].

5. **(Although you are undecided on unlawful act manslaughter) has the prosecution made you sure that D caused V’s death by gross negligence?**
 - (a) If all agreed that the prosecution has proved that, your verdict is one of “Guilty of Gross Negligence Manslaughter”. Do not consider any further questions.
 - (b) If all agreed that the prosecution has not proved that, your verdict is one of “not guilty of murder or gross negligence manslaughter (but unable to agree on unlawful act manslaughter)”. Do not consider any further questions.
 - (c) If you cannot *all* agree on either (a) or (b), Report to the judge that you are unable to agree a verdict on gross negligence manslaughter (as well as not able to agree on unlawful act manslaughter under para.3(c)).

In view of the complexity of this direction, one can readily understand why the Court of Appeal has avoided prescribing particular routes to verdict! Although a route such as this is designed to produce accuracy in the verdict, it may generate such confusion as to be counterproductive. It could of course be piloted with empirical work with jurors. This RTV works in this scenario because, unlike most RTVs, the questions are not sequential, and the offences do not follow on from each other.

Summary of conclusions

No doubt the suggested routes to verdict can be improved upon and/or simplified. We would suggest however, that whilst there is a currently a lack of clarity on what is and is not required in practice, in terms of jury agreement in homicide prosecutions, the conclusions of principle are clear, and that judicial re-statement and clarification would be beneficial. The problem has been exacerbated by the fact that the Court of Appeal expects written routes to verdict in homicide cases. If RTVs are always to be expected in homicide cases, as the Court of Appeal has made clear, precise answers to the problems we have identified are needed. We have argued that:

1. The judge should not ask the jury to give the reasons for its verdict *after* it has been returned (nor, therefore, should the judge suggest to the jury in advance that this might be done). The requirements of sentencing on the precise finding of the jury should not be the main driver concerning agreement as there are principles now established in both homicide and non-homicide cases to deal with the issue.⁸³
2. Agreement as to a particular form of manslaughter is not normally required to legitimise a verdict of manslaughter where all the alternatives involve, at root, at least unlawful act manslaughter.⁸⁴ This is subject to the following important qualifications:
 - a. If the choice before the jury is between unlawful act and gross negligence manslaughter, the jury need to be agreed on at least one of these alternatives: *Rebelo (No.1)*.⁸⁵
 - b. Where the issue is whether the verdict of *not guilty of murder* can be legitimately returned, there ought to be agreement as to at least one form of manslaughter that the jury has found (and which therefore means that D is not guilty of murder): *McCandless* and *McClenaghan*.⁸⁶ Thus, for a verdict of not guilty of murder, agreement ought in principle to be required as to at least one of these forms (even if the jury are split on whether or not there may be other forms of manslaughter or bases on which the offence could be reduced from murder to manslaughter). Not to do so can result in controversy and uncertainty in respect of cases very close to the borderline between murder and manslaughter as in *Brehmer* (and can pre-empt legitimate questions about a retrial for murder where a jury are not all agreed on a particular reason why not guilty of murder).

⁸³ See *King* [2017] 4 W.L.R. 95 at [31]; [2017] Crim. L.R. 497; *Brehmer* [2021] EWCA Crim 390; [2021] 4 W.L.R. 45.

⁸⁴ *Jones (Douglas Leary)* *The Times* 17 February 1999.

⁸⁵ *Rebelo (No.1)* [2019] EWCA Crim 633.

⁸⁶ *McCandless* [2001] NI 86; *McClenaghan* [2016] NI 51.