# Thinking point 5.1

1. Can you think of a manslaughter case by omission in which recklessness was described as foresight of an obvious risk of injury to health?
* *Stone and Dobinson*
1. How does Lidar establish a more limited mens rea for reckless manslaughter?
* It seems to suggest there must be foresight of a high probability of *serious* injury.

## Thinking point 5.2

1. In what ways are subjective recklessness and gross negligence different?
* Recklessness requires subjective awareness of the risk of harm
* Gross negligence requires a highly unreasonable level of conduct carrying an objectively obvious risk of death
1. In what way could it be useful to a jury to be told that a defendant who was reckless is more likely to be grossly negligent?
* It may seem to be common sense that if D perceived a risk of serious harm but went on to take it, they are more likely to be ‘grossly’ negligent.

## Thinking point 5.3

Are Jones and Rowley compatible?

* No!
* Jones held that while subjective recklessness may be evidence that negligence was gross, its absence does not mean that the negligence was not gross: the test for gross negligence is an objective one.
* Rowley held that D’s subjective state of mind was relevant to the circumstances, and thus to gross negligence: lack of subjective recklessness might be evidence that the negligence was not gross.

## Thinking point 5.4

1. Looking at the Bateman test, what is the standard of negligence against which the jury are asked to compare D’s negligence?
* The civil standard.
1. Do you think this would help a jury to identify gross negligence?
* ‘Gross’, the key element for criminal liability, is not clearly defined.
1. The jury are asked if the negligence is so bad as to amount to a crime. Why could this be confusing?
* There are many crimes of negligence, of varying gravity.
* There is little guidance on how bad that must be (although the courts use words like ‘exceptionally’)
1. How do you think the test could be improved?
* You might consider adding features such as giving clearer guidance on the very high degree of negligence required

## Thinking point 5.5

Is there a parallel between asking a jury to decide whether D’s negligence is gross and therefore a crime and asking a jury to decide whether a defendant was dishonest, intentional or reckless?

* No: deciding negligence is gross requires the jury to assess the objective seriousness of conduct and draw the line between criminal and non-criminal conduct.
* Dishonesty, intention and recklessness are states of mind.

## Thinking point 5.6

Consider the examples below (taken from the Law Commission report, No 237, at 36). Would they fall within the Bateman/Adomako test of gross negligence?

In each case you need to identify:

■ A duty of care;

■ Breach of that duty

■ That the breach involved an obvious risk of death;

■ That the breach caused death;

■ Whether the breach was accompanied by gross negligence which was so bad as to be regarded as criminal.

1. D is an anaesthetist who causes her patient V’s death because she fails to notice that a ventilation tube has become disconnected and that V has turned blue.

2. D, an adult of average intelligence, in the course of a fight hits V over the head with a spanner. In the heat of the moment, D does not realise that death or serious injury may result; but the blow cracks V’s skull and causes her death.

3. D, in the course of a fight, slaps V once across the face. V loses her balance and falls to the floor, cracks her skull, and dies.

* Remember to follow IRAC.
* Which element of the offence is most difficult to decide?

## Thinking point 5.7

1. If there was no unlawful act for the purposes of unlawful act manslaughter, what other offence might Lamb have committed?
* Gross negligence manslaughter
1. Could Lamb have been guilty of that offence even though he thought there was no risk of harming his friend?
* Yes: it is not a state of mind but an extremely high level of carelessness.

## Thinking point 5.8

The House of Lords failed to identify any relevant unlawful act in this case. What do you think it was? Do you agree that the boys should have been convicted of this serious offence?

* Criminal damage
* There is no right answer to this question, but you might compare the courts’ approach here to that in *R v G*.

## Thinking point 5.9

In the course of an argument in a shop D punches V slightly. V hits her head against a metal object. She is knocked unconscious and later dies from internal bleeding to the brain. Has D committed unlawful act manslaughter?

* Yes: the unlawful act is assault (battery).

## Thinking point 5.10

Given that D does not commit unlawful act manslaughter where they supply Class A drugs and prepare a syringe for immediate injection by V, who then self-injects and dies, can you think of an alternative homicide offence?

What are the elements of the offence? Can you think of any relevant cases? Would causation continue to be a problem?

* Gross negligence manslaughter: see *Khan v Khan, Ruffel, Gemma Evans*
* Causation will be less problematic as injection occurs before the duty arises.

## Thinking point 5.11

D is standing in a post office queue and gets into an altercation with the person standing behind him (A). He pushes A, who falls on top of an elderly woman (V). V sustains fractured bones and later dies from her injuries. Is D guilty of unlawful act manslaughter in respect of V’s death?

* Yes: see *Mitchell* [1983] QB 741.

## Thinking point 5.12

Do you think that the ‘directing mind and will’ test is satisfactory?

The test has been criticised on the grounds that in large organisations it may be difficult to identify the person who has this ‘directing mind’. It could also be unfair to convict a particular person when it may be organisational structure and culture which is to blame for errors and/or criminal behaviour. The recent case of SFO v Barclays considers the role of this test and its future (discussion at 5.3.3)